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2023 FAIR LABOR STANDARDS ACT MIDWINTER REPORT OF THE FLSA SUBCOMMITTEE

Presented by:

Fair Labor Standards Act Subcommittee
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Preface

This report, which covers the period June 1, 2021 to May 31, 2022, serves as the 2023 report of the Fair Labor Standards Act Subcommittee. The FLSA Midwinter Reports are primary resources for the drafting of the annual updates to the ABA/Bloomberg BNA treatise, *The Fair Labor Standards Act*.

As outlined below in the table of contents, the structure of this report follows that of the Treatise (4th. ed).

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A BRIEF HISTORY OF THE FAIR LABOR STANDARDS ACT

IV. Early Amendments to the FLSA

A. The Portal-to-Portal Act of 1947

1. Compensable Activity

In *Cortes-Diaz v. DL Reforestation, Inc.*,[1] the plaintiffs, forestry workers, sought unpaid FLSA overtime wages from their employer for preliminary work activities on Sunday and travel from the hotel to a remote forest worksite. They also sought unpaid wages under Oregon state law. In granting the employer partial summary judgment on the FLSA claim, the Oregon federal court held that the employees failed to offer evidence that loading and unloading equipment on Sundays was integral and indispensable to plaintiffs' principal activities of forestry management. The plaintiffs also did not present evidence of the amount of time it took to perform these activities, or that they performed work during the transportation of the equipment. The court also held that travel from the temporary lodging to the remote worksite was not compensable because the employees did not perform work during the trips. The district court denied the parties' cross-motions for summary judgment on the issue of whether travel time on Sunday occurred during plaintiffs' regular working hours because the parties disputed whether that travel time cut across plaintiffs' regular working hours.

3. Collective Actions

In *Garcia v. Vertical Screen, Inc.*,[2] a federal court in Pennsylvania granted the plaintiff's motion for final certification of a collective action against his employer for failure to pay overtime in violation of the FLSA and the Pennsylvania Minimum Wage Act, for time spent logging into their work computers and defendant's timekeeping system. The collective action members were full-time non-exempt employees who performed pre-employment background checks. The defendant required them to record their time by logging into an online timekeeping system at the beginning of their shifts. The workers had significant difficulties logging in, causing delays that could range from 3 to 30 minutes a shift. Because the system rounded all employee time to the nearest quarter hour, employees could miss compensable time if it took more than eight minutes to log in to the system. At the second step of the two-step certification process, the court analyzed whether the named plaintiff and opt-in plaintiffs were similarly situated by considering whether the collective action members: 1) worked in the same department, division, and location; 2) advanced similar claims; 3) sought substantially the same form of relief; and 4) had similar salaries and circumstances of employment. The court found the collective action members were similarly situated because all worked in three

[1] 2022 WL 833334 (D. Or. Mar. 21, 2022).

[2] 2022 WL 282541 (E.D. Pa. Jan. 31, 2022).

buildings on the same “campus;” all had the same timekeeping and payroll system; all claimed they were not paid for time spent logging into the system while performing compensable work; all sought monetary compensation for time spent logging into the system; and all were full-time employees with approximately the same hourly wage, the same job description, and the same training. The court rejected the defendant’s individualized defenses and fairness argument in its motion to deny final certification.

Chapter 2

OPERATIONS AND FUNCTIONS OF THE DEPARTMENT OF LABOR

III. Judicial Deference to Agency Actions Taken by the Department of Labor's Wage and Hour Division

B. *Chevron* Deference

In *Walsh v. Ideal Homecare Agency, LLC*,[1] the Secretary of Labor brought an action against a homecare agency, seeking back wages, liquidated damages, and injunctive relief for failure to pay overtime and preserve adequate payroll records. The defendant filed a motion for judgment on the pleadings, arguing that the Secretary's claims were based upon the "narrow construction" principle for construing FLSA exemptions—a principle rejected by the Supreme Court in *Encino Motorcars, LLC v. Navarro* ("*Encino II*"), which instead applied a "fair reading" standard.[2] The homecare agency further argued that the Department's 2015 Domestic Service Rule (companionship and live-in exemption) removing third-party employers from the scope of the exemption was a reversal of the Department's longstanding prior policy and therefore was not entitled to *Chevron*[3] deference. The court disagreed, stating that simply because a rule was established pre-*Encino II* does not strip it of its entitlement to *Chevron* deference. The court denied the homecare agency's motion for judgment on the pleadings, thereby allowing the Secretary to establish that the 2015 Domestic Service Rule was subject to *Chevron* deference.

E. Deference As Applied to Actions by the Department of Labor

1.Regulations

a. Legislative Regulations

In *Coalition for Workforce Innovation v. Walsh*,[4] several business groups sued the Department of Labor alleging that the agency and DOL officials violated the Administrative Procedure Act when they acted shortly after President Biden's inauguration to implement first "The Delay Rule"[5] and then "The Withdrawal Rule,"[6] which sought to delay and withdraw the Trump administration's "Independent Contractor

[1] 2021 WL 4437483 (W.D. Pa. Sept. 28, 2021).

[2] 138 S. Ct. 1134 (2018).

[3] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[4] 2022 WL 1073346 (E.D. Tex. 2022).

[5] Independent Contractor Status Under the Fair Labor Standards Act: Delay Effective Date, 86 Fed. Reg. 12,535 (Mar. 4, 2021).

[6] Independent Contractor Status Under the Fair Labor Standards Act: Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021).

Rule."[7] The Texas district court granted the plaintiffs' motion for summary judgment and denied the DOL's cross-motion, deciding that the Independent Contractor Rule remained in effect. In considering the Delay Rule, the court found that the Independent Contractor Rule is interpretive rather than legislative, and accordingly, the Delay Rule likewise should have been promulgated using the notice-and-comment procedure. The court found that the Delay Rule violated the procedural requirements of the Administrative Procedures Act, that the Withdrawal Rule was arbitrary and capricious, and consequently held that the Trump Administration's Independent Contractor Rule became effective as of its effective date. The court found that the DOL also failed to consider alternatives to withdrawing the Independent Contractor Rule in its entirety. An appeal to the Fifth Circuit was filed by the DOL on May 16, 2022.

5. Field Operations Handbook

Johnson v. Nat'l Collegiate Athletic Ass'n.[8] addressed whether Division 1 student-athletes should be considered employees of the NCAA and the universities they attend for the purposes of the FLSA. The court found DOL Field Operations Handbook ("FOH") § 10b03(e) inapplicable because it applied only to student-run groups. The court noted that NCAA sports, unlike the extracurricular activities listed in § 10b03(e), "are not conducted primarily for the benefit of the student athlete who participates in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."[9]

[7] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).

[8] 556 F. Supp. 3d 491 (E.D. Penn. 2021).

[9] *Id.* at 502–05.

Chapter 3

THE EMPLOYMENT RELATIONSHIP

II. The Economic Realities Test

In *Guillen v. Armour Home Improvement, Inc.*,[1] the plaintiff filed suit against a home improvement company, its owner, and his wife for violations of the FLSA and Maryland law, claiming defendants failed to pay all wages due. The defendants moved for summary judgment, arguing that the wife was not plaintiff's "employer." The court granted the motion on that issue, applying the economic reality test. The court focused on whether the wife had sufficient operational control of the business to be considered an employer for purposes of the FLSA. The relevant factors included: (1) the power to hire and fire the employee; (2) supervision and control of employee work schedules or conditions of employment; (3) determination of the rate and method of payment; and (4) maintenance of employment records. The court also noted that several courts have considered whether the spouse of a business owner is an employer, a question that "turns on the nature of the spouse's involvement in the business."[2] Here, the court found that the wife did not exercise control over employees, despite her status as owner and officer. She signed checks, relayed information, handled paperwork, and ran errands, all of which was done for defendant owner and with his approval and was insufficient to satisfy the control factor.

In *Raymond v. Renew Therapeutic Massage, Inc.*,[3] a licensed massage therapist sued the defendant, alleging that it misclassified her as an independent contractor to avoid minimum wage and overtime obligations under the FLSA. Notably, the plaintiff was initially employed by the defendant, then reclassified as an independent contractor pursuant to various contracts, and then offered an opportunity to work as an employee again. In ruling on the defendant's motion for summary judgment, the district court considered the six factors of the economic-reality test identified by the Sixth Circuit. The court denied the defendant's motion, finding that the "degree of skill" factor weighed in favor of contract status and there were issues of material fact regarding permanency, opportunity for profit or loss, and control.

In *Knight v. Public Partnership, LLC*[4], the plaintiff was a direct care worker for her mother under a program administered by the Centers for Medicare and Medicaid Services and the state of Pennsylvania. The defendant was the payroll contractor that provided financial management services to program participants, including payroll and tax-withholding services. The plaintiff sued the defendant for unpaid overtime under the FLSA and Pennsylvania state law. The defendant moved for summary judgment on the basis that it was not a joint employer, and the district court applied the Third Circuit's

[1] 2022 WL 524986 (D. Md. Feb. 22, 2022).

[2] *Id.* at *6.

[3] 2022 WL 831222 (E.D. Mich. Mar. 18, 2022).

[4] 2021 WL 4709683 (D. Pa. Oct. 7, 2021).

economic reality test. The parties agreed that the first and third factors—authority to hire and fire and involvement in day-to-day employee supervision—weighed against a joint employer finding. Regarding the second factor—authority to promulgate rules, make assignments and set the conditions of employment as to compensation, benefits, and work schedules—the court gave little weight to the fact that, on paper, the defendant was not the plaintiff's employer. The court concluded that it was apparent that the defendant enforced the maximum pay rate, made rules regarding the plaintiff's training, and required the plaintiff to maintain certain documents and records. As for the fourth factor, actual control over employee records, that the defendant processed the plaintiff's paystubs, provided paychecks, and ran a background check were proof of actual control. The court denied the defendant's motion based on the second and fourth factors.

In *Ivanov v. Builderdome, Inc.*,[5] the plaintiff worked as a creative director for defendants, a startup company and its founder, and alleged that defendants violated the FLSA by failing to pay her minimum wage. The plaintiff moved for summary judgment and argued that based on her employment agreement with the company, she was an employee. Following a trial, the district court explained that, in determining whether plaintiff was an employee, the relevant inquiry was not what the contract said but rather the economic realities of the parties' relationship. The court concluded that despite language in the agreement, the plaintiff treated her relationship as part of a partnership team, not as an employee. The defendants exercised little control over the plaintiff's work. Addressing the plaintiff's opportunity for profit and loss, the court found that the plaintiff had substantial opportunity for profit and loss in the business and made a substantial investment in the form of her time. She was also promised a 1% share of what had been described as a potential multi-billion dollar company, which weighed in favor of being an owner and investor. On the degree of skill factor, the plaintiff had a high degree of skill others did not possess and exercised substantial independent initiative to perform her work.

In *Carusillo v. Fansided, Inc.*,[6] the plaintiffs produced sports content for the defendants' websites. The plaintiffs filed a collective action under the FLSA and asserted claims under Massachusetts law. The plaintiffs moved for conditional certification, and the defendants moved to dismiss. One of the disputed issues was whether the plaintiffs sufficiently alleged that defendants were their employers under the FLSA. The defendants argued that the plaintiffs were properly classified as independent contractors rather than employees, and the court considered the familiar five-factor "economic reality" test of a working relationship. While the defendants argued that the plaintiffs asserted only conclusory allegations to establish an employment relationship, the Court disagreed. The court was persuaded by the allegations that the defendants hired the plaintiffs, instructed the plaintiffs as to what work to perform, and retained the right to edit their work. Furthermore, the plaintiffs were an integral aspect of the defendants' work. Without the plaintiff's written content, advertisers would not have paid

[5] 2021 WL 2554620 (S.D.N.Y. June 22, 2021).

[6] 2021 WL 4311167 (S.D.N.Y. Sept. 21, 2021), *motion to certify appeal denied*, 2021 WL 5166958 (S.D.N.Y. Nov. 5, 2021).

the defendants to advertise on the websites and the defendants would not have turned a profit. Additionally, the defendants owned all of the content produced. The court found that the plaintiffs met their burden of pleading sufficient facts to support an inference that the defendants were their employers under the "economic reality" test.

In *Tassy v. Lindsay Entertainment Enterprises, Inc*.,[7] exotic dancers brought a putative collective action against an adult nightclub operator, alleging that the dancers were employees and not independent contractors. The plaintiffs moved for summary judgment, and the court analyzed whether the plaintiffs were employees or independent contractors under the economic reality test using six factors: 1) the permanency of the relationship; 2) the degree of skill required; 3) the investment in equipment or materials; 4) the opportunity for profit or loss, depending upon the workers' skill; 5) the degree of the alleged employer's right to control the work is performed; and 6) whether the service is an integral part of the business. The court found that the plaintiffs were exclusively employed by the defendant for a considerable amount of time; the plaintiffs had no specialized skills; the plaintiffs had a small investment in their services compared to the defendant; the defendant's opportunity for profit and risk of loss were much greater than the plaintiffs'; the defendant exercised significant control over the plaintiffs; and the plaintiffs were integral to the success of the club. The court found that the exotic dancers were employees under the economic reality test and granted the plaintiffs' motion, at the same time denying the defendant's motion to decertify.

III. Employee Status

A. Employee or Independent Contractor

1. General Principles

In *Goodwin v. John*,[8] the plaintiff brought wage and overtime claims under the FLSA and state law against an individual defendant and his three businesses. The court denied the plaintiff's motion for partial summary judgment as to her status as an employee, holding that under the six-factor economic realities test, there were genuine disputes concerning whether she was an employee or independent contractor. Considering all the circumstances, the court found factual disputes as to the plaintiff's assigned responsibilities, whether she carried out the responsibilities, the number of hours she worked, how much autonomy she had over her work, and whether she enlisted others to accomplish tasks.

In *Martinez v. First Class Interiors of Naples, LLC,*[9] plaintiff drywall workers brought a collective action alleging the defendants failed to pay for all hours worked and overtime. The parties filed cross-motions for summary judgment, and the defendants moved to decertify the conditional class. The court determined it did not need to address whether the defendant was a joint employer; the question was whether the defendant was an employer, regardless if there was another employer. The court considered seven factors from Sixth Circuit precedent: (1) the defendant's power to hire

[7] 591 F. Supp. 3d 191 (W.D. Ky. 2022).

[8] 2021 WL 5114656 (D. Nev. June 21, 2021).

[9] 2022 WL 1462965 (M.D. Tenn. May 6, 2022).

and fire employees; (2) the defendant's supervision and control of employee work schedules or conditions of employment; (3) the defendant's determination of rate and method of payment; (4) the defendant's maintenance of employment records; (5) whether the plaintiff was an integral part of the operations of the putative employer; (6) the extent of the plaintiff's economic dependence on the defendant; and (7) the defendant's substantial control of the terms and conditions of the work of the plaintiff. Based on the totality of the circumstances, the court found that two factors—the defendant's maintenance of records and the plaintiffs' integrality to the business—favored the existence of an employment relationship, and the other five factors created a genuine dispute of fact. Accordingly, the court denied summary judgment for the defendant on this issue.

In *Bolden v. Callahan,*[10] a licensed cosmetologist sued a salon for minimum wage and overtime pay. Following a bench trial, the court analyzed whether the plaintiff was an employee or an independent contractor under the six-factor economic reality test. The court found that the plaintiff had sufficient opportunity for profit, independence to set her own schedule, and freedom to work at other salons, which outweighed the fact that the investment in the business and integral part of the business factors weighed toward employee status.

In *Coalition for Workforce Innovation v. Walsh,*[11] several business groups sued the Department of Labor alleging that the agency and DOL officials violated the Administrative Procedure Act when they acted shortly after President Joe Biden's inauguration to delay enforcement of a Trump Administration rule and to adopt a new regulation on the status of independent contractors under the FLSA. The Texas District Court sustained the challenge and ruled that the Trump rule (*Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, Jan. 7, 2021) remained in effect. In October 2022, the Labor Department issued a notice of proposed rulemaking with a new multifactor approach to examining the "economic reality" of a work arrangement (*Employee or Independent Contractor Classification Under the Fair Labor Standards Act,* 87 Fed. Reg. 62218, Oct. 13, 2022).

In *Yoder v. Fla. Farm Bureau Cas. Ins. Co.*,[12] insurance agents alleged they had been misclassified as independent contractors by the defendant insurance company and were owed overtime wages. The parties filed cross motions for summary judgment on the plaintiffs' independent contractor status. Relying on the economic realities test, the court held that the plaintiffs were properly classified as independent contractors and granted the defendant's motion for summary judgment. In so ruling, the court found that the weight of the factors in the Eleventh Circuit's *Scantaland v. Jeffry Knight, Inc.* decision pointed to the plaintiffs' economic independence.[13] The court held that the plaintiffs controlled their work through independent judgment; drove their own profits, in part, because they decided what sales methods to prioritize and how to use their time

[10] 595 F. Supp. 3d 727 (E.D. Ark. 2022).

[11] 2022 WL 1073346 (E.D. Tex. 2022).

[12] 2022 WL 1055184 (N.D. Fla. Mar. 9, 2022), appeal filed.

[13] 721 F.3d 1308, 1312 (11th Cir. 2013).

each day; invested substantially in their work by spending thousands of dollars annually; and had special skill through licensure. The court held the factors pointing toward independent contractor status outweighed the plaintiffs' permanency in the role of eighteen years and their integrality in the business.

a. Control

In *Weng v. HungryPanda US, Inc.*,[14] a restaurant delivery driver brought a collective action against the restaurant, its president, and his manager, alleging violations of the minimum-wage, overtime, spread-of-hours, notice, wage-statement, and other related provisions under the FLSA and state law. The district court granted the individual defendants' motion for judgment on the pleadings and dismissed the case with prejudice, finding no employment relationship. The court observed that "the overarching concern is whether the alleged employer possessed the power to control the workers in question."[15] The issue of control is analyzed using the Second Circuit's *Carter* factors, which include: the power to hire and fire the employees; supervision of employee work schedules or conditions of employment; determining the rate and method of payment; and maintaining employment records.[16] The court also consider six additional indicia of control, noting no one factor is dispositive. The plaintiff's complaint contained no allegations sufficient to indicate that any defendants exercised control over his employment, for example, by determining his deliveries or delivery area, controlling his work schedule, supervising him, or restricting him from making deliveries for other companies. Accordingly, the Court held that the plaintiff failed to plausibly allege that the individual defendants were his employer.

b. Opportunity for Profit and Loss

In *Mendiola v. Howley*,[17] painters working for a commercial painting contractor sued for minimum wage and overtime violations under state and federal law. The plaintiffs sought partial summary judgment on liability for overtime wages. The court applied the economic realities test, using the *Lauritzen* factors to determine whether the plaintiffs were employees or independent contractors.[18] The opportunity for profit or loss and integral-to-business factors favored the painters. The court found that there was little opportunity to earn additional compensation because the plaintiffs worked a set number of hours at a fixed hourly rate. The court ruled that the opportunity for the plaintiffs to perform side jobs was irrelevant because most individuals are able to perform other work outside their employment. However, the court found that rest of the factors were inconclusive and denied the plaintiffs' motion for summary judgment.

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[14] 2022 WL 292799 (S.D.N.Y. Jan. 31, 2022).

[15] *Id.* at *4.

[16] Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984).

[17] 2021 WL 3033613 (N.D. Ill. July 19, 2021).

[18] Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987).

f. "Integral Part of Employer's Operation"

In *Mendiola v. Howley*,[19] painters working for a commercial painting contractor sued for minimum wage and overtime violations under state and federal law. The court denied plaintiffs' motion for partial summary judgment on liability for overtime wages, focusing on the question of whether the painters were employees or independent contractors. The court analyzed the facts using the economic realities test based on the *Lauritzen* factors.[20] The court found two of the factors to favor the painters: opportunity for profit or loss and integral-to-business. Nonetheless, the court found the rest of the factors inconclusive and denied summary judgment.

2. Illustrative Cases

a. Cases Finding Employee Status

In *Holden v. Bwell Healthcare, Inc.*,[21] two home health aides brought an action for unpaid travel time and unpaid overtime compensation. On cross motions for summary judgment, the district court held that the home health aides were employees rather than independent contractors. As to the control element, the district court rejected the employer's argument that the control exerted was only a result of the homecare industry and state Medicaid regulations. The district court explained that when policies are imposed pursuant to regulation, as a matter of economic reality, the aides were dependent on the employer. As to the profit/loss element, the district court found that the aides were paid hourly and therefore did not have an opportunity for profit or loss, even though they could have solicited new clients. As to the investment in equipment element, the district court found that investing in clothing to wear to work was not sufficient. As to the degree of skill, the district court found that homecare aides were not skilled despite having to be certified in CPR and first aid. Regarding the permanency element, the district court explained that the aides worked at the company for more than one year. Finally, regarding the integral nature of the services provided element, the district court found that without the aides, the employer could not function as a staffing agency. In conclusion, the district court found that each element favored a finding that the aides were employees and not independent contractors.

In *Walsh v. EM Protective Services LLC*,[22] the Secretary of Labor filed a motion for partial summary judgment against a security and traffic control services company on the basis that it misclassified security guards and traffic control workers as independent contractors, thereby failing to pay the workers overtime compensation for hours worked in excess of 40 hours in a workweek. The workers at issue worked in Puerto Rico and domestically. The court applied the six-factor economic realities test, finding that all of the factors weighed in favor of employee status for the workers in Puerto Rico because the workers themselves were the only service offered by the company, the workers had a relatively low investment in equipment and material as compared to the company,

[19] 2021 WL 3033613 (N.D. Ill. July 19, 2021).

[20] *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987).

[21] 2021 WL 5827898 (D. Md. Dec. 7, 2021).

[22] 2021 WL 3490040 (M.D. Tenn. Aug. 9, 2021).

worked exclusively for the company, had no opportunity for profit or loss based on their skill because they were paid a daily rate, and were told where to live and when, where, and how to perform their security duties. Therefore, the court granted summary judgment as to the workers in Puerto Rico. Regarding the domestic workers, the court found that although most of the factors weighed in favor of employee status, there was little evidence in the record regarding the permanency of the relationship and the frequency in which the domestic workers worked for the company. Therefore, the court denied summary judgment as to the domestic workers, "[k]eeping in mind that the factors are considered 'with an eye toward the ultimate question -- [the worker's] economic dependence on or independence from the alleged employer.'"[23] As such, there were competing inferences that made the determination of employee versus independent contractor status inappropriate for summary judgment.

In *Walsh v. Freeman Security Services, Inc.*[24], the Secretary of Labor alleged that the licensed armed and unarmed security guards whom the defendant-employer hired were misclassified as independent contractors. The Secretary filed the lawsuit against the company and its Chief Executive Officer after the DOL's Wage and Hour Division began a second investigation to determine whether the security firm complied with its obligations to pay overtime under the FLSA pursuant to an agreement in the first investigation. As such, the Secretary also alleged that the security firm and its CEO willfully violated the FLSA. The security firm and its CEO moved for summary judgment. Because this issue was one of first impression for the Eleventh Circuit, the Florida district court looked to the Sixth and Fourth Circuits for guidance. The court applied the six-factor economic realities test, considering the totality of the circumstances. In doing so, the court found that the security guards were completely dependent on the security firm for their economic opportunities. Specifically, the security firm controlled the work available to the guards, the guards 'income was based solely on the hours they worked, their work was not specialized, and they performed work that was integral to the security firm's business. The court held that the security guards were employees for purposes of the FLSA and denied summary judgment. The court also denied summary judgment as to whether the security firm and its CEO acted willfully because the court needed to assess the state of mind of the testifying witnesses.

Roldan v. PSLA LLC[25] alleged violations of the FLSA and various California statutes. The plaintiff brought these claims on behalf of herself and similarly situated exotic dancers at the defendant's gentlemen's club. The plaintiff sought damages for unpaid overtime, failure to pay minimum wage, illegal kickbacks, and forced tipping. The court granted summary judgment for the plaintiff. The court found that the club exercised significant control over the plaintiff's schedule and working conditions, was responsible for bringing in clients, and funded the equipment the plaintiff used. Likewise, the plaintiff's position as an exotic dancer did not require any special skills. While the plaintiff had a minimal degree of permanency, in the case of exotic dancers, courts regularly assign little weight to this factor. Ultimately, however, exotic dancers were an

[23] *Id*. at *11.

[24] 2022 WL 445501 (M.D. Fla. Feb. 14, 2022).

[25] 2021 WL 4690587 (C.D. Cal. July 2, 2021).

integral part of the business, and weighing all these factors together, the court found that the plaintiff was the defendant's employee.

In *Sec'y of United States DOL v. Am. Made Bags, LLC*,[26] the Department of Labor alleged, *inter alia*, that employees of a manufacturer of promotional products were misclassified as independent contractors. The workers consisted of sewers/seamstresses, printers/screeners, helpers/floor hands, and designer/artists. The court granted summary judgment for the government. Applying an economic realities test, the court found that the workers were essential to the business and many had long-time relationships with the company. The plaintiffs' ability for profit/loss was minimal, and the company exercised "considerable" control over the workers. While the court found that other factors such as degree of skill and investment in tools cut both ways, in sum, the court ruled that the workers were employees. The court also found numerous recordkeeping violations. Because of past violations, injunctive relief was ordered in addition to monetary damages.

b. Cases Finding Independent Contractor Status

In *Yoder v. Fla. Farm Bureau Cas. Ins. Co.*,[27] insurance agent-plaintiffs alleged that they were misclassified as independent contractors by defendant and thus owed overtime wages. The parties filed cross motions for summary judgment on the plaintiffs ' independent contractor status. Relying on the economic realities test, the court held that the plaintiffs were properly classified as independent contractors and granted the defendant's motion for summary judgment. In so ruling, the court found that the weight of the factors in *Scantaland v. Jeffry Knight, Inc.*[28] pointed to the plaintiffs 'economic independence. Specifically, the court held that the plaintiffs 'controlled their work through independent judgment; drove their own profits, in part, because they decided what sales methods to prioritize and how to use their time each day; invested substantially in their work by spending thousands of dollars annually; and had special skill through licensure. The court held the factors pointing toward independent contractor status outweighed the plaintiffs 'permanency in the role (18 years) and integrality in the business.

In *Merrill v. Pathway Leasing LLC*,[29] plaintiffs brought a collective action against defendant for failure to pay minimum wage and unlawful retaliation under FLSA. The threshold issue before the court was whether the plaintiffs were independent contractors and thus not covered by the FLSA. The court applied the six factor economic realities test to resolve the issue. The court found that the first factor "i.e., the degree of control exerted by the alleged employer over the worker, . . . weigh[ed] heavily in favor of finding independent contractor status."[30] For example, the plaintiffs had control over whether to drive individually, as a team, or hire a third party. Unlike the company

[26] 2022 WL 479790 (N.D. Ohio Feb. 15, 2022).

[27] 2022 WL 1055184 (N.D. Fla. Mar. 9, 2022), appeal filed.

[28] 721 F.3d 1308, 1312 (11th Cir. 2013).

[29] 2021 WL 3076848 (D. Colo. July 21, 2021).

[30] *Id.* at *12.

drivers, who were subject to forced dispatch and could not choose to decline loads, the plaintiffs were free to decide if they should take loads based on profitability considerations such as the weight of the freight and fueling costs. They also set restrictions on where they would drive. Taken all together "these facts demonstrate a relatively low degree of control exerted by [d]defendants . . . over [p]plaintiffs"[31] and weighed in favor of finding that plaintiffs were independent contractors. The court found that "the second factor, i.e., the worker's opportunity for profit or loss, . . . weigh[ed] in favor of finding independent contractor status."[32] The plaintiffs, who completed their leases and purchased trucks from defendant, had opportunity to earn substantially more than their employee-peers. Unlike the company drivers, the plaintiffs were exposed to the risk of monetary loss because they had to perform maintenance on their trucks and decision-making related to fuel efficiency. The court found that these facts "demonstrate[d] that [p]laintiffs' opportunities for profit or loss were largely within their own control" and weighed in favor of finding independent contractor status.[33] The court found the third factor," i.e., the worker's investment in the business, . . . weigh[ed] in favor of finding independent contractor status."[34] The plaintiffs were responsible for truck payments, maintenance, repairs, fuel costs, business liability insurance. They were also responsible for paying their own business-related taxes. The court found that the facts demonstrated that plaintiff's "were substantially invested in their chosen business" and weighed in favor of independent contractor status. The court found that fourth factor, "i.e., the permanence of the working relationship, . . . weigh[ed] slightly in favor of a finding of independent contractor status."[35] The carrier agreement permitted the defendant to terminate the parties 'relationship with 120 days 'notice. The leases provided fixed terms, but drivers could negotiate changes to the lease. The plaintiffs also had the option to complete their lease earlier than the lease terms if they purchased their truck; after purchase, the defendant had no further interaction with the drivers. The court explained that "as a whole, these facts demonstrate[d] impermanence in the working relationship between the drivers and [defendant], based primarily on completion of the lease,"[36] which weighed slightly in favor of finding independent contractor status. The court found the fifth factor, "i.e., the degree of skill required to perform the work, . . . weigh[ed] slightly in favor of a finding of independent contractor status."[37] The court noted that the skills required between the plaintiffs and company drivers were primarily the same but that because plaintiffs had control over their business decisions, they also needed to be business and financially proficient. The court found the sixth factor, "i.e., the extent to which the work is an integral part of the alleged employer's business, . . . to be neutral."[38] In conclusion, the court found that the six factors led to the conclusion that plaintiffs were independent contractors and,

[31] *Id.*

[32] *Id.* at *13.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at *14.

[38] *Id.*

therefore, not covered by the FLSA, entering judgment in favor of the defendant on the FLSA claims.

In *Hargrave v. AIM Directional Servs., L.L.C.*,[39] the Fifth Circuit Court of Appeals affirmed the district court's summary judgment, finding that the plaintiff was an independent contractor. The Fifth Circuit affirmed the district court's conclusion for largely the same reasons it gave in *Parrish v. Premier Directional Drilling, L.P*.[40] The court applied the six-factor economic realities test and found that factors one, three, four, five, and six weighed in favor of finding independent contractor status; only factor two leaned slightly toward employee status. For factor one, the court explained that like in *Parrish,* the plaintiff had control over how to complete directional-drilling calculations and if the defendant gave him plans, he had full control over making those plans work, which leaned in favor of independent contractor status. In his argument that defendant had control, the plaintiff emphasized that he was forced to comply with safety protocols and wear a hard hat with the company logo on it. Nonetheless, the court agreed with the district court that encouraging workers to wear a hard hat with company logo and mandating compliance with safety policies "[are] not the type of control that counsels in favor of employee status."[41] The second factor weighed slightly in favor of employee status based on the larger investment the defendant made in the drilling projects plaintiff worked on, but the court explained that it is given "little weight, in the light of the nature of the industry and the work involved."[42] Factor three weighed in favor of independent contractor status because plaintiff had control over his profits. Additionally, plaintiff was not prevented from finding additional work. Factor four also weighed in favor of independent contractor status because plaintiff is "highly skilled."[43] The court noted that the initiative component of this factor probably weighed in favor of employee, but that the factors are viewed in the totality of the circumstances. Lastly, the court found that the plaintiff and the defendant had a short-lived and non-exclusive relationship, and the plaintiff worked on a project-by-project basis. These facts weighed in favor of independent contractor status. In conclusion, the court agreed with the district court that plaintiff was an independent contractor and thus not subject to FLSA.

D. **Student-Athletes**

Johnson v. Nat'l Collegiate Athletic Ass'n.,[44] addressed the issue as to whether student-athletes are employees of Division 1 colleges and universities and the NCAA. In denying the motion to dismiss filed by the NCAA and the Division 1 member schools, the court rejected the NCAA's long-standing policy of characterizing student-athletes as amateurs. Pursuant to the economic realities test, the court found the student-athletes had plausibly alleged in the complaint that they were employees.

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[39] 2022 WL 1487020 (5th Cir. May 11, 2022).

[40] 917 F.3d 369 (5th Cir. 2019).

[41] 2022 WL 1487020, at *3.

[42] *Id.*

[43] *Id.* at *4.

[44] 556 F. Supp. 3d 491 (E.D. Penn. 2021).

In the second *Johnson v. Nat'l Collegiate Athletic Ass'n*. case,[45] student-athletes asserted FLSA and state minimum wage claims against the NCAA, three colleges or universities attended by the named plaintiffs, and twenty additional universities (the "Non Attended School Defendants" or "NASDs") for non-payment of alleged wages earned during intercollegiate varsity games. The court dismissed claims against NASDs as a joint employer of the NCAA on jurisdictional grounds, finding that the NASDs did not have the authority to hire or fire student athletes, promulgate work rules or assignments, or set the conditions of NCAA sports participation. The court rejected arguments that the relationship between the NCAA and the NASDs mirrored the joint-employer relationship in *North American Soccer League,* noting that unlike with respect to the League, there were no allegations that the president of the NCAA was selected and paid for by member schools or that the NASDs were members of the Committee on Infractions or involved in the day-to-day decision-making in the NCAA.

F. Prison Labor

In *Osorio v. Geo Group, Inc.*,[46] a "deportable alien" held at a federal correctional institution brought an action for minimum wages against a private company charged with operating the facility. In dismissing the complaint, the court observed that the law is clear that incarcerated persons are not employees for purposes of the FLSA regardless of who was operating the correctional institution.

In *Fowler v. Fields*,[47] the plaintiff, a paroled state inmate, claimed he was entitled to minimum wages for work performed while a resident of a state run halfway house. Based on the economic realities test, the court granted summary judgment, noting that defendants did not have the power to control any conditions of employment or maintain employment records on plaintiff's activity. The court determined that the parolee failed to establish an employer-employee relationship, in addition to finding that the halfway house was not engaged in interstate commerce nor acting as an enterprise.

In *Gamble v. Minn. State-Operated Servs.*,[48] the plaintiffs, sexually dangerous civil detainees, brought FLSA claims against various Minnesota state officials and state agencies for work done while participating in a voluntary Vocational Work Program ("VWP"). In granting defendants' motion for summary judgment, the court concluded that sexually dangerous civil detainees are not state employees because: 1) there is no bargained for exchange of labor for mutual economic gain as occurs in a traditional employer-employee relationship; 2) the purpose of the VWP is not to enable detainees to earn a living but instead to provide therapeutic treatment for detainees to learn valuable work skills and work habits; 3) detainees cannot be fired from the VWP, meaning their participation in the VWP is for treatment and not economic gain; 4) the VWP is not for the state's economic gain, as it does not generate a profit, and

[45] 561 F. Supp. 3d 490 (E.D. Penn. 2021).

[46] 2022 WL 2062151 (W.D. Okla. Apr. 27, 2022), *report and recommendation adopted*, 2022 WL 2057477 (W.D. Okla. June 7, 2022).

[47] 2022 WL 94168 (S.D. Tex. Jan. 7, 2022).

[48] 32 F.4th 666 (8th Cir. 2022).

regardless any profit must be used for the benefit of the detainees; 5) like prisoners, the detainees' basic needs are met by the state, which means the primary purpose of the FLSA (i.e., providing a suitable standard of living) does not apply. The court also held that the state was permitted to recover the cost of care from detainees. As a result, the state's withholding of up to fifty percent of detainees 'wages earned during vocational work programs did not violate the FLSA.

IV. Employer Status

A. Joint Employers

In *Senne v. Kansas City Royals Baseball Corp.*,[49] the court determined that the MLB and its franchisees are joint employers. Using the following four factors, the court found that the MLB was not a mere regulatory body: MLB's scouting activities; Rule 4 Draft control over selection of the players not subject to Rule 4; MLB control over the contracting process, and the economic realities test.[50] The court determined that the MLB and the franchises were joint employers. The MLB and the franchises had filed summary judgment based on the Save America's Pastime Act,[51] which were granted for FLSA purposes after the effective date of that federal law, but not for purposes of state laws. The court also determined that the players were employees under the FLSA and relevant state laws; that the MLB is a joint employer and that training constituted "work for purposes of Arizona and Florida laws; that travel time on team buses or other transport is compensable; that all travel time was compensable under California law.

1. Court Decisions Addressing the Joint Employment Doctrine

a. Multi-Factor Tests to Determine Joint Employer Status

(ii.) Second Circuit

In *Curry v. P & G Auditors & Consultants, LLC*,[52] the court denied defendant's motion for summary judgment on the joint employer issue, explaining that the determination of joint employer status under the FLSA is determined by using both the "formal control" test[53] and the functional control test set forth in *Zheng v. Liberty Apparel Co.*,[54] i.e., (1) whether the premises and equipment were used for the plaintiffs 'work; (2) whether the [contractor] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete

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[49] 2022 WL 783941 (N.D. Cal. Mar. 15, 2022).

[50] The Economic Realities Test is described in Fact Sheet 13: Employment Relationship under the Fair Labor Standards Act (FLSA) at and involves an assessment of the total activity or situation which controls. *See* www.dol.gov.

[51] Save America's Pastime Act. 29 U.S.C. § 2139(a)(19) took effect on March 23, 2018. It exempted baseball players from the minimum wage and overtime sections of the FLSA pursuant to a contract that provides a weekly salary for services performed during the league's championship season at a rate that is not less than the weekly salary equivalent of a workweek of 40 hours. The analysis of this federal amendment to each state law had to be run independently. The contract's requirement for a weekly salary would satisfy the "salary basis test" under the FLSA.

[52] 2021 WL 3501197 (S.D.N.Y. Aug. 9, 2021).

[53] Carter v. Dutchess Community College, 735 F.2d 8, 12 (2d Cir. 1984).

[54] 355 F.3d 61, 72 (2003).

line-job that was integral to [the alleged joint employer's] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [the alleged joint employer or its agents] supervised plaintiffs 'work; and (6) whether plaintiffs worked exclusively or predominantly for the [the alleged joint employer]."[55]

In *Yuan v. AA Forest, Inc.*,[56] the plaintiff delivery drivers alleged violations of the FLSA and New York Labor Law (NYLL) against two corporate defendants and two individual defendants as joint employers. The defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that the plaintiffs failed to plausibly allege their joint employer status. The district court relied on the functional control test under *Zheng v. Liberty Apparel Co.*[57] and the single integrated enterprise test to hold that the plaintiffs failed to plausibly allege the corporate defendant was a joint employer. Specifically, under the single integrated enterprise test, the court held that the plaintiffs identified no examples of shared staff between the enterprises other than themselves and failed to allege a factual basis to infer one defendant's control over the other.

(iv.) Fourth Circuit

In *Scali-Warner v. N&TS Grp. Corp.*,[58] a marketing employee brought minimum wage and overtime claims against a Florida corporation that was formed to assist an Italian electronic-payments corporation with its U.S. operations. The defendant moved for summary judgment on whether it was the plaintiff's employer. The district court applied the six-factor test to determine joint employment in the Fourth Circuit.[59] The district court determined that each of the six factors weighed against finding a joint employment relationship existed. In particular, the district court found that the defendant did not exercise control over the plaintiff's employment and that the plaintiff conceded that the defendant primarily performed mere administrative duties in support of the Italian corporation's operations.

(v.) Fifth Circuit

In *Avila v. SLSCO, Ltd.*,[60] the plaintiffs worked for subcontractors on a cleanup and repair project in Puerto Rico after hurricanes Marie and Irma. SLS was the main contractor with the Puerto Rico Department of Housing and subcontracted the work out to over 100 subcontractors. Plaintiffs alleged that they and other workers from 21 subcontractors were misclassified as independent contractors and were not paid overtime. On defendant SLS's motion to decertify, the court decertified in part because the court could not apply the joint employer analysis to 21 different subcontractor relationships on a class-wide basis. SLS did not directly employ or compensate its

[55] Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2003).

[56] 2022 WL 900614 (E.D.N.Y. Mar. 28, 2022).

[57] 355 F.3d 61 (2d Cir. 2003).

[58] 2021 WL 3142025 (D. Md. July 26, 2021).

[59] *Id.* at *4 (listing the factors announced in Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 133 (4th Cir. 2017)).

[60] 2022 WL 784062 (S.D. Tex. Mar. 15, 2022).

subcontractors' workers, it did not have in its possession the potential class members' contact information or other relevant personnel records, and it was a long and tedious process to get in contact with putative class members.[61] The court thus found that the plaintiffs did not present evidence that SLS had any say in how its subcontractors classified their workers or their pay practices. As well, the lack of consistency among the subcontractors' pay methods and rates severely undercut the plaintiffs' allegation that SLS had any influence over its subcontractors' pay practices.

b. Application of Joint Employment in Various Employment Situations

In *Deardorff v. Cellular Sales of Knoxville, Inc.*,[62] the court considered the plaintiff's motion for leave to file another amended complaint, adding both the Cellular Sales Management Group, LLC, ("CSMG") and the Cellular Sales Services Group, LLC, ("CSSG"). The prospective defendants, CSSG and CSMG, opposed, arguing that the amendments are futile because the plaintiffs do not plausibly allege that CSSG and CSMG were 'employers 'within the meaning of the FLSA. The court agreed with the defendants and denied to motion to amend, finding that the plaintiff's attempt to demonstrate joint employment was insufficient and futile because it relied only on conclusory allegations.[63]

B. Individuals (Corporate Officers, Owners, Shareholders, and Managers/Supervisors) Who Are "Employers"

2. Owners and Shareholders

In *Weng v. HungryPanda US, Inc.*,[64] the plaintiff worked as a delivery driver for defendant's restaurant. The plaintiff brought an action on behalf of himself and similarly situated individuals, alleging minimum-wage and overtime violations under the FLSA, as well as other state law wage claims. Plaintiff named as defendants the restaurant for which he made deliveries, as well as his individual manager and the president of the restaurant. The district court granted the defendants' motion for judgment on the pleadings and dismissed the case with prejudice. In doing so, the court held that the plaintiff did not properly show that the individual defendants operated control over him, rather than just control over the company. While defendants owned the restaurant, the court found that they did not control the plaintiff as they did not personally supervise him as an employee, make his day-to-day task list or schedule, or sign his paycheck.

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[61] The Court also noted that this case may be the last of its kind because the 5th circuit did away with this class certification process in the meantime during this litigation in *Swales*.

[62] 2022 WL 309292 (E.D. Pa. Feb. 1, 2022).

[63] The court noted the plaintiff included zero specific facts and suggested that it could have included "specific facts indicating that CSSG, CSMG, and CSPA were joint employers, such as that employees of CSSG or CSMG conducted their training, that CSSG or CSMG hired them or had responsibility for disciplining them, or that individuals supervising them represented that CSSG and CSMG were sister organizations to CSPA, among other things." *Id.* at *17.

[64] 2022 WL 292799 (S.D.N.Y. Jan. 31, 2022).

Chapter 4

EMPLOYER COVERAGE

II. Individual Coverage

A. General Principles

In *Brewer v. Sake Hibachi Sushi & Bar, Inc.*,[1] a restaurant worker asserted FLSA claims on behalf of similarly situated employees, alleging that restaurant owners failed to provide sufficient notice they were utilizing the FLSA tip-credit and required the workers to contribute to an illegal "tip pool" and pay various business expenses. The complaint alleged that restaurant workers (a) "[h]andled food and other food service items that were purchased across state lines or traveled in interstate commerce, or both," (b) "regularly served customers dining at Defendants' restaurants who were traveling from out-of-state or across interstate lines," and (c) "regularly and frequently processed multiple interstate credit card transactions during every shift they worked."[2] On the defendants 'motion to dismiss, the district court held that although the plaintiff's allegations could have been more specific about the food and service referenced in the complaint, "on balance," she had adequately pled individual FLSA coverage.[3]

In *Wood et al. v. Mike Bloomberg 2020, Inc.*,[4] the plaintiffs, who worked as field organizers for the defendant's presidential campaign, claimed they were denied overtime under the FLSA. The defendant moved to dismiss for failure to state a claim, arguing that the FLSA does not apply to the campaign or the plaintiffs as employees of the campaign.[5] The court rejected the defendant's argument and concluded that the plaintiffs 'pleadings of their job responsibilities, which included using telephones to communicate with voters and other officials across state lines as their primary duty, "plausibly demonstrates that they were 'engaged in commerce 'under the FLSA."[6]

B. "Engaged in Commerce"

In *Ferrer v. Atlas Piles, LLC*,[7] the plaintiff, a laborer, filed an FLSA overtime action against the defendants, whom he alleged collectively operated a construction operation that installs foundation pilings. The defendants moved to dismiss the plaintiff's complaint for failure to state a claim. The plaintiff alleged that he was individually engaged in commerce in the performance of his job where the defendants regularly used telephones, cellular phones, tools, and parts that were moved in interstate

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[1] 2022 WL 348990 (N.D. Tex. Jan. 19, 2022), *report and recommendation adopted*, 2022 WL 347616 (N.D. Tex. Feb. 4, 2022).

[2] *Id*. at *5.

[3] *Id*.

[4] 2022 WL 891052 (S.D.N.Y. Mar. 25, 2022).

[5] *Id.* at *2.

[6] *Id.* at *6.

[7] 2022 WL 483215 (S.D. Fla. Feb. 16, 2022).

commerce. The district court noted that the Eleventh Circuit held that a plaintiff may be engaged in interstate commerce by regularly using telephones to communicate with customers that are out-of-state; however, the district court found that the plaintiff in his complaint did not allege that he himself had used telephones with out-of-state customers but rather that the defendants engaged in that conduct. Accordingly, the district court found that the plaintiff failed to plausibly allege individual coverage under the FLSA. The court ultimately denied the defendant's motion to dismiss, finding that the plaintiff had sufficiently plead enterprise coverage under the FLSA.

2. Regular Use of the Channels of Commerce

In *Dobrosmylov v. DeSales Media Grp., Inc.*,[8] the plaintiff worked as a Lead Video Editor and Graphic Artist for an entity with a religious based mission. The plaintiff sued the defendant for failure to pay overtime under the FLSA and state law. The court denied the defendant's motion for summary judgment challenging whether the plaintiff was covered under either the "enterprise coverage" or "individual coverage" prong of the Act. Addressing the enterprise coverage issues, the court rejected the defendant's argument that it did not qualify as an "enterprise" because of the entity's religious purposes where there was a genuine issue of fact concerning the nature and extent of its business operations on the side.

C. "Engaged in the Production of Goods"

In *Lin v. Quality Woods, Inc.,*[9] the magistrate judge recommended denial of the plaintiff's motion for default judgment against the defendants and instead recommended dismissal of the action, *sua sponte*, due to the plaintiff's "discordant factual allegations and incompatible theories of liability." For the primary defendant, Quality Woods, the complaint attempts to establish enterprise coverage by reciting the statute in conclusory fashion in alleging it engaged in interstate commerce and had annual gross sales in excess of $500,000. The plaintiff did not allege that he was engaged either in commerce or in the production of goods for commerce. The only details the plaintiff pled about his work were that he was a carpenter and assembled furniture. The court held the plaintiff must plead some explanation about the defendant's business to bring it within the statute's ambit, such as the source of its cabinet materials or their ultimate destination. The district court adopted the magistrate judge's report and recommendation in its entirety.

In *Lingle v. Sun Mountain Retreat*, *LLC,*[10] the plaintiff, who worked as a laborer/handyman at a resort, brought various overtime claims under the FLSA. The defendants filed a motion to dismiss, asserting the plaintiff failed to allege facts that meet the requirements for either enterprise or individual coverage under the FLSA. The court found the plaintiff failed to adequately plead enterprise coverage because he did not allege the defendants employed more than one employee. The court also dismissed

[8] 2021 WL 2779303 (E.D.N.Y. July 2, 2021).

[9] 2021 WL 4129151 (E.D.N.Y. Aug. 10, 2021).

[10] 2022 WL 1203215 (D. Colo. Apr. 22, 2022).

the claims for individual coverage because the plaintiff failed to allege his duties were related to interstate commerce. Rather, the plaintiff alleged he performed handyman work, such as yard work, plumbing, and maintaining engines.

2. "Goods"

In *Dobrosmylov v. DeSales Media Grp., Inc.*,[11] the plaintiff worked as a Lead Video Editor and Graphic Artist for an entity with a religious based mission. The plaintiff sued the defendant for failure to pay overtime under the FLSA and state law. The court denied the defendant's motion for summary judgment challenging whether the plaintiff was covered under either the "enterprise coverage" or "individual coverage" prong of the Act. On the issue of individual coverage, the court also found that the employee's work, such as creating advertising copy, afforded a basis for individual coverage even though the employer did not charge for those goods or products.

III. Enterprise Coverage

A. General Principles

The district court in *Comas v. Chris's Auto Sales Corp.*,[12] considered a motion for default judgment. The court held that the plaintiff had established protection under the Act under "enterprise coverage" as the complaint alleged that the defendant was engaged in interstate commerce in used car and truck sales with gross revenues in excess of $500,000 per year," using tires, fluids, vehicles and other goods materials and supplies that were previously placed in the stream of commerce from outside the State of Florida."[13]

In *Tecocoatzi-Ortiz v. Just Salad*,[14] 16 delivery drivers brought suit against 24 Just Salad franchises and the cofounder/CEO, alleging that they were employed by all named defendants. The defendants filed a motion for summary judgment, arguing that the plaintiffs never worked for at their locations. The plaintiffs claimed all defendants were liable under the single integrated enterprise theory of liability. To determine if the group of entities qualified as a singled integrated enterprise, the New York district court analyzed four factors: 1) interrelation of operations, 2) centralized control of labor relations, 3) common management, and 4) common ownership or financial control. Since the Second Circuit Court of Appeals has not yet applied the single integrated enterprise rule to FLSA, the district court reviewed other district court decisions. Those decisions revealed that some courts used the test in a FLSA context, where other courts declined to apply the formal test and instead applied the economic realities test. This court held that joint liability did not exist because the plaintiffs failed to point to any evidence to satisfy either the single integrated enterprise or economic reality tests. The district court granted the summary judgment for Just Salad and ten stores where the plaintiffs never worked.

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[11] 2021 WL 2779303 (E.D.N.Y. July 2, 2021).

[12] 2022 WL 1658827 (S.D. Fla. May 25, 2022).

[13] *Id*. at *2.

[14] 2022 WL 596831 (S.D.N.Y. Feb. 25, 2022).

In *Brewer v. Sake Hibachi Sushi & Bar, Inc.*,[15] restaurant workers alleged that restaurant owners failed to comply with the requirements of the FLSA's tip-credit provision by failing to provide sufficient notice and requiring the workers to contribute to an illegal "tip pool" and pay various business expenses and were therefore liable for the full minimum wage for every hour worked. The complaint alleged that the restaurant workers (a) "[h]andled food and other food service items that were purchased across state lines or traveled in interstate commerce, or both," (b) "regularly served customers dining at Defendants' restaurants who were traveling from out-of-state or across interstate lines," and (c) "regularly and frequently processed multiple interstate credit card transactions during every shift they worked."[16] Based on these allegations, the district court denied the defendants 'motion to dismiss and held that the plaintiff had adequately pled that she engaged in activities within the FLSA's enterprise coverage theory.[17]

B. Requirements of Section 203(r)

1. "Related Activities"

c. Vertical Activities

In *Johnson v. 5147 Dogwood Charitable Group., Inc.*,[18] a floor worker filed suit against the past and present operators of a bingo establishment, alleging that the defendants violated the FLSA and the Florida Minimum Wage Act ("FMWA") by not providing her a minimum wage and overtime pay for work performed. The plaintiff was paid an hourly wage plus tips when she worked at the bingo establishment from 2007 to 2010, but when she returned to work at the bingo establishment in 2018, she was not paid an hourly wage. The bingo establishment was operated by an entity that subleased space in a building to various charitable organizations so they could conduct bingo games on the property. The lease was eventually assigned to a charitable trust, who began operating the bingo establishment. The trust did not pay anyone working at the bingo establishment because it considered them to be volunteers, not employees. The plaintiff moved for summary judgment on the issue of whether the FLSA and FMWA applied to the charitable bingo establishment, whereas the defendants contended that the plaintiff failed to establish the requisite elements of enterprise coverage under the FLSA. The district court held that enterprise coverage applied because it was undisputed that the bingo establishment brought in more than $500,000 in annual sales and that its employees handled and sold goods and materials that had moved in commerce (i.e., bingo cards, tickets, and other supplies necessary to conduct bingo).

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[15] 2022 WL 348990 (N.D. Tex. Jan. 19, 2022), *report and recommendation adopted*, 2022 WL 347616 (N.D. Tex. Feb. 4, 2022).

[16] *Id*. at *3.

[17] *Id.* (citing Molina-Aranda v. Black Magic Enters., L.L.C., 983 F.3d 779, 786–87 (5th Cir. 2020)).

[18] 2021 WL 4144768 (N.D. Fla. Sept. 7, 2021).

2. "Common Business Purpose"

In *Johnson v. 5147 Dogwood Charitable Group., Inc.*,[19] a floor worker filed suit against the past and present operators of a bingo establishment, alleging that the defendants violated the FLSA and the Florida Minimum Wage Act ("FMWA") by not providing her a minimum wage and overtime pay for work performed. The plaintiff was paid an hourly wage plus tips when she worked at the bingo establishment from 2007 to 2010, but when she returned to work at the bingo establishment in 2018, she was not paid an hourly wage. The bingo establishment was operated by an entity that subleased space in a building to various charitable organizations so they could conduct bingo games on the property. The lease was eventually assigned to a charitable trust, who began operating the bingo establishment. The trust did not pay anyone working at the bingo establishment because it considered them to be volunteers, not employees. The plaintiff moved for summary judgment on the issue of whether the FLSA and FMWA applied to the charitable bingo establishment, whereas the defendants contended that the plaintiff failed to establish the requisite elements of enterprise coverage under the FLSA. The district court held that enterprise coverage applied because it was undisputed that the bingo establishment brought in more than $500,000 in annual sales and that its employees handled and sold goods and materials that had moved in commerce (i.e., bingo cards, tickets, and other supplies necessary to conduct bingo). The defendants contended, however, that the bingo establishment was not an "enterprise" because the operation was not engaged in a "common business purpose" under 29 U.S.C. § 203(r)(1). In other words, the defendants disputed that they had a "common business purpose" because, under Florida law, bingo could only be conducted for charitable purposes and there was thus no ordinary commercial bingo halls in the state with which to compete. The district court disagreed, holding that when charitable organizations engage in what (in economic reality) are ordinary commercial activities, they are treated just like any other ordinary business enterprise. Accordingly, enterprise coverage applied.

C. Requirements of Section 203(s)

In *Reyes v. Tacos El Gallo Giro Corp.,*[20] the United States District Court for the Eastern District of New York held that under the standards for enterprise coverage, the defendant-employer was subject to the FLSA and, notwithstanding the plaintiff-employee's inability to establish individual coverage, the plaintiff could seek recoveries for FLSA violations. To properly allege enterprise coverage, the plaintiff must state the nature of his work and the nature of his employer's business, and he must provide only straightforward allegations connecting that work to interstate commerce. Employers are subject to the FLSA when their employees are "employed in an enterprise engaged in commerce or in the production of goods for commerce" ("enterprise coverage"). Enterprise coverage exists where an employer has (1) "employees engaged in commerce or in the production of goods for commerce"; and (2) an "annual gross volume of sales made or business done" equal to or greater than $500,000. The court

[19] 2021 WL 4144768 (N.D. Fla. Sept. 7, 2021).

[20] 2022 WL 940504 (E.D.N.Y. Jan. 25, 2022).

found that the plaintiff provided the factual detail necessary to support a finding that the defendant was engaged in interstate commerce and subject to the FLSA.

IV. Geographical Limits of Coverage

In *Newton v. Parker Drilling Mgmt. Servs., Ltd.*,[21] an off-shore oil worker sued his employer, alleging various wage-and-hour violations under the FLSA and California Labor Code. The defendant argued that because the plaintiff's claims arose out of work conducted on the Outer Continental Shelf, those claims were governed exclusively by federal laws and regulations unless federal law does not address the relevant issue. The Ninth Circuit agreed, holding that pursuant to the Outer Continental Shelf Lands Act (OCSLA),[22] all law on the Outer Continental Shelf is federal, and state law is adopted as surrogate federal law only to the extent it is applicable and not inconsistent with federal law. Specifically, the Ninth Circuit found that California's laws addressing meal periods, wage statements, and waiting time penalties were inapplicable because the FLSA addresses these issues. It provides that bona fide meal periods are not work time; requires that employers make, keep, and preserve such records of employees and of the wages, hours, and other conditions and practices of employment; and requires that employees be paid on their regular payday. Accordingly, only the FLSA governed the work conducted by the plaintiff, and the dismissal of the California claims was affirmed.[23]

[21] 860 F. App'x 536 (9th Cir. 2021).

[22] 43 U.S.C. § 1331 *et seq*.

[23] *Id.* at 536–38.

Chapter 5

WHITE-COLLAR EXEMPTIONS

IV. THE SALARY BASIS TEST

B. Requirements of the Salary Basis Test

1. Salary Basis Test Generally

In *Smith v. Wall St. Gold Buyers Corp.*,[1] a gold and pawn shop employee filed an action against the shop owners for violating the FLSA and the New York Labor Law. At a final pretrial conference, the defendants raised the issue of the plaintiff's exempt status, and the court directed the parties to brief the issue. The court deemed the filed memorandums as the parties' cross motions for partial summary judgment. On report and recommendation, the court recommended both motions be denied. The plaintiff had worked on and off for defendants from 2012 to 2018.[2] Over the course of the plaintiff's employment, she received wages in various forms. For five to seven days' worth of work, she was paid a salary of $600 per week on a paycheck and an additional $100 in cash. She also received $100 to $165 per day, in cash, on a weekly basis. The plaintiff denied consistently receiving $600 a week because the paychecks often bounced. The plaintiff further alleged the defendants reduced her pay if they determined she purchased fake gold, and there were weeks when she received no pay because the defendants did not have sufficient funds. All parties agreed the plaintiff was never paid on an hourly basis. The general criteria for meeting the salary basis test requires an employee be given "a predetermined amount constituting all or part" of the employee's compensation which is "not subject to reduction because of variations in the … quantity of work performed."[3] The district court found the evidence suggested that the plaintiff was not paid a predetermined weekly or monthly wage.

In *Lewis v. Shafer Project Res., Inc.,*[4] the plaintiff brought a collective action against the defendant, Shafer, seeking unpaid overtime. The plaintiff filed a motion for partial summary judgment to preclude the defendant from asserting FLSA exemptions, arguing the plaintiffs were not paid on a salary basis. The plaintiffs asserted they were paid a day rate rather than a salary and that the defendant took improper deductions. Relying on *Hewitt v. Helix Energy Solutions Group, Inc.*,[5] the district court held a day rate may satisfy the salary requirement if the employment agreement has a salary guarantee in excess of the weekly statutory minimum regardless of the number of hours, days, or shifts worked, establishing a reasonable relationship exists between the guaranteed salary amount and the amount actually earned. The court denied the motion

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[1] 2021 WL 4711730 (E.D.N.Y. Sept. 20, 2021), *report and recommendation adopted*, 2021 WL 4711698 (E.D.N.Y. Oct. 8, 2021).

[2] From 2004 through 2019, the FLSA salary basis test required exempt employees be compensated on a salary basis at a rate no less than $455 per week.

[3] Anani v. CVS RX Servs., Inc., 788 F. Supp 2d. 55, 62 (E.D.N.Y. 2011), *aff'd*. 730 F.3d 146 (2d Cir. 2013) (citing C.F.R. § 541.602(a)).

[4] 2021 WL 8016159 (S.D. Tex. Oct. 13, 2021).

[5] 15 F.4th 289 (5th Cir. 2021), *cert. granted*, 212 L.Ed.2d 762 [142 S.Ct. 2674] (2022).

holding the defendant's weekly pay of six times a daily rate satisfied the reasonable relationship test. The court also held the plaintiffs failed to submit sufficient evidence of improper deductions.

In *Ferguson v. Tex. Farm Bureau*,[6] the plaintiff-agency managers filed a collective action under the FLSA alleging that the defendant misclassified them as independent contractors. The defendant filed a partial motion for summary judgment, arguing that even if one of the individual plaintiffs was an employee under the FLSA, a white-collar exemption under the FLSA would apply to that plaintiff's overtime allegations. The district court noted that while a pay scheme similar to the individual plaintiff's was currently before the Fifth Circuit for *en banc* review, despite the defendant's contention that the plaintiff's pay was a matter of "actuarial certainty," the individual plaintiff in this case presented evidence inconsistent with the salary basis test because his pay under the defendant's current policies was neither predetermined nor guaranteed but rather completely dependent on customer payments. Accordingly, the district court found there was an issue of material fact and denied the defendant's motion for summary judgment.

V. The Executive Exemption

D. "Customarily and Regularly Direct the Work of Two or More Other Employees"

In *Brown v. Wheatleigh Corporation*,[7] a former hotel guest services manager alleged that the hotel and its owners violated the FLSA by misclassifying him as an exempt employee and failing to pay him overtime wages. The plaintiff moved for partial summary judgment as to whether the executive exemption was inapplicable to his claims. The district court observed that, as a matter of law, the First Circuit has found that with respect to directing a total of 80 employee-hours of work each week for the entire relevant period, spending 76% of the employee's total work time was too low to satisfy the "customarily and regularly" requirement.[8] The defendants admitted that they "at best can show that Plaintiff directed the work of two or more full-time employees or their equivalent 65% of the time during the busy season (13 out of 20 pay periods)."[9] Because the defendants could not meet the burden of proving that the plaintiff customarily and regularly directed the work of two or more employees, the court held that the plaintiff was entitled to partial summary judgment in his favor.[10]

E. Authority With Respect to Significant Personnel Matters or Input Must Be "Given Particular Weight"

In *Loizon v. Evans*, a former deputy chief probation officer sued the Chief Judge of the Cook County Circuit Court for unpaid overtime wages, among other claims

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[6] 2021 WL 7906824 (W.D. Tex. Aug. 24, 2021).

[7] 2021 WL 4079779 (D. Mass. Sept. 8, 2021).

[8] *Id*. at *5 (citing Sec'y of Labor v. Daylight Dairy Prods., Inc., 779 F.2d 784, 784 (1st Cir. 1985)).

[9] *Id*. at *6.

[10] *Id*.

related to his termination.[11] The district court dismissed the deputy chief's FLSA claims at summary judgment because, in addition to satisfying the other requirements of the executive exemption, he conducted performance evaluations that led to merit pay increases for his subordinates.[12]

VI. The Administrative Exemption

A. "Office or Non-Manual Work"

In *Hobbs v. EVO Inc.*,[13] field engineers, who operated downhole video cameras, brought suit for unpaid overtime. The Fifth Circuit Court of Appeals affirmed the district court's decision holding, after a bench trial, that the field engineers were not exempt from the FLSA's overtime requirements. The appellate court affirmed that the field engineers, despite spending most of their important time inside a wireline truck interpreting and analyzing video footage, were more similar to non-management production-line employees who perform work with physical skill and energy.[14]

B. "Directly Related to Management or General Business Operations"

In *Wimberly v. Beast Energy Servs*., *Inc.*,[15] two service supervisors brought suit against an oilfield service company for unpaid overtime, alleging that they were improperly classified as exempt administrative employees. In denying the defendant's motion for summary judgment, the district court considered the performance of office or non-manual work directly related to the management or general business operations of the company, focusing on the "administrative-production dichotomy." The court held that the plaintiffs did not perform the requisite non-manual work to qualify as exempt. Rather, the "plaintiffs worked to produce the very services Beast Energy offers – the delivery and operation of oilfield equipment at Beast Energy's customers 'well sites."[16] The court further reasoned that safety-related responsibilities were ancillary to the plaintiff's primary duty. The court concluded that the plaintiffs spent most of their time loading equipment, traveling, setting up equipment, operating equipment, and taking down equipment, all duties that were manual in nature.

In *Berry v. Drive Casa, LLC*,[17] an information technology ("IT") director brought an overtime claim against a subprime auto finance dealership and its owners and operators, alleging misclassification. Following a bench trial, the district court found that the defendants had established their affirmative defense, demonstrating that the plaintiff was not entitled to overtime wages because he fell within the administrative exemption. As the IT Director, the plaintiff served on the executive team and oversaw IT contracts, as well as the purchase, implementation, and strategic planning of the company's IT

[11] 2022 WL 899905, *1 (N.D. Ill. Mar. 28, 2022).

[12] *Id.* at *15.

[13] 7 F.4th 241 (5th Cir. 2021).

[14] *Id*. at 249.

[15] 2022 WL 658717 (S.D. Tex. Mar. 4, 2022).

[16] *Id.* at *6.

[17] 2022 WL 1190353 (N.D. Tex. Apr. 21, 2022).

needs. Although the plaintiff occasionally performed manual work such as physically replacing computers or telephones and relocating employee workstations as a COVID-19 countermeasure, the defendants met their burden of demonstrating the plaintiff's primary duties were administrative in nature.

In *Hobbs v. EVO Inc.*,[18] field engineers, who operated downhole video cameras, brought suit for unpaid overtime. The Fifth Circuit Court of Appeals affirmed the decision of the district court, which held, after a bench trial, that the field engineers were not exempt and therefore entitled to overtime. The defendant had the burden of showing that the plaintiffs' primary duty related to the management or general business operations. The court explained that it did not meet this burden because even if the field engineers had provided some guidance for what they saw on the video cameras, "the focus is not on a general concept of advice or consultancy but rather on policy determinations for how a business should be run or run more efficiently. Thus, the district court committed no error in determining that the administrative exemption did not apply.

In *Simmons v. USAble Corp.*,[19] a collective of information security analysts sued their former employer, an independent insurance licensee, for misclassification under the FLSA and state law, seeking unpaid overtime compensation. After conditional certification, the defendant moved for summary judgment, asserting that the plaintiffs were properly classified as exempt pursuant to the administrative exemption. The plaintiffs worked in the department that was responsible for the protection of confidential medical information maintained by the defendant. In this department, the plaintiffs "performed duties to ensure that [the department] secured the information utilized, maintained, and transmitted by [defendant] to the maximum extent possible." In granting the defendant's motion for summary judgment, the court found that these duties were "directly related to the management and/or general business operations" prong of the administrative exemption due to the defendant's regulatory obligation to perform these functions.

C. "Discretion and Independent Judgment"

In *Menefee v. N-Title, LLC*,[20] a closer and escrow officer brought a claim for unpaid overtime compensation, alleging misclassification as an independent contractor. At trial, the employer asserted the administrative exemption affirmative defense, and the court evaluated the meaning of "discretion and independent judgment." The court found that the plaintiff did not formulate policies or procedure and could not deviate without approval. The only question was whether the escrow officer's 48-hour rule regarding submission of documents was a policy imposed by her discretion. The court found this issue to be a minor point, insufficient to rise to the level of discretion to create policy. As a result, the court found for the escrow officer and awarded damages, liquidated damages, attorney's fees, and costs.

[18] 7 F.4th 241 (5th Cir. 2021).

[19] 2021 WL 4505549 (E.D. Ark. Sept. 30, 2021).

[20] 2021 WL 3413319 (W.D. Tex. July 9, 2021).

In *Berry v. Drive Casa, LLC*,[21] an information technology ("IT") director brought an overtime claim against a subprime auto finance dealership and its owners and operators, alleging misclassification. Following a bench trial, the district court found that the defendants had established their affirmative defense, demonstrating that the plaintiff fell within the administrative exemption. The court found that the plaintiff exercised discretion and independent judgment when he chose, implemented, and maintained various IT programs, signed contracts for such programs on behalf of the defendant company, attended executive meetings, and provided advice to executives on various IT related issues and decisions.

In *Hobbs v. EVO Inc.*,[22] field engineers, who operated downhole video cameras, brought suit for unpaid overtime. The Fifth Circuit Court of Appeals affirmed the decision of the district court, which held, after a bench trial, that the field engineers were not exempt and therefore entitled to overtime. On the question of discretion and independent judgment as it pertains to the application of the administrative exemption, the Fifth Circuit rejected the employer's argument that the field engineers exercised discretion by setting up and configuring a camera, explaining that they lacked independent judgment because they needed supervisor approval to deviate from the employer's policies.[23] The Fifth Circuit relied on the district court's findings that the field engineers did not exercise judgment as they were not consultants or experts, that they provided no recommendations, and that the descriptions of what they observed downhole were simply observations.

In *Brown v. Nexus Bus. Sols., LLC*,[24] business development managers alleged FLSA overtime claims against a company that catered to auto dealerships looking to increase sales volume and market share of General Motors vehicles. On appeal from the district court's grant of summary judgment based on the administrative exception, the plaintiffs argued that their work was too restricted and repetitive to allow for meaningful discretion. The plaintiffs further argued that, even if they had some level of discretion, it was limited to insignificant matters. The Eleventh Circuit rejected both arguments and affirmed the district court's grant of summary judgment, recognizing that the plaintiffs developed business leads and opportunities for GM dealerships, acted as the facilitator and liaison between the customer and the dealerships, and were tasked with building relationships and developing leads. In short, the discretion exercised by the plaintiffs went straight to the heart of GM customer recruitment efforts.

[21] 2022 WL 1190353 (N.D. Tex. Apr. 21, 2022).

[22] 7 F.4th 241 (5th Cir. 2021).

[23] *Id.* at 250.

[24] 29 F.4th 1315 (11th Cir. 2022).

VII. The Professional Exemption

B. Creative Professionals

In *Senne v. Kansas City Royals Baseball Corp.*,[25] a collective of minor league baseball players sued Major League Baseball (MLB), the commissioner, and several MLB franchises, alleging violations of the minimum wage and overtime requirements under the FLSA and various state laws. The district court granted plaintiffs' motion for partial summary judgment on the defendants' creative professional exemption defense. Finding that the creative professional exemption did not apply to any of the claims asserted in the case, the district court noted that professional sports players are not mentioned in the non-exhaustive listings of creative work under the related regulations or interpretations. Although skill is required to play baseball, the applicable skill is not recognized in the field of artistic endeavor. Professional athletes were not intended to be covered by the creative professional exemption.

D. Employees Engaged in the Practice of Law or Medicine

In *Sebren v. Harrison*,[26] a former assistant/paralegal who later passed the bar examination sued the law firm where she had previously worked for failure to pay overtime under the FLSA and state law. The plaintiff moved for summary judgment, which was granted in part and denied in part. Given that the plaintiff was classified and paid as an independent contractor prior to passing the bar, and not as an employee, she did not receive a salary sufficient for any exemption to apply. As for the plaintiff's employment by the firm as an attorney, a genuine dispute of material fact existed regarding the nature of the plaintiff's duties as an attorney and whether they were "professional" for purposes of the exemption.

VIII. Highly Compensated Employees

In *Boudreaux v. Schlumberger Tech. Corp.*,[27] a collective of directional drillers brought overtime claims against an oil and gas exploration support company. The plaintiffs were paid a set salary regardless of hours worked and were also paid a day rate for each day they worked in the field. The court granted summary judgment to the employer as to seven of the plaintiffs based on the highly compensated employee ("HCE") exemption because each was paid a salary, earned more than $100,000 per year, and performed one of the duties of the executive exemption, the administrative exemption, or both. In each instance, the plaintiff could not come forward with evidence sufficient to create a genuine question of material fact as to the HCE exemption to defeat summary judgment.

[25] 2022 WL 783941 (N.D. Cal. Mar. 15, 2022).

[26] 552 F. Supp. 3d 249 (D.R.I. 2021).

[27] 2022 WL 992670 (W.D. La. Mar. 30, 2022).

A. Compensation Requirements

In *Alvarez v. NES Global LLC*,[28] a project scheduler brought a collective action on behalf of day rate workers against a staffing company, alleging she and others had been denied overtime when working more than 40 hours in a workweek. The plaintiff asserted that putative members of the collective had been paid under a day rate system that included a weekly retainer amount for any week in which they worked any hours and a flat daily rate for each day they worked more than a certain number of hours or days in such week. The defendant contended that the system was lawful because the workers were highly compensated employees who performed at least one of the duties or responsibilities of an executive, administrative, or professional employee. Although the district court questioned whether the duties prong of any exemption could be proved collectively, given the wide range of jobs performed by day rate workers, the court concluded that the salary basis test component of the defendant's "highly compensated employee" defense could be decided collectively and certified the collective on that basis.

In *Hewitt v. Helix Energy Sols. Grp., Inc.*,[29] the plaintiff, an oil rig worker, brought action against an oil and gas services company for violation of the overtime provision of the FLSA. The district court granted summary judgment in favor of the defendant, and the plaintiff appealed. On appeal, the issue before the Fifth Circuit was whether the plaintiff qualified as a highly compensated employee exempt from the overtime provision of the FLSA. To satisfy the highly compensated employee exemption, the employee must earn a certain level of low income, "be paid on a salary basis, as well as perform certain duties. And unless those tests are met, the employee is 'not exempt ... no matter how highly paid they might be.'"[30] The parties agreed that the plaintiff meets the exemption's duties and income threshold requirements but disagreed over the salary-basis test component. The defendant argued that the plaintiff was highly compensated so it should not have to comply with the other regulations. The Fifth Circuit disagreed, explaining that the regulations do not indicate a different application based on how much an employee is paid. Further, an employee could not be deprived of the benefits of the FLSA simply because they are paid well. Even though the plaintiff received annual compensation that qualified him as "highly compensated," the plaintiff was paid on a daily basis, and the defendant did not satisfy either prong of the regulation that provides a way for an employer to pay a daily rate yet satisfy the salary-basis test. In conclusion, the court held that plaintiff was not exempt from the FLSA overtime requirement.

B. Duties Requirements

In *Hobbs v. EVO Inc.*,[31] field engineers who operated downhole video cameras brought suit for unpaid overtime. After a bench trial where the district court found the

[28] 2021 WL 3571223 (S.D. Tex. Aug. 11, 2021).

[29] 15 F.4th 289 (5th Cir. 2021), *cert. granted*, 212 L.Ed.2d 762 [142 S.Ct. 2674] (2022).

[30] *Id.* at 291 (citing § 29 C.F.R. § 541.601(d)).

[31] 7 F.4th 241 (5th Cir. 2021).

field engineers were non-exempt, the parties filed cross-appeals to the Fifth Circuit. The defendant argued that plaintiffs were exempt under the highly compensated exemption because, *inter alia*, they "regularly performed at least one administrative duty," including spending '"their most important time inside a wireline truck interpreting and analyzing footage.'"[32] The defendant asserted that the district court applied too high a standard in analyzing the plaintiffs' duties because it considered whether the plaintiffs' "primary duty" was exempt work, while an employee only needs to "customarily and regularly" perform exempt duties for the HCE exemption to apply.[33] The Firth Circuit affirmed, holding that the defendant had failed to demonstrate that the plaintiffs' work satisfied either prong of the administrative exemption. First, after analyzing the trial testimony in detail, the court found that the plaintiffs' monitoring of video footage did not entail the regular exercise of discretion or judgment because their "monitoring and annotating video footage did not require them to evaluate possible courses of conduct or make decisions after considering various possibilities."[34] Second, the court found that the plaintiffs' work was not directly related to the management or general business operations. On this prong, the defendant asserted that plaintiffs performed quality control work, but the only specific duty the defendants identified was that plaintiffs "examine[d] the clarity of the well fluid before filming to assess whether the camera could record usable images once inside the well."[35] The court found this insufficient because "field engineers 'rudimentary fluid-quality assessments are functional, not conceptual, work, and the quality concerns it addresses relate more closely to the production of images than to business administration." Instead, the plaintiffs' work was more similar to non-management production-line employees.[36]

In *Newsome v. QES Pressure Control, LLC*,[37] the plaintiff, a coil tubing supervisor, sued his employer, an oil and gas services company, alleging he was misclassified as exempt under the FLSA and sought to recover unpaid overtime compensation and liquidated damages. Defendant moved for summary judgment, arguing that plaintiff was exempt as a highly compensated employee, which requires a showing that: (1) the employee earns total annual compensation of $100,000 or more; (2) the employee's primary duty includes performing office or non-manual work; and (3) the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee. When evaluating whether the plaintiff's primary duty included non-manual or office work, the district court noted that the Fifth Circuit has held that an employee's primary duty will usually be what he does that is of principal value to the employer. The defendant acknowledged that the plaintiff did perform manual work but argued that his most important work was non-manual work supervising a crew of operators. The plaintiff provided evidence that at least half of his time each day was spent performing manual work and that some days this was as high as 80%. Given this, the district court found a

[32] *Id.* at 248.

[33] *Id.* at 249.

[34] *Id.* at 253.

[35] *Id.* at 254.

[36] *Id.* at 255.

[37] 2021 WL 8443685 (W.D. Tex. Aug. 23, 2021).

dispute of material fact regarding whether plaintiff's primary duty was performing office or non-manual work and denied summary judgment on this exemption. For similar reasons, the district court found there was a material issue of fact as to whether plaintiff could establish he customarily and regularly performed at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

X. The Outside Sales Exemption

In *Medrano v. Flowers Foods, Inc.*,[38] individual distributors of baked goods brought claims for failure to pay overtime. The employer moved for summary judgment, arguing that the distributors were exempt because they conducted outside sales. The district court addressed the sole question of whether judgment was proper under the outside sales exemption. The district court denied summary judgment. The court held that a jury could find that the distributors were not involved in the actual sale of baked goods because the sales were determined by agreements between the employer and retailers. The distributors took the orders, picked up the orders, transported the orders, kept the shelves neat, and removed stale product. Due to the process of "pay by scan," the distributors were not paid until the baked goods were actually purchased. The court recited the standard that making a "sale" involved obtaining a commitment but that the distributors were not involved in that process. The distributors were paid for products sold by the store, but not for products to the store. The court analyzed the primary duty element and held that a jury could find that the distributors spent most of their time in non-sales activities such as driving, unloading, stocking, and arranging shelves. The court also held that a jury could find most of the distributors' duties to be promotional work and that the employer failed to provide evidence that making sales was the primary duty.

A. Making Sales

In *Modeski v. Summit Retail Sols., Inc.*,[39] the defendant hired "Brand Reps" to be stationed at displays with its products in another merchant's retail store to bring attention to the employer's products in hopes that a customer would take a product to the register to be rung for sale by an employee of the retail store. The "Brand Reps" performed in-store demonstrations and engaged with customers, set up displays, handed out samples, and gave sales pitches and promotional materials to customers that defendant provided. The district court granted summary judgment for the employer, finding the Brand Reps were exempt outside salespeople. On appeal, the First Circuit affirmed. Citing the Supreme Court decision in *Christopher v. SmithKline Beecham Corp.*,[40] the court explained that Brand Reps did not have to obtain a "firm commitment" to buy to be considered "making sales" within the meaning of the FLSA, because although the Brand Reps did not consummate or ring up the sale at the register, the efforts to persuade customers was sufficient to constitute selling.

[38] 2021 WL 3544745 (D.N.M. Aug. 11, 2021).

[39] 27 F.4th 53 (1st Cir. 2022).

[40] 567 U.S. 142 (2012).

CHAPTER 6

OTHER STATUTORY EXEMPTIONS

III. Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA

F. Casual-Basis Babysitters and Domestic Companionship Service Providers

2. Companionship Services

In *Romero v. Diaz-Fox*,[1] a domestic employee who provided care to the defendant's mother sued to recover unpaid overtime and minimum wages under the FLSA. The defendant claimed that the plaintiff was exempt under either the (1) live-in domestic employee exemption or (2) the companionship service exemption. The defendant moved for summary judgment, arguing that they were not the plaintiff's employer and that the plaintiff was exempt from overtime. The district court denied summary judgment in its entirety. In particular, the court found that neither the live-in nor the companionship exemption applied and the defendant was therefore not entitled to summary judgment. First, the court held that the plaintiff was not exempt under the live-in domestic service exemption because for the exemption to apply, the plaintiff must reside on the employer's premises either permanently or for extended periods of time. The plaintiff, however, slept at the defendant's home only two nights a week, which did not qualify as an extended period of time.[2] Second, the court found that the companionship exemption did not apply because the undisputed facts established that the plaintiff, out of his 125.5 hours of work per week, spent over 25.1 providing care services (i.e. assistance with activities of daily living) for the defendant's mother. The companionship exemption does not apply if an employee exceeds twenty percent of their workweek performing care duties, as opposed to fellowship and protection duties.[3]

IV. Section 213(b) Exemptions From the Overtime Requirements of the FLSA

A. Employees Covered Under the Motor Carrier Act

In *Caudle v. Hard Drive Express, Inc.*,[4] a truck driver employee alleged that the defendant had terminated him in retaliation for his threat to report its unpaid wages in violation of the FLSA and Michigan's Whistleblowers' Protection Act ("WPA"). The defendant moved for summary judgment, arguing that the plaintiff's actions were not protected under the FLSA. The district court concluded that although the Motor Carrier Act precluded the plaintiff's overtime claim, the employee was not exempt from any other FLSA provisions and, as such, was covered by the FLSA anti-retaliation provision. The district court ultimately held, however, that the plaintiff could not demonstrate a *prima facie* case of retaliation under the FLSA or state law and granted summary judgment in favor of the employer.

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[1] 2021 WL 3619677 (S.D. Fla. Aug. 16, 2021).

[2] *Id.* at 4.

[3] *Id.* at 5.

[4] 2022 WL 570436 (E.D. Mich. Feb. 24, 2022).

1. Overview of Motor Carrier Act
b. SAFETEA-LU Technical Corrections Act

In *Martinez v. Env't Oil Recovery, Inc.*,[5] the plaintiff, who worked as a driver, alleged that the defendant failed to pay him overtime. He asserted that the defendants paid him a daily rate regardless of hours worked. The defendant moved for summary judgment, arguing that the plaintiff was exempt from overtime pursuant to the Motor Carrier Act (MCA) exemption because the plaintiff primarily worked as a tanker truck driver who regularly drove vehicles with a GVWR in excess of 10,001 pounds. The district court granted the motion. The court rejected the plaintiff's contention that the MCA was inapplicable because the plaintiff regularly drove lightweight vehicles, thereby establishing that he was a covered employee under the Technical Corrections Act (TCA). The TCA 'narrowed the employees who are covered by the FLSA, and"excepted from the MCA exemption, to those 'whose work, in whole or in part,' affects 'the safety and operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce.'"[6] The plaintiff was unable to establish that he was a covered employee under the TCA because he failed to show that "he worked on a TCA-eligible vehicle and that he did so on a more than *de minimis* basis."[7] The plaintiff failed to meet this burden because (1) he failed to submitted "competent summary judgment evidence of the TCA eligible vehicles he allegedly drove;" (2) his declaration was "devoid of any specificity as to the date or dates that he allegedly performed work with a vehicle with a GVWR less than 10,000 pounds;" and (3) he did "not provide[] competent summary judgment evidence that he transported goods (recyclable oil or oil products) in interstate commerce in [the TCA vehicles]."[8]

2. Application of the Exemption (for Vehicles in Excess of 10,000 Pounds)
a. Carriers Subject to the Power of the Secretary of Transportation

In *Fiveash v. S.E. Pers. Leasing, Inc.,*[9] the plaintiff brought a collective action suit on behalf of herself and all current and former extradition officers employed by U.S. Corrections, LLC, ("USC") and South East Personnel Leasing, Inc. ("SEPL") for failure to pay overtime and willful violations of the Fair Labor Standards Act ("FLSA"). SEPL moved for summary judgment, arguing that, because UPC's prisoner transportation drivers are not subject to the Secretary of Transportation's authority, the work performed by the plaintiff and others was not covered by the FLSA under the Motor Carrier Act exemption. The plaintiff argued SEPL failed to meet its burden to show that the MCA exemption applied because it did not demonstrate that the plaintiff operated a passenger van weighing less than 10,001 pounds. In a report and recommendation, the magistrate judge disagreed, explaining that the requirements of 49 U.S.C.A. § 31132 are disjunctive and the defendants only needed to demonstrate that the vehicle plaintiff

[5] 2021 WL 7084165 (E.D. Tex. Dec. 14, 2021).

[6] *Id*. at *7.

[7] *Id*.

[8] *Id*. at *9.

[9] 2022 WL 110570 (W.D. Tx. Apr. 13, 2022).

drove met *one* of its definitions of "commercial vehicle." The court found that SEPL met its burden by showing that the plaintiff operated a vehicle designed to transport more than eight passengers, which met one of the definitions of commercial vehicle under 49 U.S.C.A. § 31132, and by providing the plaintiff's work logs, which demonstrated that she used a such a vehicle every workweek of her employment in accordance with 29 C.F.R. § 782.2(a).

b. Employees Engaged in Activities That Directly Affect Safety
(i.) Drivers

In *Green v. Lazer Spot, Inc.*,[10] the plaintiff sued his employer, a company that provided transportation and yard management services to manufacturing, warehousing, and distribution facilities, for failure to pay overtime. The plaintiff asserted he worked as a "yard jockey." The defendant argued the plaintiff was a truck driver and moved for summary judgment, arguing that he was exempt under the MCA. The parties did not dispute that the plaintiff's "day-to-day activity is operating a jockey truck" that he used to "jockey" trailers (some of which are loaded with client property) in and out of loading bays at client facilities; and that he occasionally move[d] trailers over public roads when he works at certain facilities."[11] The parties disputed, however, "where [the plaintiff] transports trailers over public roads, how frequently he transports trailers over public roads, and whether [his] trailers are exclusively unloaded or are occasionally loaded with client property."[12] In granting summary judgment for the defendant, the district court found that the plaintiff fell within the class of motor carrier employees that the DOT regulates.[13] The court explained that an employee's job title was irrelevant. To be classified as a driver subject to DOT regulations, according to the court, the pertinent question was whether a '"substantial part' of the employee's activities meet the DOT's definition of driver," i.e., '"an individual who drives a motor vehicle in transportation which is, within the meaning of the [MCA], in interstate or foreign commerce.'"[14] The district court held there was no genuine dispute of fact that the plaintiff was a driver under the MCA. Although the plaintiff only drove intrastate and only occasionally over public roads, it was undisputed that the goods he transported were bound for out-of-state delivery. The court found that regardless of how often the plaintiff carried intrastate-bound goods on public roads, his job duties nonetheless met the MCA's definition of driver because, "by moving loaded trailers, [plaintiff] acts as an intermediate, intrastate step in the goods' ultimate interstate journey, and thereby participates in interstate commerce."[15]

In *Bethel v. Lazer Spot, Inc.*, the district court denied the defendant's motion for summary judgment, holding that there remained a question of fact as to whether the plaintiff was a "driver" as defined by the MCA and thus exempt from the overtime pay

[10] 2021 WL 6063590 (M.D. Pa. Dec. 22, 2021).

[11] *Id.* at *2.

[12] *Id.*

[13] *Id*. at 4.

[14] *Id.* (citing 29 C.F.R. § 782.3(a)).

[15] *Id.* at *5.

requirement.[16] The plaintiff was employed as a yard driver and moved trailers from one area of the truck yard to another without driving on public roads. The defendant asserted that the plaintiff fell within the MCA exemption because all drivers were required to cross-train every 60 to 90 days on public roadways. The plaintiff denied he ever trained on public roadways, and two other yard drivers submitted declarations stating that they, too, never cross-trained. Consequently, the court held that there remained a question of fact as to whether the plaintiff was considered a "driver" under the MCA.

In *White v. U.S. Corrs., LLC*,[17] the plaintiff employee brought a suit against her former employer on behalf of herself and similarly situated individuals, alleging failure to pay overtime. The defendants operated as a leasing services provider and a commercial carrier provider, with the plaintiff hired by the leasing services provider to drive prisoners in transport vans. The defendant moved for summary judgment arguing that the plaintiff was exempt under the Motor Carrier Act. In opposing the motion, the plaintiff argued that the defendants could not satisfy the second prong of the MCA exemption—that she operated a "commercial vehicle"—because she did not operate a vehicle weighing at least 10,001 pounds each workweek. The court rejected this argument, explaining that she operated a vehicle that met another definition of commercial vehicle under the MCA - specifically, that she operated a vehicle capable of transporting more than eight passengers each workweek.[18]

(iii.) Loaders

In *Crum v. Forward Air Sol*. Inc.,[19] the plaintiff brought claims for overtime pay against his employer, a DOT-registered company that received, packed, and delivered goods for third parties. The plaintiff worked at one of the defendant's terminals, primarily loading goods onto trucks that then traveled interstate to deliver goods to retail locations. The court found that the defendant's motion for summary judgment "proceeds from a faulty premise" because it relied on a DOL regulation to define the safety-related duties of a loader rather than explaining how the plaintiff's activities fell "within the DOT's definition of the work of a 'Loader.'"[20] Indeed, the Supreme Court has made clear, in a case that explicitly addressed the definition of an exempt loader, that the DOL "has no authority to define what employees are subject to the Secretary of Transportation's Jurisdiction and therefore fall within the MCA Exemption, a ruling acknowledged in the DOL's regulations."[21]

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[16] 2022 WL 1683738 (N.D. Ga. Mar. 28, 2022).

[17] 2022 WL 1491349 (W.D. Tex. May 11, 2022)*, report and recommendation adopted*, 2022 WL 2902837 (W.D. Tex. May 26, 2022).

[18] *Id.* at *4 (quoting Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 707-08 (1947)).

[19] 2022 WL 1032781 (N.D. Ala. Apr. 6, 2022).

[20] *Id.* at *3.

[21] *Id*. at *5. (quoting Levinson v. Spector Motor Service, 330 U.S. 649, 673-74 (1947)).

c. Transportation in Interstate Commerce

(i.) Definition of "Interstate Commerce" Under the Motor Carrier Act

In *Smith v. ADEBCO, Inc.,*[22] the court denied the defendant's motion for judgment on the pleadings, finding that truck driver's claim for overtime wages was not subject to the MCA exemption. Specifically, the court found the plaintiff sufficiently pled he was not exempt under the MCA because he alleged he never operated in interstate commerce, the materials he transported did not move across state lines, and that he did not reasonably expect to be called upon for interstate driving. The court rejected defendant's argument that plaintiff was subject to the MCA exemption simply because the employer operated in interstate commerce, concluding that a particular employee's work must touch interstate commerce for the employee to qualify for the MCA exemption.

3. Small Vehicle Exception (for Vehicles of 10,000 Pounds or Less)

a. Determining Vehicle Weight

In *Benavidez v. Oil Patch Grp., Inc.*,[23] the plaintiff alleged that he was not paid overtime wages as required by the FLSA while driving an F-250 without a trailer. It was undisputed that driving an F-250 without a trailer is operating a vehicle with a GVWR of 10,000 pounds or less and therefore falls outside the MCA exemption. It was also undisputed that the plaintiff drove commercial motor vehicles with a GVWR exceeding 10,000 pounds in interstate commerce. Therefore, to succeed on his overtime claim, the plaintiff carried the burden of proving he operated the F-250 on more than a de minimis basis each of the challenged workweeks. The court held that the plaintiff's "non-specific ambiguous" declarations—"which present no dates, lengths of trips, specific purposes or destinations, specific customers nor any other specific details about any of the alleged trips"—insufficient to meet his burden. The court thus granted the defendant's motion for summary judgment.

D. Employees Employed as Seamen

1. "Seaman"

In *Adams v. All Coast, L.L.C.,*[24] the plaintiff filed a collective action on behalf of himself and all others employed on the defendant's fleet of liftboats, claiming that they were misclassified as seamen exempt from the FLSA's overtime requirements. The plaintiffs alleged that they spent most of their time performing completely terrestrial activities. The district court granted summary judgment for the defendant, finding the employees' work served the liftboats' operation "as a means of transportation"[25] and that they were exempt as employees "employed as a seaman."[26] The Fifth Circuit

[22] 566 F. Supp. 3d 826 (M.D. Tenn. 2021).

[23] 2022 WL 2903119 (W.D. Tex. Apr. 14, 2022).

[24] 15 F.4th 365 (5th Cir. 2021).

[25] *See* 29 C.F.R. § 783.81.

[26] *See* 29 U.S.C. § 213(b)(6).

reversed and remanded. The appellate court explained that the plaintiffs and other employees spent much of their time operating cranes or engaging in other non-maritime work, including "loading or unloading of freight at the beginning or end of a voyage."[27] Because the district court did not properly interpret the applicable exemption and corresponding regulations for seaman work, including for those employees who worked as cooks, the Fifth Circuit remanded to the district court.

H. Taxicab Drivers

In *John v. All Star Limousine Serv., Ltd.*,[28] the defendant moved for summary judgment of claims filed by the plaintiff, who worked as a chauffeur for the defendant's' car service and claimed that defendant failed to pay him for all hours worked, failed to pay him the required rate for overtime work, made improper deductions from his pay, and failed to provide him with the required notices. The district court granted the defendant's motion, finding that the plaintiff's claim was barred by the FLSA's taxicab exemption because the plaintiff: (1) operated a chauffeured passenger vehicle; (2) was available for hire by individual members of the general public; and (3) had no fixed schedule, fixed route, or fixed termini. In doing so, the court pointed out that as to the second prong, the defendant's chauffeurs drive members of the public from a pick-up location of the customer's choice to the customer's required destination of choice. The plaintiff was not told to take a fixed or specific route or job, and thus the defendant operated chauffeured passenger vehicles that "take passengers wherever they want to go." The court also rejected the plaintiff's argument that the exemption did not apply because some of the company's business involved recurring or corporate contracts.

V. Section 207 Exceptions From the Overtime Requirements of the FLSA

B. Section 207(i) Exception: Commissioned Employees in Retail Service Establishments

2. "More Than Half of an Employee's Compensation for a Representative Period Must Represent Commissions"

In *Johnson v. Mattress Warehouse, Inc.*,[29] a mattress salesman sued her employer under the FLSA and Pennsylvania state law for failure to pay her and other similarly situated employees overtime wages. The defendant moved for summary judgment, arguing that the plaintiff was exempt from overtime under both the FLSA's and the state law's exemptions for commissioned retail sales employees. The district court, in granting the defendant's motion, found that the defendant appropriately used a one-year representative period to determine whether more than half of the plaintiff's compensation was for commissions earned on the retail sale of mattresses and related accessories. The district court found that the defendant presented a compelling argument that a one-year representative period accounted for seasonal or temporary changes in compensation from fluctuating sales over time. The district court further held that the compensation plan was bona fide and made in good faith because it was made

[27] *See* 29 C.F.R. § 783.32.

[28] 2022 WL 36219 (E.D.N.Y. Jan. 4, 2022).

[29] 2021 WL 4206722 (E.D. Pa. Sept. 16, 2021).

without fraud or deceit. The amount of the plaintiff's commissions were not tied to her hours worked, and she had an incentive to sell items eligible for higher commissions to increase her compensation. The fact that the plaintiff was guaranteed a certain hourly rate did not mean her commission payments were not bona fide. Accordingly, the district court held that the retail commission exemption from overtime wages applied.

Chapter 7

AGRICULTURAL EXEMPTIONS

II. General Scope of the Term "Agriculture"

C. "Secondary" Meaning of the Term "Agriculture"

2. Practices Performed "on a Farm"

In *Bills v. Cactus Fam. Farms, LLC*.,[1] the Eighth Circuit affirmed the district court's grant of summary judgment, agreeing that the plaintiff was an "employee employed in agriculture" and therefore exempt from the overtime pay requirements of the FLSA. The plaintiff worked as an Animal Care Auditor for a pork production company and monitored the loading of livestock into transportation vehicles at the farms of independent contractors to ensure biosecurity and safety protocols were followed. The court reasoned that "secondary" agriculture includes "any practices performed…on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."[2] Thus, the court held that the plaintiff was, as a matter of law, employed in secondary agriculture and thus exempt.

4. "Such Farming Operations" on the Farm

In *Luna Vanegas v. Signet Builders, Inc*.,[3] the plaintiff was a former employee of a construction company that was contracted to build livestock confinement structures on farms. He filed a complaint alleging the construction company violated the FLSA's overtime-pay rules. The district court granted the construction company's motion to dismiss, holding that the former employee fell within the agricultural exemption. Specifically, the plaintiff fell into the secondary definition of agriculture, which encompasses workers engaged in "any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." The court found that the plaintiff performed his work on farms, and the work he performed—constructing livestock containment structures—was incidental to farming, not related to a separately organized activity from farming operations. Therefore, his work fell within the FLSA's exemption for secondary agriculture.

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[1] 5 F.4th 844 (8th Cir. 2021).

[2] Holly Farms Corp. v. N.L.R.B., 517 U.S. 392, 398(1996).

[3] 554 F. Supp. 3d 987 (W.D. Wis. 2021), *rev'd and remanded*, 46 F.4th 636 (7th Cir. 2022).

Chapter 8

COMPENSABLE HOURS

II. Historical Context of the Term "Hours Worked"

C. U.S. Supreme Court Interpretation of the Portal-to-Portal Act: *Steiner, King, Packing, Alvarez, Sandifer,* and *Busk*

In *Peterson v. Nelnet Diversified Sols., LLC*,[1] call-center loan servicing employees used their computers to access loan information and payment history that was needed to perform their job duties. These employees were paid starting when they logged into the timekeeping system on their computer. For this to happen, they had to arrive at the office, wake up their computer, insert their badge, wait for a program to launch, and then click a link to the payroll system. In evaluating whether this time should have been considered compensable time, the Tenth Circuit Court of Appeals analyzed the job duties and found that the employees could not "dispense" with booting up their computers and launching software to be able to perform their jobs. Reversing the district court's grant of summary judgment on a different ground, the appellate court agreed with the district court's finding that booting up the computers and launching the software "was integral and indispensable to the work" under *Integrity Staffing Sols., Inc. v. Busk*.[2]

III. Principles for Determining "Hours Worked"

A. Definition of "Employ"

1. Knowledge of the Employer

In *Beans v. AT&T Servs.,*[3] Inc., the magistrate judge recommended grant of the defendants 'motion for summary judgment in claims for unpaid overtime by unionized call center employees. The plaintiffs 'claims were limited to uncompensated post-shift call time when employees did not self-report this additional time under the policies of a collective bargaining agreement. The plaintiffs contended that the defendants had actual and constructive knowledge of the additional work time because of use of computer tracking monitored by management. The defendant argued that existence of computerized tracking was not sufficient to impute actual or constructive knowledge. The court analyzed the case as a battle between competing principles in the Fifth Circuit case of *Newton v. City of Henderson*[4]*:* the "no report, no recovery" principle and the "if you see, it you must pay it" principle articulated in *Mosley-Lovings v. AT&T Corp.*[5] In recommending summary judgment for the defendants, the court found that the plaintiffs' reliance on computerized time tracking platforms alone, without more direct evidence that the defendants were actually or constructively aware of the time worked, was insufficient to create a genuine issue of fact and avoid summary judgment. The court

[1] 15 F.4th 1033 (10th Cir. 2021).

[2] 574 U.S. 27, 31 (2014).

[3] 2022 WL 1590475 (N.D. Tex. Apr. 8, 2022).

[4] 47 F.3d 745 (5th Cir. 1995).

[5] 2020 WL 6865785 (N.D. Tex. July 31, 2020).

rejected as irrelevant evidence from a related case where genuine issues of fact precluded summary judgment, in which the plaintiffs presented management deposition testimony from other call centers stating they were generally aware that employees worked overtime and that employees' reported time may not be accurate but that they had failed to audit computer records.

In *Banks v. Claiborne County School District*,[6] the plaintiff was an administrative assistant at a high school within the defendant-district. The plaintiff alleged she was undercompensated because she was required to work "off-the-clock," and when she attempted to submit accurate time records, a payroll clerk instructed her to alter her timesheets. The defendant argued that the court should grant summary judgment on the plaintiff's "off-the-clock" claims because it claimed the plaintiff concealed her overtime hours worked. The court applied prior case law involving off-the-clock claims, including cases stating that to establish an employer knew or should have known that an employee was working unrecorded overtime, it is not enough for an employee to show her workload was such that she had to work overtime to complete assigned tasks. Furthermore, an employee's subjective belief that an employer wants her to work overtime to finish work timely is insufficient to impute constructive knowledge. However, because the plaintiff alleged that she was directed to alter her timesheets (although her deposition testimony was inconsistent, claiming that it was more of an "insinuation" that a supervisor would be "upset" about overtime hours worked), her claim survived summary judgment.

C. The Continuous Workday Rule and the Concept of Principal Activities

1. In General

In *Mayhew v. Angmar Med. Holdings, Inc.*,[7] the plaintiff sued the defendant for violations of the FLSA, alleging the defendant failed to compensate the plaintiff and others for all time spent during the continuous workday. The plaintiff worked as a home health care nurse. The plaintiff alleged that the defendant failed to compensate for time spent driving and for waiting between home health care appointments. The defendant filed a motion for summary judgment and a motion to decertify the conditionally certified collective action. The court referenced the continuous workday rule as being "once the work day starts, all activity is ordinarily compensable until the work day ends."[8] The court found that the plaintiff's individual claims did not violate the continuous workday rule because her lengthy commute was not compensable, she was not required to work during her commute, and she performed work for only a limited amount of time during her commute time. The court rejected the plaintiff's group claims regarding the travel time to and from patient visits because the record contained evidence that plaintiffs were compensated for the travel time. The court then moved to the waiting time claims. The court found that there are exceptions to the continuous workday rule. The court found that when an employee is completely relieved of duty and able to use the time for their own purposes, then the time is not compensable and not subject to the continuous

[6] 2021 WL 7080980 (S.D. Miss. Dec. 29, 2021).

[7] Mayhew v. Angmar Med. Holdings, Inc., 2022 WL 343670 (D. Kan. Feb. 4, 2022).

[8] *Id.* at *2 (citing Aguilar v. Mgmt. & Training Corp., 948 F.3d 1270, 1279 (10th Cir. 2020)).

workday rule. The court found that the plaintiff did not identify any restrictions on the employee's movement during the waiting time and that the record contained evidence that the waiting time could be used for the employee's own activities. Based on the evidence, the court found the waiting time to be noncompensable and granted the defendant's motion for summary judgment.

In *Walsh v. East Penn Manufacturing Company, Inc.*,[9] the Secretary of Labor filed suit against a lead acid battery manufacturer for failure to compensate its employees for the time spent changing into and out of uniforms and personal protective equipment and showering at the end of their shifts in violation of the FLSA. The manufacturer did not dispute that such activities were compensable as "donning and doffing activities" under the FLSA, but it argued via summary judgment motion that the difference in what the manufacturer actually paid its employers and what they allegedly should have been paid was merely *de minimis*. The court ultimately held, *inter alia*, that the "continuous workday rule" required the manufacturer to compensate its employees for all time spent during the continuous workday and that the manufacturer committed a *per se* violation of the FLSA's recordkeeping provision by failing to record actual time spent on donning and doffing activities.

IV. Application of Principles

A. Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities

2. Donning and Doffing Clothing and Protective Equipment

a. In General

In *Tyger v. Precision Drilling Corp.,*[10] employees who worked on oil and gas drilling rigs brought a collective action against the defendant-employer seeking compensation for time spent donning and doffing personal protective equipment (PPE). After the Third Circuit vacated the first summary judgment decision, the district court again found in favor of the defendant. The district court adopted the Second Circuit's standard in its analysis, holding that to show that donning and doffing their PPE is integral and indispensable to drilling oil and gas wells, the employees must therefore prove that their basic PPE "guards against 'workplace dangers' that accompany [their] principal activities and 'transcend ordinary risks.'" The court concluded that the hazards employees described were ordinary, hypothetical, or isolated, thus dooming their claims.

3. Preparing Equipment and Vehicles

In *Peterson v. Nelnet Diversified Sols., LLC*,[11] call-center loan servicing employees used their computers to access loan information and payment history, which was needed to perform their job duties. The employer paid these employees starting when they logged into the timekeeping system on their computer. For this to happen,

[9] 555 F. Supp. 3d 89 (E.D. Pa. 2021).

[10] 594 F. Supp. 3d 626 (M.D. Pa. 2022).

[11] 15 F.4th 1033 (10th Cir. 2021).

they had to arrive at the office, wake up their computer, insert their badge, wait for a program to launch, and then click a link to the payroll system. In evaluating whether this time should have been considered compensable time, the Tenth Circuit Court of Appeals analyzed the job duties and found that the employees could not "dispense" with booting up their computers and launching software to be able to perform their jobs. Reversing the district court's grant of summary judgment on a different ground, the appellate court agreed with the district court's finding that booting up the computers and launching the software "was integral and indispensable to the work" under *Integrity Staffing Sols., Inc. v. Busk*.[12] The appellate court rejected the employer's argument that turning on the computer was the modern equivalent of waiting in line to punch a timeclock, noting that time clocks are not an integral tool for employees, while the computer was for these employees.

4. Shift Change Activities

In *Forrester v. American Security and Protection Service, LLC*,[13] the plaintiff was required to report to work 10 to 15 minutes before her scheduled shifts and argued that she should be paid for that time. The purpose of this time, called "pass down," was to create an overlap between shifts. Work-related activities that are "preliminary" or "postliminary" to the "principal activity or activities" the employee is "employed to perform" are not compensable under the FLSA. An activity is not a principal activity if the employer could eliminate the activity without impairing the employee's ability to complete their work. The Sixth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint because her allegation of pass down time as involving "shift-change duties" was not enough to show that pass down time is compensable under the FLSA.

5. Other Preparatory/Concluding Activities

In *Meadows v. NCR Corp.*,[14] the plaintiff, a customer engineer, sued for overtime violations for failure to pay off-the-clock time. The plaintiff won at a jury trial, and the defendant employer moved for a new trial. The plaintiff sought recovery for time that was not recorded but was, by his testimony, related to his primary activities. The defendant argued that there was no reasonable basis for the jury finding and that written policies prevented the time from being compensable. The evidence showed that the employer frequently compensated for non-compensable time, and the jury determined that the employer had a custom or practice of compensating employees for off-the-clock activities that lasted two to three minutes. This led the court to affirm that it was reasonable for the jury to find actual or constructive notice of off-the-clock time.

[12] 574 U.S. 27, 31 (2014).

[13] 2022 WL 1514905 (6th Cir. May 13, 2022).

[14] 2021 WL 5299778 (N.D. Ill. Nov. 15, 2021).

C. Waiting Time

1. On-Duty Waiting Time

In *Watkins v. United Needs & Abilities, Inc.*,[15] the plaintiff sued his employer, alleging failure to pay waiting time under both the FLSA and relevant state law. The plaintiff worked as a residential aide at defendant's care facility for individuals with developmental disabilities, and his role required him to be on-site Monday through Friday and actively working from 4:00 p.m. to 11:00 p.m. and again from 6:00 a.m. to 8:30 a.m. When he was not actively working, the plaintiff was required to remain at the facility but could attend to his own personal activities and desires. The district court differentiated between an employee who is engaged to wait, resulting in compensated time, and an employee who is waiting to be engaged, resulting in uncompensated time. The court considered a variety of factors to differentiate between the two, including whether the time is spent primarily for the employee's benefit, whether the employee can engage in personal activities, and how frequently the waiting time is interrupted. The court additionally considered whether a prior informal agreement showed that the time spent waiting was understood to be uncompensated. The court granted the defendant's motion for summary judgment and held that such time was not compensable due to the informal agreement stating as such, and for the reason that the time the plaintiff was required to work was only seldom interrupted, and when it was interrupted, it was paid.

3. On-Call Time

In *Gonzales v. Charter Communications*,[16] maintenance technicians brought wage and hour claims under the FLSA and the California Labor Code for the defendant's "On-Call Policy," which required employees to be on-call for a 24-hour period every four or five weeks. During the on-call time, employees had restrictions on accessibility via cell, uniform requirements, physical/mental condition requirements, response time, and reporting time. The defendant filed for summary judgment. In evaluating the motion, the district court noted: "In the Ninth Circuit, there are two predominant factors for determining whether the employee's waiting time while on call (excluding actual time spent working) is compensable: '(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.'"[17] The court found that the balance of these factors "falls decisively in Defendant's favor" and granted its motion for summary judgment as to plaintiff's on-call claims.

In *Creese v. Bald Eagle Towing & Recovery,*[18] the district court granted summary judgment for the employer on claims brought by its employee, a large truck tow operator, that on-call hours outside of his regularly scheduled work hours should be

[15] 2021 WL 2915265 (D. Me. July 12, 2021).

[16] 2022 WL 1595725 (C.D. Cal. Jan. 26, 2022).

[17] *Id*. at *4 (quoting Owens v. Loc. No. 169, Ass'n of Pulp & Paper Workers, 971 F.2d 347, 350 (9th Cir. 1992)).

[18] WL 2788382 (M.D. Fla. July 5, 2021).

counted toward overtime. Relying upon the distinction between being "engaged to wait" and "waiting to be engaged" set forth in *Skidmore v. Swift & Co.*,[19] as well as testimony indicating the degree to which the employee was able to use on-call time for personal endeavors, the district court determined that the tow truck driver had no right to pay for hours spent waiting between calls outside his regularly scheduled work time.

D. Rest Breaks and Meal Periods
2. Meal Periods

In *Nevett v. Renown Health*,[20] registered nurses alleged that their former employer failed to pay them overtime wages as required by the FLSA and Nevada state law because it did not provide a bona fide meal break. The plaintiffs alleged that the defendant would deduct 30 minutes for a meal break without verifying whether an employee had taken a meal break and that, during meal breaks, they were required to carry a defendant-owned telephone or radio and respond to any calls and were not permitted to leave defendant's premises. They further claimed that the defendant's electronic medical records system, which recorded the specific time that the plaintiffs entered data into the system, would show that they entered data into the system during meal breaks and when they were not clocked into the defendant's timekeeping system, i.e., when they were off-the-clock. The defendant moved to dismiss. The court first noted that instead of pointing to specific shifts, the plaintiffs only generally alleged that none of their meal breaks were bona fide. They also failed to allege any specific instances in which defendant called them during a meal break, requiring that they interrupt their meal break and return to work. The court stated that the plaintiffs did not allege facts raising a plausible inference that, during any given week, they performed uncompensated work during a meal break. Finally, the court explained that the defendant did not have the obligation to confirm that employees did not work during their meal breaks. The district court granted the defendant's motion to dismiss.

b. Decisions Finding That Meal Periods Are Not Compensable

In *Dean v. Akal Securities, Inc.,*[21] the plaintiffs were previously employed by the defendant security company as Aviation Security Officers ("ASOs"). The plaintiffs brought a collective action, made up of other former ASOs, asserting that the defendant's meal period policy violated the FLSA. The district court granted summary judgment in favor of the employer. The defendants appealed. In this appeal, the Fifth Circuit considered whether a meal period policy that automatically deducted an hour of pay violated the FLSA. To answer this question, the court applied the predominant benefit test. When applying this test the court "consider[s] whether the employee or the employer received the predominant benefit for the meal break."[22] "The relevant factors for this consideration include: [1] whether the employees are subject to real limitations on their personal freedom which insure to the benefit of the employer; [2] whether

[19] 323 U.S. 134, 136 (1944).

[20] 2022 WL 1288754 (D. Nev. Apr. 18, 2022).

[21] 3 F.4th 137 (5th Cir. 2021).

[22] *Id.* at 144 (citing Naylor v. Securiguard, Inc., 801 F.3d 501, 506 (5th Cir. 2015)).

restrictions are placed on the employee's activities during those times, such as whether or not the employee may leave the work site if he chooses; [3] whether the employee remains responsible for substantial work-related duties; and [4] how frequently the time is actually interrupted by work-related duties."[23] The court added that the goal of the analysis is to "determine 'whether the employee can use the time effectively for his or her own purposes.'"[24] After applying the predominant benefit test, the court concluded that the meal periods were not required to be compensated under the FLSA. First, the court explained that the restrictions were inherent to working on a plane. The court noted that the challenged meal period policy was specific to the return flights. On the return flights, during the meal period, the ASOs were not responsible for substantial work-related duties. The time was not actually interrupted by work-related duties. Lastly, the court explained that the employer received no benefit arising from "inevitable restrictions on mobility or the prohibitions on the use of technological devices when confined to a plane."[25] The Fifth Circuit agreed with the district court that the plaintiffs "fail[ed] to identify any work-related duties they claim interfered with the *bona fide* meal periods," and as such, the ASOs were free to use the time effectively for their own purposes. In conclusion, the ASOs, not the employer, benefited from the one-hour-meal periods, which were therefore not compensable.

E. Sleeping Time and Certain Other Activities

In *Watkins v. United Needs & Abilities, Inc.*,[26] the plaintiff brought claims against his employer for failure to pay sleeping time under both the FLSA and relevant state law. The plaintiff's role as a residential aide at defendant's care facility for individuals with developmental disabilities required him to be on site Monday through Friday, even while not actively working. The district court granted the defendant's motion for summary judgment and held that while sleep time is not compensable as a default, employers and employees may agree that such time is compensable. While the parties here had no written agreement on whether sleep time was compensable, the court held that such agreements need not be in writing and may be implied. Because the plaintiff was clearly notified he would not be paid for the time spent sleeping, and he spent two years under this pay method without complaint, the court held there was a reasonable agreement that time spent overnight while not actively working was not compensable.

G. Time Spent on Other Activities
2. Health-Related Activities

In *Pipich v. O'Reilly Auto Enters., LLC*,[27] distribution center employees brought overtime claims for time spent on pre-shift COVID-19 health screenings. In granting the employer's motion to dismiss, the district court concluded that the pre-shift health screenings were not "integral and indispensable" to the distribution employees' duties of

[23] *Id.* (quoting Bernard v. IBP, Inc. of Neb., 154 F.3d 259, 264 n.16 (5th Cir. 1998)).

[24] *Dean*, 3 F.4th at 144 (quoting *Bernard*, 154 F.3d at 266).

[25] *Id.* at 145-46.

[26] 2021 WL 2915265 (D. Me. July 12, 2021).

[27] 2022 WL 788671 (S.D. Cal. Mar. 15, 2022).

loading and transporting products from the employer's distribution centers to the employer's stores.[28] The employer could have eliminated the pre-shift health screenings without affecting the ability of the distribution center employees to perform those duties. Accordingly, the court held that the time spent on the pre-shift health screenings was not compensable.

V. Recording Work Time

A. Rounding Practices

In *Houston v. Saint Luke's Health Sys. Inc.,*[29] a nurse filed suit against a hospital claiming the hospital's policy of rounding clock-in or clock-out times to the nearest tenth of the hour for purposes of payroll violated the FLSA. The court certified an FLSA collective action that resulted in 1,430 opt-in plaintiffs and a Rule 23 class action that included 13,683 class members. The parties hired experts to analyze the large volume of time data. The plaintiff conceded that defendant's rounding policy was facially neutral but argued it still violated the law as applied because it resulted in over 74,000 unpaid hours spread across the relevant time period. The court recognized that a facially neutral rounding policy will violate the FLSA only if the policy as applied "over a period of time" systematically undercompensates employees.[30] The plaintiffs argued that relevant case law supports using a net effect approach or an employee percentage approach to determine whether a rounding policy is neutral as applied. However, the court rejected this argument, concluding it was not necessary for every employee to gain or break even every pay period or every set of pay periods analyzed to comply with the FLSA rounding rules. The court granted summary judgment for the defendant, noting that 49.2% of shifts had time removed and 50.7% of shifts had time added or were not impacted by rounding.

B. The De Minimis Doctrine

2. Determining What Constitutes De Minimis Time

c. Cases Finding That Time Is Not De Minimis

In *Peterson v. Nelnet Diversified Sols., LLC*,[31] call-center loan servicing employees used their computers to access loan information and payment history, which they needed to perform their job duties. The employer paid these employees starting when they logged into the timekeeping system on their computer. For this to happen, they had to arrive at the office, wake up their computer, insert their badge, wait for a program to launch, and then click a link to the payroll system. The district court had found booting up the computers and launching the software to be compensable but had nonetheless granted the employer's motion for summary judgment on the grounds that the time spent booting up computers and launching software was de minimis. The Tenth Circuit Court of Appeals reversed, finding that even though the daily time was between 1.1

[28] *Id.* at *4.

[29] 2022 WL 1299121 (W.D. Mo. Mar. 29, 2022).

[30] *Id.* at *6 (citing Corbin v. Time Warner Entm't.-Adv. Newhouse P'ship, 821 F.3d 1069, 1080 (9th Cir. 2016)).

[31] 15 F.4th 1033 (10th Cir. 2021).

and 2.27 minutes (a relatively small amount of time), the time was still not *de minimis* because the unrecorded time was incurred during every shift and it would not be administratively burdensome for the employer to estimate the amount of time that employees spent such tasks each day.

Chapter 9

MINIMUM WAGE REQUIREMENTS

II. Payment of the Minimum Wage

A. "Free and Clear" Payments

In *Parker v. Battle Creek Pizza, Inc.,*[1] the parties had filed cross motions for partial summary judgment to determine the proper legal calculation for reimbursing delivery drivers for vehicle expenses. The plaintiffs, current or former pizza delivery drivers, were paid flat rates per delivery. The defendant did not keep track of the delivery drivers' actual vehicle expenses or reimburse them at the IRS mileage reimbursement rate. The court noted that the failure to pay proper expenses could violate the requirement that the minimum wage be paid "finally and unconditionally" and "free and clear" and that employers could not shift business expenses to their employees if doing so reduced employees' wages below the minimum wage. The defendant urged that a "reasonably approximate" standard, rather than the IRS rate or payment of actual expenses, would be appropriate to meet its reimbursement obligations. The court rejected the defendant's argument because the "reasonably approximate" standard was not found in the law or the applicable portions of the DOL's Field Operations Handbook.[2] The court determined that to comply with minimum wage regulations, delivery driver employers can either keep records of and reimburse delivery drivers' actual expenses or reimburse drivers at the IRS standard rate. The court granted the plaintiff's motion for partial summary judgment.[3]

In *Matias-Rossello v. Epoch LLC*,[4] the plaintiff, a pizza delivery driver, filed a class and collective action suit alleging that the defendants violated the FLSA by not paying the minimum hourly wage. The plaintiff alleged the defendants treated employees as tipped employees without giving proper notice and failed to adequately reimburse employees for expenses related to use of personal vehicles to make delivery runs. The defendants reimbursed drivers, including the plaintiff, at the rate of $1 per delivery. The plaintiff argued that because the defendant did not keep records of drivers' expenses, the defendants should have reimbursed at the IRS standard business mileage rate. The defendants argued that their reimbursement rate was a reasonable approximation of the driver's expenses. The court found that the IRS standard business mileage rate is only one method to determine the reasonableness of vehicle-related expenses. The court found that the plaintiff had offered no evidence to support his claim that the defendants' reimbursement method actually reduced his wage rate below the minimum wage. The plaintiff submitted no evidence in his pleadings of his actual expenses or his estimated expenses. Because the plaintiff produced no evidence to satisfy his burden that the defendants' reimbursement rate was not reasonable or that

[1] 2022 WL 1284379 (W.D. Mich. Apr. 28, 2022).

[2] Dept. of Labor Field Operations Handbook, § 30c 15(a) (2000).

[3] *Parker,* 2022 WL 1284379, at *2–5.

[4] 2022 WL 993601 (D.P.R. Mar. 31, 2022).

the IRS rate would have better satisfied the requirements, the court granted the defendant's motion for summary judgment and dismissed the claims with prejudice.

III. Non-Cash Wages Under Section 203(m): "Board, Lodging, or Other Facilities"

B. "Board, Lodging, or Other Facilities"

4. Items Primarily for the Benefit or Convenience of the Employer Are Not Facilities

In *Adams v. Aztar Indiana Gaming Co.*,[5] the plaintiff worked as a "Table Games Dealer," an hourly, tipped, nonexempt position. The plaintiff brought an FLSA collective action and a class action under Indiana state wage law for alleged unpaid minimum wages; the court denied defendant's partial motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The plaintiff argued that deductions to pay for state-issued gaming licenses pushed her and other dealers' pay rate below the FLSA minimum wage for the weeks in which the deductions were made. The FLSA permits an employer to make paycheck deductions for reasonable costs of "board, lodging, or other facilities," which it credits as wages, as long as the "facilities" are primarily for the benefit of the employee, not the employer.[6] Here, the court held that the plaintiff plausibly alleged that the state-issued gaming licenses were primarily for the benefit of the defendant because the casino needed licensed employees to operate table games and the dealers have no use outside of their work for such licenses, which are non-transferable and valid only for the casino at which they were issued.

IV. Payment of Wages to Tipped Employees

B. Current Statutory Provisions Regarding Tipped Employees

In *Williams v. Saki Hibachi Sushi & Bar, Inc.*,[7] the plaintiff brought a collective action on behalf of herself and other servers who participated in a tip-pool that included non-tipped employees. After a bench trial awarding the plaintiffs $55,000.00 for misappropriated tips and $55,671.29 for unpaid minimum wages, the defendant moved for judgment as a matter of law that plaintiffs were not entitled to recover withheld tips and related liquidated damages. The defendant argued that the March 23, 2018 Consolidated Appropriations Act of 2018 ("CAA"), which added a new paragraph to § 203(m) stating that "[a]n employer may not keep tips received by its employees for any purposes," did not apply retroactively.[8] As such, the pre-amendment rule only entitled the plaintiffs to damages for unpaid minimum wages and not misappropriated tips. The court agreed, reasoning that the "pre-Amendment text of § 216(b) clearly limits the employee's recovery for [minimum wage violations caused by tip pooling] to the 'amount of their unpaid wages . . . and in an additional equal amount as liquidated damages.'"[9] Thus, because the CAA amendment to the FLSA would impose new liability for the

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[5] 2021 WL 4316906 (S.D. Ind. Sept. 22, 2021).

[6] *See* 29 U.S.C. § 203(m)(1).

[7] 574 F. Supp. 3d 395 (N.D. Tex. 2021).

[8] Consolidated Appropriations Act, Pub. L. 115-141, div. S, tit. XII, sec. 1201(a), § 203(m), 132 Stat. 348, 1148 (Mar. 23, 2018).

[9] 574 F. Supp. 3d at 405 (citing U.S.C. § 216(b)).

employer for misappropriated tips, the plaintiffs were not entitled to "$55,000.00 in withheld tip damages and the corresponding award of $55,000.00 in liquidated damages."[10]

D. Dual Jobs

In *Rafferty v. Denny's, Inc.*,[11] the plaintiff-server alleged violations of the tip-credit provisions of the FLSA because she worked 30 to 50% of her shifts in non-tipped work. The district court granted summary judgment in favor of the defendant, and the plaintiff appealed. On appeal, the Eleventh Circuit reversed the district court's grant of summary judgment. Before analyzing the facts, the appellate court provided a detailed history of the dual jobs regulation[12] and determined that it should not afford deference to the DOL's 2018 Opinion Letter on dual jobs under the *Auer*[13] or *Skidmore*[14] standards. Rather, using "traditional tools of interpretation,"[15] the court held that the dual jobs regulation does not permit an employer to apply the tip credit where an employee works in unrelated duties for more than 20 percent of their time. Applying that standard, the appellate court reversed and remanded, finding there were genuine issues of material fact about the percentage of time the plaintiff spent on activities unrelated to her tipped occupation.

E. Tip Pooling

In *Fares v. H, B, & H, LLC*,[16] the plaintiffs, exotic dancers/entertainers, filed a collective action against the defendant for violations of the FLSA, alleging in one count that the defendant failed to pay them minimum wages and in a separate count that the defendants improperly required them to share tips with non-service employees who do not customarily receive tips. The district court found that there was no private cause of action for alleged violations of the tip-sharing rule under the FLSA where such violation is not tied to an allegation for unpaid minimum or overtime wages. The district court granted the defendant's motion to dismiss and declined to allow the plaintiffs to incorporate their count alleging minimum wage violations into their count alleging a violation of the FLSA's tip pooling regulations. Accordingly, the district court dismissed plaintiffs' tip sharing allegations with prejudice.

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[10] *Id*. at 408.

[11] 13 F.4th 1166 (11th Cir. 2021).

[12] 29 C.F.R. § 531.56.

[13] Auer v. Robbins, 519 U.S. 452 (1997).

[14] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[15] 13 F.4th at 1188.

[16] 2021 WL 4133960 (E.D. Wis. Sep. 10, 2021).

F. Deductions From Tips

1. Generally

In *Ettore v. Russos Westheimer, Inc.*,[17] a former server sued a pizzeria restaurant for improperly claiming a tip credit on her wages and making an unreasonable deduction from her paychecks. In reviewing the district court's grant of the plaintiff's summary judgment motion and denial of the defendant's summary judgment motion, the Fifth Circuit evaluated the defendant's evidence to determine that it did not meet its burden to establish its entitlement to the deduction. The Fifth Circuit affirmed the district court's grant of summary judgment for the plaintiff, finding that the "linen fee" deduction covering the laundering of employees' aprons, unlimited fountain drinks, and a meal for each employee for each shift was unreasonable. The panel recognized that the pizzeria failed to keep sufficient records substantiating the cost to meet its burden to establish the "linen fee" as a permissible deduction, where the only evidence the pizzeria provided was a copy of its menu.

In *Lopez v. Fun Eats & Drinks, LLC,*[18] a class of servers and bartenders filed suit alleging that their employer made unlawful deductions from their pay, resulting in the loss of the tip credit the restaurant claimed against its minimum wage obligation. At summary judgment, the magistrate judge recommended that the court grant the plaintiffs' motion for partial summary judgment, finding the restaurant was not permitted to claim a tip credit against the minimum wage because servers and bartenders were required to pay for uniforms, cash register shortages and unpaid tabs, and meals above their actual cost.[19]

V. Satisfying the Minimum Wage Requirement

B. Satisfying the Minimum Requirements Under Non-Hourly Pay Structures

2. Commission Payments

In *Reed v. Brex, Inc.,*[20] the Seventh Circuit affirmed the district court's grant of summary judgment for the employer on the validity of its commission structure. The lower court held that the plaintiffs were paid bona fide commissions within the meaning of the exception to the FLSA's overtime requirements. The court found that the undisputed evidence presented to the district court showed that the employer's payment plan was a bona fide commission because the pay was highly responsive to sales performance and varies in accordance with sales. In addition, the employees were paid on a true commission basis the majority of the time.

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[17] 2022 WL 822181 (5th Cir. Mar. 18, 2022).

[18] 2021 WL 3502361, at *1 (N.D. Tex. July 16, 2021).

[19] *Id.* at *8.

[20] 8 F.4th 569 (7th Cir. 2021).

Chapter 10

OVERTIME COMPENSATION

II. General Principles

In *Mendez v. MCSS Restaurant Corp.*,[1] current and former restaurant workers brought a collective action against the restaurant owners and operators for overtime violations. The workers moved for summary judgment. The court found that the restaurant owners were "employers" but denied all other grounds for summary judgment finding issues of fact. The district court analyzed all aspects of FLSA and NYLL claims providing an excellent road map and citations to authority. An important aspect of summary judgment proof was addressed by the court. The court rejected unsworn declarations for failure to comply with the requirement the declarations be dated and because English declarations were made for Spanish speakers. The court found the declaration of the Spanish speaking paralegal insufficient to meet the required evidentiary standard because the translator did not do the actual translation. The court also rejected the employer's argument that tip credit under the NYLL could be taken without written notice.

III. The "Workweek" Concept

A. Determining the Workweek

In *Walsh v. Fusion Japanese Steakhouse, Inc.*,[2] the Secretary of Labor brought suit against defendant-restaurants and their owners for violations of the FLSA's overtime provisions. The restaurants' kitchen employees typically worked five days per week; however, some employees worked four or six days per week. Regardless of the number of hours worked in a workweek, the employees were paid a lump sum twice per month. Although the restaurants' workweek was limited to seven days per week as required by the FLSA, some employees worked over 40 hours during those seven days. The restaurants' position was that the lump sum payments were intended to cover not only the minimum wages, but also the overtime worked in a workweek. However, based on the evidence available, the employees who worked over 40 hours in a workweek were not paid one and one-half times the employees' standard rate of pay as required by the FLSA. Therefore, the court held that the restaurants violated the FLSA's overtime provision.

B. Overtime Must Be Paid on the Regular Payday

In *Bishop v. City of Philadelphia (Dep't of Prisons*),[3] a correctional officer brought FLSA claims against a municipal prison for failure to pay overtime compensation in a

[1] 564 F. Supp. 3d 195 (E.D.N.Y. 2021).

[2] 548 F. Supp. 3d 513 (W.D. Pa. 2021).

[3] 2021 WL 4477097 (E.D. Pa. Sept. 30, 2021).

timely manner. In granting summary judgment for the defendant and not for the plaintiff, the district court found that the defendant's delay in paying the plaintiff was not unreasonably delayed. Specifically, the district court found that when the defendant experienced issues with running a new payroll system, that the defendant paid overtime compensation by the following pay period.

IV. The "Regular Rate"

C. Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime

3. Gifts, Christmas, and Special Occasion Bonuses: Section 207(e)(1)

In *McPhee v. Lowe's Home Ctrs.*,[4] non-exempt hourly employees brought claims that a tax reform bonus and payments for volunteer hours were excluded from the calculation of their regular rate. The district court granted the employer's motion to dismiss. The Fourth Circuit affirmed the dismissal based on the finding that the tax reform bonus was a gift or discretionary bonus because the payments were given in honor of a special occasion, were not made pursuant to a contract, were not based on hours or wages, and were not substantial. The panel also held that the bonus was not a retention bonus because the time period (two weeks) was too short. Lastly, the appellate court held that the volunteer hours were not for the primary benefit of the employer, and therefore, the hours could not fall into the definition of "work."

D. Calculating Regular Rate and Overtime Under Various Methods of Payment

1. Payment of Wages Based on an Hourly Rate

In *Silva v. Legend Upper W. LLC*,[5] a group of five plaintiffs prevailed at trial and recovered $499,076 from an individual defendant for various violations of the FLSA and New York wage law. The individual defendant was found to be an employer under the FLSA and New York law where he had decision-making authority over compensation and payroll record-keeping, as well as the ability to hire and fire. He was found liable for failing to pay plaintiffs minimum wage and overtime despite being merely a manager. The plaintiffs, however, were not awarded damages for the full three-year statute of limitations because they failed to introduce evidence that they notified the defendant of any wage violation, or that the defendant otherwise had knowledge of what the law required. Instead, the court found that evidence sounding in retaliation—that plaintiffs were disciplined and/or terminated after raising pay-related grievances—was more consistent with the conclusion that the defendant was ignorant of the FLSA's requirements, not that he was willfully disregarding the same.

[4] 860 F. App'x 267 (4th Cir. 2021).

[5] 2021 WL 4197360 (S.D.N.Y. Sept. 14, 2021).

2. Payment of Wages Based on a Nonhourly Rate
e. Salaried Employees: Fluctuating Workweek Method

In *Hernandez v. Plastipak Packaging, Inc.*,[6] the plaintiff brought a claim against the defendant for failure to pay time and one-half compensation for overtime hours worked. The issue before the Eleventh Circuit was "whether [the defendant] paying [the plaintiff] bonuses—a shift premium for night work and holiday pay—on top of his fixed salary precludes the use of the fluctuating workweek method."[7] The plaintiff was a non-exempt employee who received a fixed bi-weekly salary, so even when the hours he worked each week fluctuated, he was still paid in full. On top of his salary, the plaintiff was paid shift premiums for working a week of night shifts and received holiday pay—eight hours of holiday pay regardless of if the employee worked, and, if working on a holiday, pay for the hours worked plus an additional eight hours of holiday pay. At the district court proceedings, both parties moved for summary judgment. The defendant argued that the fluctuating workweek method was applicable for overtime payment calculations, and the plaintiff argued it was not because he did not receive a fixed weekly salary. The district court granted summary judgment for the plaintiff because it found that the bonuses for night shifts and holidays offended the methods requirement of a fixed salary. The district court reasoned that "a salary isn't fixed just because the base salary doesn't fluctuate; rather, the addition of bonuses to an employee's base pay, renders the [fluctuating workweek method] inapplicable."[8] Reviewing the district court's summary judgment de novo, the Eleventh Circuit disagreed, explaining that "so long as an employee receives a fixed salary covering every hour worked in a week, the payment of a bonus on top of the employee's fixed salary does not bar an employer's use of the fluctuating workweek method to calculate overtime pay."[9]

V. Special Problems Concerning the Regular Rate
F. Gap Time

In *Conner v. Cleveland Cnty,*[10] the Fourth Circuit Court of Appeals reversed judgment on the pleadings for the defendant in a case alleging failure to pay all compensation due for straight time in weeks when overtime was worked. The appeals court noted that courts universally reject "pure" gap time claims under the FLSA, i.e., when an employee is not paid for all straight time hours worked but receives at least the minimum wage for those hours. Nonetheless, some courts recognize a claim for gap time when overtime is worked during the week. In this instance, because the plaintiff alleged that the county had changed its method of calculating pay such that EMS employees received less than what the county's pay ordinance provided, she stated a cause of action for "overtime" gap time due to the county's failure to pay her all compensation due for her straight time hours.

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[6] 15 F.4th 1321 (11th Cir. 2021).

[7] *Id.* at 1332.

[8] *Id.* at 1325 (internal quotations omitted).

[9] *Id.*

[10] 22 F.4th 412 (4th Cir. 2022).

VI. Exceptions From the Regular Rate Principles

A. Using Basic Rates for Regular Rates

In *Barragan v. Home Depot U.S.A., Inc.*,[11] the plaintiffs were Home Depot associates who earned bonuses for meeting sales objectives and company goals. They alleged that the defendant illegally failed to include those bonuses in their respective regular rates of pay when calculating overtime premium pay due under the FLSA. The defendant argued that the "basic rate" regulation[12] permitted it to exclude the bonuses from the regular rate because it only varied the regular rate by fifty cents per week, on average. The court held that regulation only applied to piece rate workers, defendant could not set a "basic" rate equal to a straight time hourly rate because it is an exception from the requirements of computing overtime at the regular rate, and the defendant had not submitted any evidence showing an agreement about a proposed "basic rate" or any understanding that bonuses would be excluded from the overtime rate. Therefore, the court granted summary judgment in the plaintiff's favor.

[11] 2021 WL 3634851 (S.D. Cal. Aug. 17, 2021).

[12] 29 C.F.R. § 548.3(e).

Chapter 11

GOVERNMENT EMPLOYMENT

II. Coverage Issues

A. What Constitutes a "Public Agency" for FLSA Coverage

In *Knight v. MTA – New York City Transit Authority*,[1] the plaintiff commenced an action for unpaid overtime under the FLSA, the New York State Civil Service Law and the New York Code of Rules and Regulations. The plaintiff argued that the employer required her to "bank" 160 hours of overtime as "compensatory hours" instead of paying her a premium rate for those hours. The district court dismissed the plaintiff's claim for failure to adequately state a claim and failure to adequately plead a violation of the FLSA because the parties had a valid agreement under section 207(o) of the FLSA that overtime work would be banked as time off. On appeal, the plaintiff only challenged the court's finding that she had not adequately stated a claim. The Second Circuit affirmed the district court's decision, finding that the decision as to section 207(o) of the FLSA was sufficient to dismiss the claim and that the plaintiff's failure to challenge this finding was fatal to her appeal.

C. Exclusions for Non-Civil Service Employees

2. Personal Staff or Elected Officials

In *Clews v. County of Schuykill,*[2] part-time deputies in the office of an elected county coroner claimed the county denied them overtime compensation in violation of the Fair Labor Standards Act and fired them unlawfully for seeking overtime pay. The county argued the plaintiffs were excluded from FLSA protection by 29 U.S.C. § 203(e)(2)(C)(ii)(11) as the personal staff of an elected public official. A federal district court granted summary judgment to the county, but the U.S. Court of Appeals for the Third Circuit reversed and remanded the case for a resolution of material factual disputes. In a ruling of first impression for the Third Circuit, the appeals court held that for an employee to be a member of an elected official's personal staff, the official must (1) work closely with the employee in a sensitive position of trust and confidence, and (2) exercise personal control over the employee's hiring, promotion, work conditions, discipline, and termination. The court declined to adopt a six-factor test applied in the Fifth Circuit[3] and favored by the Sixth, Eighth, and Tenth Circuits but said the factors cited by the Fifth Circuit should be considered in deciding whether an individual is a member of an elected official's personal staff.

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[1] 2022 WL 839277 (2d Cir. March 22, 2022).

[2] 12 F.4th 353 (3d Cir. 2021).

[3] Teneyuca v. Bexar Cnty., 767 F.2d 148 (5th Cir. 1985).

D. Volunteers

1. Definition of "Volunteer"

b. Receipt of Expenses, Reasonable Benefits, or a Nominal Fee

In *Adams v. Palm Beach Cnty*,[4] the court granted the defendant's motion to dismiss FLSA and Florida law minimum wage claims filed by golf course attendants on the basis that they were public agency volunteers. The plaintiffs were offered discounted rounds of golf and could accept tips, but they alleged that they performed duties such as being a cart attendant, ranger, ranger assistant, and range ball picker and were expected to follow "strict rules" without receiving wages. The court concluded that the plaintiffs met the "Public Agency Volunteer Exception" under 29 U.S.C. § 203(e)(4)(A), and in particular 29 C.F.R. § 553.104(a), which provides, in pertinent part, that individuals "are considered volunteers and not employees of such public agencies if their hours of service are provided with no promise, expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof …" Among other things, the court pointed to how it was not objectively reasonable to expect to receive wages for this position and that the ability to play golf at a reduced fee was a reasonable benefit consistent with the economic realities of the particular situation.

III. Public Sector Exemptions From FLSA Overtime Requirements

C. Section 207(p)(1): Special Detail Work by Fire Protection and Law Enforcement Personnel

In *Owens v. City of Malden*,[5] the court evaluated whether city police officers were due overtime payments for detail work provided to the city, such as services provided by the police officers during their off-duty hours to other city departments. Police officers claimed that the deduction of a 10% administration fee from their overtime pay violated the FLSA. The federal law specifically provides for the exclusion of detail work hours performed at their own option by fire protection and law enforcement employees of public agencies from the calculation of hours for overtime pay when the work is performed for a "separate and independent employer."[6] The court noted the fact that city departments had hired the officers for detail work was not dispositive of whether or not those departments were separate and independent from the city.

V. Special Provisions that Apply to Fire Protection and Law Enforcement Employees

B. The Section 207(k) Exemption

In *Pilot v. City of Yonkers*,[7] a police officer brought an overtime claim for time spent caring for his police canine at home. The city moved for summary judgment on whether it was entitled to the partial overtime exemption under 29 U.S.C. § 207(k).

[4] 2021 WL 4516612 (S.D. Fla. Oct. 4, 2021).

[5] 568 F. Supp. 3d 77 (D. Mass. 2021).

[6] 29 U.S.C. § 207(p)(1).

[7] 2021 WL 4429839 (S.D.N.Y. Sept. 27, 2021).

Although the police officer did not dispute that he worked a 25-day work period, he argued that the city was not entitled to the exemption because it did not formally adopt at 29 U.S.C. § 207(k) work period or pay him in accordance with the exemption's provisions. The district court granted the city's motion, holding that "the Section 207(k) exemption applies if the employee participates in an exemption-qualifying work period."[8] The city could apply the 29 U.S.C. § 207(k) exemption retroactively even if it had paid the police officer more overtime that the provision required.

In *Vance v. Vill. of Highland Hills*,[9] the parties agreed that the plaintiff, a firefighter, was entitled to some back pay for unpaid overtime and liquidated damages, but the village who had employed him argued the back pay must be reduced because of a statutory exemption under 207(k) for some period of the firefighter's claim. The Sixth Circuit agreed with the district court, affirming its findings that the defendant had not established the 28-day work period required by section 207(k) to avoid an overtime violation.

VII. The Federal Sector

G. FLSA's Interplay With Other Federal Statutes and the Constitution Regarding Federal Sector Employees

1. Cases Addressing the Impact of Other Laws

a. Tucker Act

In *Terry v. Architect of the Capitol,*[10] the plaintiff, a painter in the "House Office Buildings Jurisdiction," claimed he was entitled to Sunday pay pursuant to the defendant's pay policy. The defendant moved to dismiss for lack of jurisdiction, arguing, in part, that the Little Tucker Act—a companion statute to the Tucker Act—did not confer jurisdiction to the court on his Sunday pay claim. The Little Tucker Act confers original jurisdiction on district courts for civil actions against the US, not exceeding $10,000, that are "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the Union States…" The court held that the Little Tucker Act was inapplicable because plaintiff was not seeking the wages under or through a substantive right found in some other source of law such as the Constitution, an Act of Congress, or a federal regulation. The court ruled that "the defendant's pay policy cannot be an independent sources of a substantive right for which the Little Tucker Act operates as a waiver of sovereign immunity.[11]

[8] *Id.* at *8.

[9] 2021 WL 4963365 (6th Cir. Oct. 26, 2021).

[10] 2021 WL 2417535 (D.D.C. June 14, 2021).

[11] *Id.* at *11.

b. Whether Other Federal Laws Preempt Application of the FLSA to Certain Federal Sector Employees

In *Reilly v. Century Fence Co.*,[12] the court considered the defendant's practice of including a "cash fringe" (i.e., money paid to employees in lieu of fringe benefits) in some of its employees' paychecks. The defendant argued that the overtime rate should be calculated on a pay rate that does not include the cash fringe payment; the plaintiffs disagreed. Importantly, some of the employees worked on projects governed by the Davis-Bacon Act ("DBA"), which applies to certain contracts between an employer and the federal government and has its own method of calculating overtime pay. The DBA allows employers to credit the cost of fringe benefits toward an employer's obligation in meeting the required minimum prevailing wage. After analyzing various sections of the DBA, the district court granted the defendant's summary judgment motion, finding that section "3142(e) [of the DBA] allows [the defendant] to exclude its cash fringe payments from the regular rate so long as those payments are larger that its §3141(2)(B) costs and contributions."[13]

IX. Unique Constitutional Defenses

C. Waiver of Sovereign Immunity

In *Redgrave v Ducey*,[14] the Ninth Circuit certified a matter to the Arizona Supreme Court. Specifically, the appellate court was unsure if Arizona consented to damages liability for a state agency's violation of the FLSA. The Arizona Supreme Court responded that "the legislature has not unequivocally consented to federal damages liability," so Arizona has not consented to liability under the FLSA. Accordingly, the Ninth Circuit concluded that Arizona has not abrogated its sovereign immunity against FLSA claims.

In *Terry v. Architect of the Capitol,*[15] the plaintiff, a painter in the "House Office Buildings Jurisdiction," claimed the defendant did not pay him environmental hazard pay on either regular wages or overtime in violation of the Accountability Act and the Back Pay Act among other laws. The defendant moved to dismiss for lack of jurisdiction, arguing that the United States had not waived sovereign immunity on the environmental hazard pay claim. According to the court, the Accountability Act did amount to a waiver of sovereign immunity in that it mandated that certain provisions of the FLSA, most particularly the minimum wage and overtime provisions, were applicable to legislative employees. However, the court agreed with the defendant's arguments that while the plaintiff attempted to craft his claims as ones for unpaid overtime, he was really trying to seek review of his regular rate of pay, and sovereign immunity was not waived as to that type of claim. The Back Pay Act was inapplicable to his regular rate and overtime claims because it does not expressly waive sovereign immunity and does not create an independent cause of action.

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[12] 2022 WL 124027 (W.D. Wis. Jan. 13, 2022).

[13] *Id.* at *5.

[14] 859 F. App'x 27 (9th Cir. 2021) (unpublished).

[15] 2021 WL 2417535 (D.D.C. June 14, 2021).

In *McCarty v. Purdue University*,[16] the plaintiff sued the defendants alleging multiple federal and state claims, including under the FLSA for failure to compensate her for overtime hours having improperly classified her as an exempt employee. The plaintiff sued both the university and individual employees of the university who were her superiors in the IT department. The defendants argued that they could not be sued individually because they were an extension of the university and cannot be held liable under the doctrine of sovereign immunity. The court indicated that the general rule was that suits against state officials in an individual capacity are not barred by the Eleventh Amendment because the plaintiff is seeking damages from the individuals and not from the state, but the court must consider whether the suit is really against the state versus the individuals. The court found that the fact the university chose to indemnify the individuals and use state funds to cover any judgment was not determinative to provide the individuals sovereign immunity. In addition, the court noted that the state was not required to indemnify the individuals and was assuming those costs voluntarily. The court found that any judgment would not restrain the state from acting or require the state to act, as the plaintiff was only seeking unpaid overtime and not future compensation. The court also found that the defendants had not argued that the amount of damages exceeded their ability to pay even if the state had not indemnified them. Based on the facts of the case, the court found that the individual defendants did not establish that a suit against them was the same as a suit against the state. Therefore, the individual plaintiffs were not immune from suit.

[16] 2021 WL 3912564 (N.D. Ind. Sept. 1, 2021).

Chapter 13

RETALIATION

II. Parties

A. Plaintiffs

1. "Any Employee"

In *Caudle v. Hard Drive Express, Inc.*,[1] a truck driver alleged that he was terminated in retaliation for threatening to report his employer for unpaid wages in violation of the FLSA and the Michigan's Whistleblower Protection Act ("WPA"). The defendant moved for summary judgment, arguing that the plaintiff's claims were not protected under the FLSA. The district court concluded that although the Motor Carrier Act precludes an overtime claim, the employee was not exempt from any other FLSA provisions and, as such, is covered by the FLSA anti-retaliation provision. The district court ultimately held, however, that the plaintiff could not demonstrate a *prima facie* case of retaliation under the FLSA or state law and granted summary judgment in favor of the employer.

3. Spouses, Family Members, and Friends of Employees

In *Ornelas v. CD King Construction, LLC*,[2] a former superintendent for a general construction services company brought a retaliation claim, alleging that he was demoted from his superintendent position, deprived of equipment necessary to complete his job, removed from projects, and reprimanded for work performance after his brother filed a lawsuit to recover unpaid overtime. The magistrate judge recommended denial of the defendants' motion to dismiss the retaliation claim, rejecting the defendants' argument that the plaintiff did not personally participate in a protected activity and could not suffer "vicarious retaliation" under the FLSA for the actions of his brother. The court observed that the Supreme Court has held that the anti-retaliation provision of Title VII "is satisfied based on the protected activity of 'a close family member' and found 'no textual basis' for excepting 'third-party reprisals.'" The court thus concluded based on the similar statutory language of the anti-retaliation provisions of Title VII and the FLSA that the FLSA's anti-retaliation provision similarly applies in the context of third-party protected activity.[3]

B. Defendants

1. "Any Person"

In *Evans v. Dart*,[4] the plaintiffs, correctional officers, brought FLSA collective action claims against their employer, and in the same action, two individual plaintiffs also brought claims against individual defendant-union officers, alleging retaliation for

[1] 2022 WL 570436 (E.D. Mich. Feb. 24, 2022).

[2] 2021 WL 8444015 (W.D. Tex. Aug. 17, 2021).

[3] *Id.* at *2–3.

[4] 2021 WL 2329372 (N.D. Ill. Jun. 18, 2021).

filing FLSA claims. In granting the motions to dismiss for the two individual plaintiffs' retaliation claims, the district court agreed with the individual defendants that the FLSA's "any person" provision did not apply to them as union officers, as they did not have control over the two plaintiffs' employment for purposes of the FLSA's retaliation provision. The district court held that for these defendants to be liable for FLSA retaliation, they must have been acting on behalf of the employer. Here, the individual defendant-union officers had control over the collective bargaining agreement but not the ability to hire, fire, supervise, or pay the individual plaintiffs. Accordingly, the district court granted the motions to dismiss the FLSA retaliation claims against the individual defendants.

3. Labor Unions

In *Garner v. Int1 Union, United Auto., Aerospace & Agric. Implement Workers of Am.*,[5] the defendant filed a motion to dismiss plaintiff's complaint. As related to plaintiff's FLSA claim, the court first evaluated whether an individual could sue his or her labor organization for retaliation under the FLSA–even though defendant did not raise this argument. In evaluating this threshold issue, the court first noted that there was no binding Supreme Court or Tenth Circuit precedent on the subject. Looking outside of the Tenth Circuit, the court observed that while the Third Circuit had previously concluded that the FLSA's use of the term "any person" was broad enough to include a labor union, most other courts across the country had concluded that a person may only obtain relief against their "employer," which, as defined in the FLSA,, expressly excluded "labor organizations." Despite this, because the issue of coverage under the FLSA was not jurisdictional and defendant did not brief or raise the issue, the court evaluated the defendant motion to dismiss the retaliation claim under Federal Rule of Civil Procedure 12(b)(6) and dismissed the claim without prejudice.

III. Prima Facie Case and Burden of Proof

In *Fox v. Starbucks Corp.*,[6] the district court enumerated the prima facie case of retaliation under the FLSA: (1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action. If the defendant meets this burden, the plaintiff must produce sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action. The plaintiff met the first two elements because no meaningful dispute that the plaintiff made an internal complaint that he believed a store manager had underpaid

[5] 2022 WL 860613 (D. Colo. Mar. 23, 2022), *report and recommendation adopted sub nom*. Garner v. Int'l Union, United Auto., Aerospace & Aric. Implement Workers of Am., 2022 WL 1102526 (D. Colo. Apr. 13, 2022).

[6] 2021 WL 4155029 (S.D.N.Y. Sept. 13, 2021).

Starbucks employees and that the plaintiff was thereafter terminated. Nonetheless, the court granted summary judgment to Starbucks under this framework because the plaintiff failed to demonstrate a genuine dispute of material fact as to the causal connection element. The court explained that the plaintiff could not rely on general corporate knowledge alone but must show that the particular decision maker who took adverse action against him had knowledge of his protected activity.

In *Williams v. Vapor Rising, Inc*.,[7] the plaintiff filed two claims under the FLSA: one for unpaid wages and one for retaliation. Addressing the retaliation claim, the court held that when a claim is based on circumstantial evidence, it will apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under this framework, "a plaintiff first must establish a prima facie case of retaliation, which requires showing that (1) the plaintiff engaged in protected activity, (2) the plaintiff subsequently suffered an adverse employment action by the defendant, and (3) a causal connection existed between the plaintiff's activity and the defendant's adverse action."[8] The court reasoned that plaintiff established a prima facie case due to the temporal proximity between plaintiff's termination and protected activity. However, the court noted the Eleventh Circuit has indicated "that a plaintiff relying on temporal proximity in order to establish causation must, additionally, overcome the defendant's legitimate, nondiscriminatory reason for adverse action."[9] Ultimately, because the plaintiff had cast sufficient doubt" on the defendant's proffered reasons for his termination, the court denied the defendant's motion for summary judgment.

In *Wilson v. New York & Presbyterian Hosp*., the district court addressed the elements of a prima facie case of FLSA retaliation. Specifically, the court addressed whether a hostile work environment could constitute an adverse employment action under the prima facie case. The court held that a hostile work environment *could* constitute an adverse employment action but whether it *would* is "highly fact intensive."[10] The court reasoned that "[r]olling eyes or becoming visibly frustrated with a coworker may be unkind behavior, but such conduct is too minor to be actionable as retaliation."[11] The court also stated that "[t]hough a negative performance evaluation can constitute an adverse employment action in the retaliation context, a performance evaluation that provides an overall rating of 'meets expectations' is ordinarily not an adverse employment action."[12] Last, the court held that temporal proximity can prove causal connection in some circumstances, but where there is "'an intervening causal

[7] 2022 WL 939911 (M.D. Fla. Feb. 24, 2022), *report and recommendation adopted*, 2022 WL 911735 (M.D. Fla. Mar. 29, 2022).

[8] 2022 WL 939911, at *4.

[9] 2022 WL 939911, at *6 (quoting Wolf v. Coca-Cola, 200 F.3d 1337, 1342-43 (11th Cir. 2000)).

[10] 2021 WL 2987134 (E.D.N.Y. July 15, 2021).

[11] *Id*. at *6.

[12] *Id*. (citing Krinski v. Abrams, No. 01-cv-5052, 2007 U.S. Dist. LEXIS 38376, at *36 (E.D.N.Y. May 25, 2007)).

event that occurred between the protected activity and the allegedly retaliatory' event, mere temporal proximity" is not enough to prove the causation element.[13]

In *Morzine v. Philadelphia Housing Authority*,[14] a police lieutenant brought retaliation claims following the termination of his employment. In assessing the defendant's motion for summary judgment, the district court found that the plaintiff had met the first two requirements to establish a *prima facie* case of retaliation; in particular, that he had engaged in protected activity and had suffered an adverse employment action after doing so. However, the court found the plaintiff had failed to establish the third requirement—a causal connection between the protected conduct and the employment action—and therefore granted judgment to the defendant. The court rejected the plaintiff's argument that a ten-day timespan between his final complaint and termination was close enough by itself to establish causation, citing to other evidence that refuted an inference of retaliation, such as the defendant's prior knowledge of the plaintiff's complaints and knowledge of other employees who had complained about unpaid overtime but had not been terminated.

In *McCowan v. City of Philadelphia*,[15] the plaintiff sued the defendants, alleging violations of multiple state and federal laws, including retaliation claims under the nursing mother provisions of the FLSA. The plaintiff worked as an officer in the Philadelphia police department. The defendants filed a motion for summary judgment on all claims. The court began its analysis of the retaliation claim by reviewing the elements of a prima facie retaliation case: 1) the plaintiff engaged in activity protected by the FLSA, 2) the plaintiff suffered an adverse action subsequent to or contemporaneous to the protected activity, and 3) there is a causal connection between the plaintiff's activity and the adverse action.[16] The court stated that the *McDonnell Douglas* burden-shifting framework applied when analyzing a retaliation claim under the FLSA. Here, the parties agreed that the plaintiff met the first element when she requested appropriate lactation space on two occasions. The court found three incidents that would be considered adverse employment actions under the second element. In reviewing the third element, the court found no causal connection between the adverse actions and the plaintiff's protected activity. The first two adverse actions occurred before the plaintiff engaged in her protected activity, and the third adverse action did not occur close enough in time to her protected activity. Moreover, the plaintiff did not demonstrate that the decision-maker in this action was aware of her protected activity. Because the plaintiff was unable to establish a prima facie case of retaliation, the court granted the defendants' motion for summary judgment on this claim.

In *Smith v. ADEBCO, Inc.,*[17] the court denied defendant's motion for judgment on the pleadings, finding plaintiff had stated a prima facie retaliation claim. Specifically, the

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[13] Id. at *7 (citing Garcia v. Yonkers Bd. of Educ., 21018 U.S. Dist. LEXIS 142514, at *18 (S.D.N.Y. Aug. 21, 2018)).

[14] 2021 WL 4592150 (E.D. Pa. Oct. 6, 2021).

[15] McCowan v. City of Philadelphia, 2022 WL 758991 (E.D. Pa. Mar. 10, 2022).

[16] *Id.* at *33.

[17] 566 F. Supp. 3d 826 (M.D. Tenn. 2021).

court found the defendant's filing of a countersuit against plaintiff—who had filed an FLSA claim against it four months prior—for alleged negligence related to a trucking accident raised an inference of retaliation where the defendant did not sue a similarly situated employee involved in a similar accident. The court found the plaintiff's retaliation claim survived dismissal given the causal connection between the filing of the FLSA complaint and the defendant's filing of a countersuit and because of the disparate treatment of a similarly-situated employee who had not engaged in protected activity.

In *Haliburton v. Paladino Construction, Inc.*,[18] the plaintiff brought a claim of retaliation after allegedly reporting a COVID-19 diagnosis to his employer and being terminated less than a week later. The court granted summary judgment on behalf of the employer because the only evidence supporting plaintiff's claim he reported his COVID-19 diagnosis prior to his termination for job abandonment was his contradictory declaration. Accordingly, the plaintiff failed to establish a prima facie claim of retaliation under the FLSA/EPSL.

In *Girling v. JHW Servs., LLC*,[19] the district court denied the defendant's motion to dismiss plaintiff's FLSA retaliation claim. The court held that the plaintiff adequately pled a prima facie case of retaliation by alleging that within a few weeks after he engaged in protective activity by filing an FLSA collective action against defendants, they retaliated against him by providing false information to a state unemployment agency, resulting in the wrongful denial of unemployment benefits.

In *Hyseni v. Penske Logistics LLC*[20] a truck driver sued his employer for failure to pay for all hours work and for retaliating against him after filing his lawsuit by installing a camera in his truck to monitor his activities, reducing his work hours, and continuing to deny pay for all hours worked. The trucking company moved for summary judgement on the retaliation claim, arguing no causal link exists between the protected activity and the alleged retaliatory conduct. The court granted summary judgment for the employer because the employee's testimony on when the retaliatory activity occurred relative to the protected activity was inconsistent and vague. Some of the plaintiff's testimony suggested the defendant's actions were taken before he filed the lawsuit. Even if the court assumed all of the retaliatory actions took place after the lawsuit was filed, that fact alone without any causal link is insufficient to establish a claim for retaliation. Moreover, the employer demonstrated its actions were nonretaliatory. In particular, the employer demonstrated plaintiff's hours were reduced, if at all, because the customer's demands fluctuated, and plaintiff's hours still remained well above the average relative to other employees. Likewise, the employer showed to the court's satisfaction that the camera was installed in plaintiff's vehicle as part of a national program wholly unrelated to anything specific to plaintiff.

[18] 2022 WL 1585461 (E.D. Ark. April 5, 2022).

[19] 2022 WL 80279 (W.D. Tex. Jan. 7, 2022).

[20] 2021 WL 3371530 (D. Ariz. Aug. 3, 2021).

In *Andrews v. Lecats Ventriloscope LLC*,[21] the plaintiff was fired two days after she made a complaint regarding her status as an exempt employee. The plaintiff filed suit for retaliation under the FLSA, and the employer moved for summary judgment. The employer pointed to evidence, which was not rebutted, showing that the decision to terminate the plaintiff's employment occurred *before* she submitted her FLSA complaint. Additionally, the employee failed to provide evidence, other than temporal proximity, showing a causal connection between her complaint and the adverse action. Therefore, the court found the plaintiff failed to successfully establish a causal connection between her complaint and the adverse action necessary for her *prima facie* case and granted the employer's motion for summary judgment.[22]

In *Sobucki v. Centrum-East West Arenas Venture, LLC*,[23] the district court denied the defendant's motion for summary judgment on the plaintiff's FLSA retaliation claim because a reasonable jury could find that the defendant fired plaintiff in retaliation for filing his FLSA lawsuit alleging overtime violations. Though the defendant's representatives testified in their depositions that the defendant's decision to fire plaintiff was made for an unrelated reason prior to plaintiff's filing of his lawsuit, the district court reasoned that a jury could find for plaintiff based on the "suspicious timing, actions, and statements [of defendants] together[.]"[24] In particular, record evidence showed that five days after the lawsuit was filed, a representative of the defendant made comments to the plaintiff "suggest[ing] that the lawsuit was a mistake" and "express[ing] frustration" when the plaintiff refused to discuss the lawsuit; that subsequently, ten days later, the plaintiff received a written notice for tardiness; then, three days later, the plaintiff received a written notice for failing to log his time when he had not previously received written notices in three years of employment; and the plaintiff was fired 58 days after filing suit.

In *Sondesky v. Cherry Scaffolding Inc.*,[25] the Third Circuit denied the former employer's appeal of the district court's denial of its motion for judgment notwithstanding the verdict, which sought to reverse a jury verdict in favor of the appellee, a former bookkeeper, on her FLSA retaliation claims. The former bookkeeper had brought suit in district court alleging that her former employer retaliated against her when it sued her in small claims court because of her complaint that she should be paid overtime.[26] The Third Circuit denied the appeal, reasoning that there was sufficient evidence at trial that the former bookkeeper engaged in protected activity and the small claims lawsuit was causally related to the plaintiff's complaint seeking overtime. The former bookkeeper's testimony that "she had a telephone conversation with [her employer] asking for

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[21] 2022 WL 704578 (N.D. Ohio Mar. 9, 2022).

[22] *Id.* at *7.

[23] 2021 WL 3418849 (N.D. Ill. Aug. 5, 2021).

[24] *Id.* at *6.

[25] 2021 WL 4147099 (3d Cir. Sept. 13, 2021).

[26] *Id.* at *3. The plaintiff also alleged that the defendant retaliated against her by sending an email to her former employer stating that she had stolen money from the defendant. The jury found for the plaintiff on this retaliation claim, as well, but the Third Circuit did not consider it on appeal because the defendant waived the argument by only referencing the claim in the heading section of a brief. *Id.* at *4.

overtime wages" and "sent [her employer] a weekly breakdown of payroll timesheets that clearly indicated her overtime hours" was sufficient evidence of "asserting her rights to overtime pay" and thus "engaging in protected activity under the FLSA."[27] In addition, the former bookkeeper's testimony that her employer pursued claims against her in small claims court once he learned that she had paid herself overtime was sufficient to support a causal connection between the former bookkeeper's complaint for overtime pay and the small claims action against her.

In *Cortese v. Skanska Koch, Inc.*,[28] a union member, who was qualified to operate a crane, alleged FLSA and New York Labor Law retaliation claims against the general contractor employer and a related entity, alleging they changed his work assignment to that of primarily operating a hoist rather than a crane and then did not rehire him after a layoff. The plaintiff also brought other state law and breach of contract claims. The district court granted the defendants' motion for summary judgment on retaliation. The worker provided evidence that crane operators are paid a higher hourly rate than hoist operators. The worker met the first element for retaliation because he made a sufficient showing that he participated in a protected activity known to the defendants. While overbroad, he sufficiently complained that it was unfair to pay him at a lower rate than members of another union who performed the same work at higher pay. However, the member did not show an adverse employment action for either retaliation violation. Because he only worked overtime once, any lost wages were *de minimis*. Thus, the court found, this would not have deterred him from pursuing an FLSA claim. The defendants' refusal to rehire him was not an adverse employment action because the plaintiff provided no evidence as to why he was not rehired. Because he speculated as to the reason, the court disregarded his testimony.

In *Harapeti v. CBS Television Stations, Inc.*,[29] the plaintiff sued her former employer for unpaid wages and overtime due to misclassification of employee status under the FLSA and for unlawful retaliatory discharge in violation of the FLSA. The plaintiff alleged "that as a consequence of her repeatedly asking that she be paid as a full-time employee, she suffered retaliation and was placed on the weekend shift indefinitely."[30] To make out a prima facie case of retaliation under the FLSA the plaintiff must show that they engaged in a protected activity, subsequently suffered an adverse action, and a causal connection existed between the activity and the adverse action.[31] Filing a complaint, "that is sufficient[ly] clear and detailed [that] a reasonable employer [would] understand it . . . as an assertion of rights protected by the statute,"[32] is a protected activity under the FLSA. The defendant argued that the plaintiff never lodged a sufficiently clear and detailed complaint. In response, the plaintiff contended that she raised the issue with her supervisor of her misclassification as a producer when she was doing a reporter's job and as a freelancer when she was working as a full-time

[27] *Id.* at *3.

[28] 544 F. Supp. 3d 456 (S.D.N.Y 2021).

[29] 2022 WL 1274049 (S.D. Fla. Mar. 1, 2022).

[30] *Id.* (internal citations omitted).

[31] *Id.* at *7; *see* Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342–42 (11th Cir. 2000).

[32] *Id.* at *7 (quoting Kasten v. Saint–Gobain Performance Plastics Corp., 563 U.S. 1 (2011)).

employee. The court explained that "[e]ven if these are considered 'complaints, 'being misclassified as a producer or freelancer is not actionable conduct under the FLSA."[33] Thus, the court concluded, the plaintiff "failed to establish that she was engaged in a protected activity, and her claim fails on the first element."[34] Even though the retaliation was destined to fail, the court continued its analysis of the claim and similarly found the evidence on other elements insufficient to go to a jury. For the second element, the court explained that neither alleged adverse employment action—i.e., staffing Plaintiff on the weekend shift indefinitely and not immediately assigning her to cover to the Parkland Shooting story—constituted "adverse employment decisions sufficient to support an FLSA retaliation claim."[35] The plaintiff alleged she was "humiliated" and "made an example out of" in front of her peers, but that was not sufficient. The FLSA requires a tangible employment action that substantially alters employment, and there is no evidence the two alleged adverse employment actions "altered her compensation, terms, conditions, or privileges of employment or affected her status as an employee."[36] Lastly, the plaintiff also failed to establish causation. Even though there was temporal proximity between when the plaintiff spoke with her supervisor and the Parkland Shooting story, there was no evidence that the executive producer was aware of her complaints, which is a requirement for the causation element.

In *Shaffer v. IEP Techs., LLC*,[37] the question before the court was "whether a time span of slightly more than three months between the filing of an FLSA litigation complaint by an employee and that employee's termination is sufficiently proximate to provide the foundation for a retaliation case."[38] The court noted that First Circuit precedent does not reveal a bright line rule identifying the outer limits of the temporal proximity between the protected activity and adverse action that is sufficient to support an inference of retaliation. But, after reviewing the record and the corroborating causal evidence, the court concluded that "a gap of just over three months is sufficiently proximate to justify permitting the case to proceed to resolution by a factfinder."[39] Because there was no direct evidence, the court applied the three-step burden-shifting analysis. First, the court identified that the plaintiff participated in FLSA litigation and filed an FLSA action against defendant, which constitutes protected activity. Second, the court notes that the plaintiff was terminated, which is the quintessential adverse employment action. The plaintiff also experienced changes in job assignments and written reprimands, but the court found these did not qualify as adverse employment actions. Last, the court looked at the causation piece. Typically, temporal proximity supports a causation inference, but that inference weakens with time. The inference can survive a lack of close proximity if time is only one factor and retaliation is reinforced by other evidence corroborating an inference of retaliation. Here, there was a gap of three months between filing the FLSA action and his termination. Despite the lack of temporal

[33] *Id.* (citing Altare v. Vertical Realty MFG, Inc., 2020 WL 209272 (S.D. Fla. Jan. 14, 2020)).

[34] *Id.* at *8.

[35] *Id.* at *8.

[36] *Id.* at *8.

[37] 557 F. Supp. 3d 191 (D. Mass. 2021).

[38] *Id.* at 195.

[39] *Id.*

proximity, the court recognized that the other corroborating evidence presented, which was relied on by defendant to justify the termination, suggested pretext. This led the court to find "that the gap of less than three and half months between his filing of the instant FLSA suit and his termination suffices to establish a prima facie case in the summary judgment record now before me."[40]

IV. Protected Activities Under Section 215(a)(3)

A. Generally

In *Girling v. JHW Servs., LLC*,[41] the district court rejected standards that limited actionable retaliation to ultimate employment decisions. The court held that the plaintiff's allegation that within a few weeks of his lawsuit alleging substantive FLSA violations, the defendant supplied false information to the North Dakota unemployment agency, causing him to "to lose critically necessary unemployment benefits," was sufficient to plead a materially adverse action.

In *Garner v. Int1 Union, United Auto., Aerospace & Agric. Implement Workers of Am.*,[42] the defendant moved to dismiss the plaintiff's complaint. As it related to the plaintiff's FLSA retaliation claim against her labor organization, the court agreed with the defendant labor organization that the plaintiff (proceeding pro se) had not alleged any casual connection between his EEOC Charge and the defendant's purported retaliatory conduct. Specifically, the court noted that the plaintiff alleged that "the only justification for [the defendant's actions or inactions] was . . . [the plaintiff's] interaction with the EEOC." The court noted, however, that absent from the Complaint were any allegations regarding the date that the EEOC Charge was filed or that the defendant even had notice that the plaintiff had filed an EEOC Charge prior to taking any allegedly adverse actions. Because of that deficiency, the court granted defendant's motion to dismiss the FLSA claim but denied defendant's request that the claim be dismissed "with prejudice," as the defendant did not present any legal authority supporting its request, and it was not obvious that any amendment would be futile.

B. Filing Any Complaint: "Fair Notice"

1. Internal Complaints

In *Williams v. Vapor Rising, Inc.*,[43] the plaintiff, a retail employee, filed a claim against a vape shop, for retaliation under the FLSA. Each party filed a motion for summary judgment; the court denied both. The plaintiff based her retaliation claim on her allegation that she verbally told the defendant that it had created fraudulent payroll records. The defendant denied that such was protected activity. The court rejected the

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[40] *Id.* at 212.

[41] 2022 WL 80279 (W.D. Tex. Jan. 7, 2022).

[42] 2022 WL 860613 (D. Colo. Mar. 23, 2022), *report and recommendation adopted sub nom.* Garner v. Int'l Union, United Auto., Aerospace & Aric. Implement Workers of Am., 2022 WL 1102526 (D. Colo. Apr. 13, 2022).

[43] 2022 WL 939911 (M.D. Fla. Feb. 24, 2022), *report and recommendation adopted*, 2022 WL 911735 (M.D. Fla. Mar. 29, 2022).

defendant's position and noted that "to be considered a protected activity, an employee is not required to make a formal complaint under the FLSA to an employer; rather informal complaints that implicate the statute are satisfactory."[44] Therefore, the plaintiff's complaints about pay records being fraudulent constituted protected activity under the FLSA.

2. Complaints by Managers and Human Resources Personnel

In *Johnson v. Eldor Auto. Powertrain USA, LLC*,[45] a manager filed suit claiming retaliation by his former employer, a manufacturer of automotive ignition oils. The plaintiff was discharged after he orally and through email raised concerns to the defendant about salaried employees working over 40 hours without overtime compensation being a violation of Virginia law. The plaintiff proposed that those employees receive bonuses after fifty-five hours of work or compensatory time off. In the few weeks that followed, the plaintiff raised complaints about employees being overworked but did not again reference any law. Shortly thereafter, the defendant terminated the plaintiff's employment, citing poor performance. The defendant moved for summary judgment on the plaintiff's retaliation claim, arguing that the plaintiff did not engage in protected FLSA activity and even if he had, he did not give the defendant sufficient notice that he was participating in an FLSA-protected action. The plaintiff argued that, taken together, his oral and written complaints amounted to filing an FLSA intracompany complaint, which provided the defendant with adequate notice of its alleged FLSA violation. The district court disagreed, reasoning that the plaintiff's complaints at most made a confused reference to the FLSA and that the complaints did not explain why the salaried employees would be entitled to overtime compensation. The court said the plaintiff's "amorphous mention" of possible wage law violations were insufficient to warrant protection under the FLSA. Moreover, the district court held that the plaintiff's advice to the defendant to look into whether it was violating the FLSA was inadequate to give the defendant notice that the plaintiff was engaging in FLSA protected activity or asserting a FLSA violation. Accordingly, the district court granted the defendant summary judgment on the plaintiff's FLSA retaliation claim.

3. "Good Faith" Requirement

In *Schneider v. Scottsdale Unified Sch. Dist. No. 48*,[46] a teacher, filed suit for retaliation alleging constructive discharge against a school district. The defendant filed a motion to dismiss. The plaintiff had agreed to take on extra responsibilities after regular school hours, for which she would be paid under a separate billing code. When payment was not forthcoming, she filed a demand for payment and request for clarification with human resources. She claimed numerous acts of retaliation, took medical leave, rejected several possible resolutions presented by the defendant, and ultimately resigned. To establish retaliation, an employee, even if they are wrong about the underlying merits of their complaint, must have a good faith belief that the activity fairly

[44] 2022 WL 93911, at *5 (citations omitted).

[45] 2022 WL 97180 (W.D. Va. Jan. 10, 2022).

[46] 2022 WL 901418 (D. Ariz. Mar. 28, 2022).

falls within the protection of the FLSA. The district court dismissed the complaint, ruling that the plaintiff had no reasonable belief, as an exempt teacher, that the action of the employer in failing to pay her for her additional activities was unlawful.

V. Prohibited Conduct Under Section 215(a)(3)

A. Constructive Discharge

In *Hodge v. N.C. Dep't of Pub. Safety*,[47] the plaintiff, a corrections officer, filed suit against his former employer, the state department of public safety, for retaliation. The plaintiff alleged that he was subjected to an investigation after he complained about employees not being paid for all hours worked. Upon being informed of the investigation, the plaintiff resigned. The plaintiff claimed he was constructively discharged from his employment. The district court rejected the claim and held that the employer simply threatening to open an investigation into the correction officer's off-duty-conduct while in uniform, which could lead to his termination, did not amount to a working condition that was so intolerable or unbearable that he was forced to resign.[48]

D. Retaliatory Lawsuits

In *Johnson v. Helion Techs., Inc.*,[49] two technician employees filed a collective action against an information technology company claiming that the defendant failed to properly pay them overtime wages. Another employee filed his consent to join the action. Less than one month after that employee filed his consent, the defendant filed a state court lawsuit against him for breach of his employment contract, which was eventually merged into the federal action as a counterclaim. The plaintiffs successfully amended their complaint to add a count for retaliation under the Fair Labor Standards Act ("FLSA"), claiming that the defendant initiated a retaliatory lawsuit against the employee for joining the collective action. The plaintiffs moved for summary judgment on, among other things, the FLSA retaliation claim. The district court found that the plaintiffs established that (1) the employee engaged in FLSA protected activity by joining the lawsuit, (2) the defendant had knowledge of the employee's protected activity, (3) the employee suffered an adverse employment action when the defendant filed a lawsuit in response to the FLSA action against it, and (4) a causal connection existed due to the close temporal proximity between the employee's participation in the lawsuit and the claim filed against him. The defendant argued that it had a legitimate, non-retaliatory reason for filing the lawsuit—namely; the employee breached his employment contract. The district court disagreed, finding that the defendant's breach of contract claim, which did not survive summary judgment, was "totally baseless." Accordingly, no showing of pretext was required, and the district court granted summary judgment in the plaintiffs 'favor on the FLSA retaliation claim.

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[47] 2021 WL 2652953 (W.D.N.C. June 18, 2021).

[48] *Id*. at *5–6.

[49] 2021 WL 3856239 (D. Md. Aug. 27, 2021).

VII. Remedies

B. Monetary Damages

4. Compensatory and Punitive Damages

b. Punitive Damages

In *Shroyer-King v. Mom-N-Pops, LLC,*[50] the plaintiff, a server and cook, sued her former employer-restaurant and its owners for violations of the FLSA and various state laws. The plaintiff sought punitive damages but did not claim that any of the alleged FLSA violations amounted to retaliation. The defendant moved to dismiss the claim for punitive damages. The court granted the motion, noting that punitive damages are available only in retaliation claims.

In *Genc v. Imperial Pacific Int1 (CNMI), LLC*,[51] construction workers filed suit against a construction company for unpaid wages and retaliation under the FLSA. The matter came before the district court on the plaintiffs' motion for default, which was granted on plaintiffs' FLSA retaliation claims. The district court held that punitive damages are available for retaliatory conduct and articulated three "guideposts" in reviewing punitive damages: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The court found the defendant's conduct of cutting off drinking water, food supply, and internet services and ultimately refusing to pay the plaintiffs to be sufficiently reprehensible to warrant punitive damages. But, the court found that the plaintiffs request for punitive damages three times the amount of the total unpaid wages and liquidated damages owed was not proportionate to the reprehensibility of defendant's behavior, since "punitive damages must be limited to incidents of retaliation" occurring over one month and involving two pay periods. To calculate an appropriate amount of punitive damages, the court considered the (1) contractual wages owed during the retaliation period; (2) overtime owed; and (3) liquidated damages owed. The court then factored those amounts against multipliers based on the egregiousness of the defendant's retaliatory conduct and the impact on each plaintiff.

C. Attorneys' Fees and Costs

In *Hager v. Omnicare, Inc.*,[52] a certified collective action of 1,231 delivery drivers servicing pharmaceutical customers filed suit against their employer seeking unpaid overtime and minimum wage. The parties agreed to settle the FLSA claims for $11.9M. Of the total settlement amount, around $3.9M was allocated to the attorney fee and cost award. This agreed amount is 2.84 times the lodestar calculation. The court found this represented a fair and reasonable amount given years of extensive and complex litigation culminating in the settlement agreement.

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[50] 2021 WL 5055662 (W.D. Pa. Nov. 1, 2021).

[51] 2022 WL 542176 (D.N. Mar. Feb. 24, 2022).

[52] 2021 WL 5311307 (S.D.W.V. 2021).

In *Hall v. National Metering Services, Inc.*,[53] the plaintiffs brought a putative collective and class action alleging failure to pay overtime wages. After discovery, the parties reached a settlement agreement that provided less than $2,000 in additional payments to three employees, in addition to $4,250 in attorney fees at a rate of $300 per hour for approximately fifteen hours of work. The court noted that it could use a lodestar analysis or a percentage of recovery analysis as the circumstances warranted. Here, counsel for the plaintiffs claimed fifteen hours of work for investigating the claim, interviewing witnesses, opposing a motion to dismiss, and other related activities. The court found the hours spent and hourly rate to be reasonable and approved the fee award.

[53] 2021 WL 3511127 (D.N.J. Aug. 9, 2021).

Chapter 14

RECORDKEEPING

II. Recordkeeping Requirements for Employees Subject to the Minimum Wage and/or Overtime Pay Provisions of the FLSA

A. Records Generally Required for Employees Subject to the Minimum Wage and/or Overtime Provisions of the FLSA

In *Walsh v. Fusion Japanese Steakhouse, Inc.*,[1] the Secretary of Labor for the United States Department of Labor brought an action against the defendant restaurants and restaurant owners for failing to keep employment records required by the FLSA. The Secretary alleged that the defendants did not keep the following required information for each employee: (1) the employee's full legal name; (2) the employee's complete home address; (3) the employee's date of birth if under nineteen years old; (4) the employee's gender and job title; (5) the hours worked each day and total for workweek; the straight-time wages for the workday and workweek; and (6) total overtime pay for hours worked over 40 in a workweek. The defendants asserted several reasons for the failures, including discarding the documentation, not keeping full names because they were too long and difficult to remember, and blaming the employees for "refusing" to keep the records. The court held the defendants' duty to maintain accurate records was non-delegable and entered summary judgment in the plaintiff's favor.

III. Recordkeeping Requirements for Employees With Unique Pay Systems Under Section 207 of the FLSA

D. Employees Paid on the Basis of "Applicable" Rates (Section 207(g)(1) or 207(g)(2))

In *Pilot v. City of Yonkers*,[2] a police officer brought an overtime claim against the city defendant for time spent caring for his police canine at home. The defendant moved for summary judgment on whether it compensated the police officer pursuant to an agreement in accordance with 29 U.S.C. § 207(g)(2). The district court denied the defendant's motion, ruling that even if the union and the defendant's negotiated memorandum of understanding set an $8.00 hourly rate for at-home canine care, the defendant did not prove that it compensated the police officer at one-and-one-half times that hourly rate. Internal city documents interchangeably referred to an $8.00 hourly rate and an $8.00 daily rate for at-home canine care. Further, the defendant compensated the police officer at an $8.00 daily rate, but the payroll records did not indicate the time the payment was intended to cover. Finally, the police chief testified that the defendant had no method of computing the correct rate of pay. Thus, the defendant could not meet its burden of demonstrating that it compensated the police officer at a rate of one-and-one-half times the rate set in the memorandum of understanding.

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[1] 548 F. Supp. 3d 513 (W.D. Pa. 2021).

[2] 2021 WL 4429839 (S.D.N.Y. Sept. 27, 2021).

VI. Violation of Recordkeeping Requirements

A. Actions by the Secretary of Labor

In *Sec'y of Lab. v. Valley Wide Plastering Constr. Inc.*,[3] the plaintiff alleged the defendant construction company failed to pay overtime, maintain records, and interfered with employees' FLSA rights. The court granted the plaintiff's motion for a preliminary injunction, and the plaintiff filed a motion for civil contempt sanctions. The plaintiff alleged the defendant violated the injunction by failing to keep accurate records of the hours worked and wages paid to employees, employees' regular rates, and employees' contact information. The plaintiff supported its motion for contempt with testimonial evidence of surveillance that showed approximately two dozen instances where employees were observed at job sites without their time being recorded. The plaintiff also provided evidence of timesheets with erasure marks, timesheets with uniform time entries that drew doubt as to their accuracy, and timesheets that appeared to be completed by someone other than the employee. The court further determined the defendant's payroll records contained false regular rates. The court granted the plaintiff's motion for sanctions in part, holding that the defendant did not take reasonable steps to ensure that it maintained accurate time and pay records. The court denied the motion in part, holding that even though some employee contact information was incorrect, the defendant took reasonable steps to maintain updated employee contact information by inserting change of address forms in employee paychecks. The court deferred ruling on the plaintiff's request for imposition of a fine, but awarded the plaintiff reasonable attorneys' fees and investigative costs.

[3] 2022 WL 1423589 (D. Ariz. May 5, 2022).

Chapter 15

DEPARTMENT OF LABOR

ENFORCEMENT AND REMEDIES

II. Department of Labor Investigations

B. Conducting Investigations

4. Employee Interviews and the Informer's Privilege

In *Walsh v. Medstaffers LLC*,[1] the Secretary of Labor of the United States Department of Labor filed a lawsuit against the defendant, an in-home healthcare services company, for FLSA violations. The Secretary filed a motion for a preliminary injunction to enjoin further violations and sought to support the motion with statements the Department collected during its investigation. Because employees expressed concern over providing statements to the Department, the Secretary invoked the informer's privilege, did not provide the statements to the defendant, and provided the statements to the court *in camera.* The defendant objected to the invocation of the informer's privilege, and the court agreed the Secretary could not invoke the informer's privilege if it used the statements to support the motion for preliminary injunction because it would deprive the defendant of the ability to adequately prepare its defense. The court provided the Secretary with two options: (1) invoke the privilege and not use the statement to support the motion; (2) waive the privilege and submit the statements into the evidence.

IV. Actions for Injunctive Relief

D. Temporary Restraining Orders and Preliminary Injunctions

1. Authority to Seek Preliminary Relief

In *Pineda v. Skinner Servs., Inc.*,[2] the plaintiff laborers alleged the defendant construction company and its owners and managers violated the FLSA by requiring employees to work off-the-clock and by taking involuntary deductions from employees' wages. The plaintiffs filed a motion for a preliminary injunction because they were concerned the defendants would dissipate their assets. The district court granted the motion restricted the defendants from selling and transferring their assets. The defendants appealed, arguing that the court did not have the power under Rule 65 of the Federal Rules of Civil Procedure to prevent a party from disposing of its assets. The appellate court affirmed the district court's ruling, holding that the court had authority to grant injunctive relief under Rule 64 of the Federal Rules of Civil Procedure, which authorizes a court to use the state's prejudgment remedies. The appellate court concluded the relief the district court granted was authorized under Massachusetts law. The appellate court also held that the Norris-LaGuardia Act, which governs injunctions in cases involving labor disputes, did not divest the district court of jurisdiction because

[1] 2021 WL 5505825 (M.D. Pa. Nov. 24, 2021).

[2] 22 F.4th 47 (1st Cir. 2021).

the Norris-LaGuardia Act does not apply to claims brought under the FLSA for unpaid wages.

2. Proof and Procedure

In *Walsh v. Medstaffers LLC,*[3] the Secretary of Labor of the United States Department of Labor filed a lawsuit against the defendants, an in-home healthcare services company and its chief executive officer, for FLSA violations. The Secretary contemporaneously moved for a temporary restraining order and preliminary injunction pending resolution on the merits of the claims. As a threshold inquiry, the court examined whether the Secretary proved he was likely to succeed on the merits and irreparable harm if the relief was not granted. The court determined neither element was satisfied and declined to examine the remaining two factors: the harm the defendants would face if the relief was granted and the public interest in the relief. The court denied the motion, reasoning that the Secretary did not submit evidence that the defendants were interfering with the Department's investigation or retaliating against employees for cooperating with the investigation. The court also concluded the Secretary failed to satisfy the element of irreparable harm because he proffered no evidence that any violation was ongoing.

[3] 2021 WL 5505825 (M.D. Pa. Nov. 24, 2021).

Chapter 16

LITIGATION ISSUES

II. Subject Matter Jurisdiction and Venue

A. Subject Matter Jurisdiction

1. Federal Courts' Original Jurisdiction Over FLSA Claims

In *Ferrer v. Atlas Piles, LLC*,[1] the plaintiff laborer alleged the defendant violated the FLSA by failing to pay him overtime wages. The defendant filed a motion to dismiss, arguing that the district lacked subject matter jurisdiction because there was no enterprise coverage under the FLSA. The court denied the defendant's motion to dismiss, holding that the issue of enterprise coverage was a substantive question and not a jurisdictional one. The court agreed with the weight of authority in other circuits and held that because the FLSA does not state that enterprise coverage is a jurisdictional question, it must be a substantive one. Because the plaintiff's complaint alleged the defendant was a covered enterprise under the FLSA, the court held defendant's Rule 12(b)(1) motion was not an appropriate motion to file and declined to convert the defendant's motion to dismiss into a motion for summary judgment.

2. Federal Courts' Supplemental Jurisdiction Over State Law Claims in FLSA Cases

In *Johnson v. Corp. Express, Inc.*,[2] a driver filed suit against his employer for alleged violations of the minimum and overtime wage provisions of the FLSA and for alleged violations of the spread of hours, overtime wage, and wage statement provisions of the NYLL. The defendant asserted counterclaims for faithless servant and unjust enrichment, alleging that the plaintiff engaged in a scheme to use the company credit card to improperly purchase gas for other individuals in exchange for cash. The plaintiff moved to dismiss the defendant's counterclaims for lack of subject matter jurisdiction, arguing that the counterclaims lacked an independent basis for federal question or diversity jurisdiction. The court granted the plaintiff's motion. Although the defendant asserted that its counterclaims were compulsory, the court disagreed. The court explained that a counterclaim is compulsory when there is a "logical relationship" between the counterclaim and the main claim, and the "logical relationship" test is satisfied if the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit. The court held that the defendant's counterclaims did not have a logical relationship to the plaintiff's wage and hour claims because there was no basis to infer that the plaintiff conducted his scheme during working hours or that the scheme interfered with the performance of the plaintiff's job. The court further declined to exercise supplemental jurisdiction over the defendant's counterclaims because the plaintiff's claims and the defendant's counterclaims did not stem from a common nucleus of operative facts. The court reasoned that the defendant, other than relying on

[1] 2022 WL 483215 (S.D. Fla. Feb. 16, 2022).

[2] 2022 WL 992633 (E.D.N.Y. Mar. 31, 2022).

the employment relationship, failed to identify any factual overlap between its counterclaims and the plaintiff's claims.

In *Bermudez v. Rivera Services Group Inc.*,[3] the defendant filed a motion to dismiss the plaintiff's remaining, singular state law retaliatory discharge claim after the plaintiff's FLSA claims were dismissed following the court's approval of a settlement of the FLSA claims. The court declined to exercise supplemental jurisdiction over the plaintiff's remaining state law claim. The plaintiff argued that the district court should retain jurisdiction because she planned to amend her complaint to include additional federal claims when she received a right-to-sue letter from the EEOC. The court noted that 28 U.S.C. § 1367(c) permits a federal court to decline to exercise supplemental jurisdiction where it "has dismissed all claims over which it had original jurisdiction…." and that interests in comity supported the dismissal of claims arising under state law that are "best suited for determination by [a state] court."

In *de Cortes v. Brickell Inv. Realty, LLC*,[4] a real estate agent brought an overtime lawsuit under the FLSA against her former employer. The plaintiff also brought claims for false advertising under the Lanham Act and state law claims for tortious interference with a business relationship, defamation per se, and a declaratory judgment that the non-compete the plaintiff signed was unenforceable. The defendant moved to dismiss the state law claims under Rule 12(b)(1) arguing that because the state law claims were not related to the FLSA and Lanham Act claims there was no basis for the district court to exercise supplemental jurisdiction over the state law claims. The court denied the defendant's motion to dismiss, concluding that although the state law claims did not form part of the same case or controversy as the FLSA claim, they did form part of the same case or controversy as the Lanham Act claim.

3. Removal of FLSA Actions From State to Federal Court

In *JSW Diversified, L.L.C. v. ATMA Energy, LLC*,[5] the plaintiff filed a lawsuit asserting two state law claims against the defendants in a Texas state court. One of the defendants asserted counterclaims and filed a third-party claim alleging violations of the FLSA. The plaintiff and third-party removed the action to federal court, and once there, one of the defendants filed a motion to dismiss. The court independently identified jurisdictional problems and ordered the parties to show cause why the matter should not be remanded to state court. The plaintiff and third-party conceded that removal based on the FLSA counterclaim was procedurally defective, but they argued that the defendant waived the procedural defect by not timely moving to remand the matter within 30 days. The federal court disagreed and determined the jurisdictional defect was not procedural in nature and was not subject to waiver. The court remanded the case back to state court, holding that it lacked original jurisdiction over the matter because removal of a state action based on federal counterclaims is not permitted.

[3] 2022 WL 409588 (S.D. Fla. Feb. 10, 2022).

[4] 546 F. Supp. 3d 1332 (S.D. Fla. 2021).

[5] 2022 WL 1121421 (W.D. Tex. Apr. 13, 2022).

In *Perez v. Anchor Construction Corp.*,[6] the plaintiffs filed a complaint in the Superior Court of the District of Columbia alleging the defendants violated the D.C. Minimum Wage Act and the D.C. Wage Payment and Collection Law. The plaintiffs later amended the complaint to assert a claim under the FLSA. The defendants removed the action to federal court, and the plaintiffs filed a motion to remand, arguing that the removal documents were defective and the defendants were time barred from correcting the deficiencies. The court denied the plaintiffs' motion to remand. The court determined that the fact that the defendants had mistakenly cited to the diversity jurisdiction statute rather than the federal question jurisdiction statute did not make the original removal untimely when, after the 30-day period for removal, the defendants requested and received permission from the court to amend the original notice of removal. The citation to a different removal statute did not constitute a "new basis" for removal because despite the citation to the diversity jurisdiction statute, the defendants had made clear in the original notice that the reason for the removal was based on the plaintiff's assertion of a federal claim. In addition, the court determined the defendants' failure to include all items required from the state court docket with the notice of removal was a procedural error and not sufficient grounds for remand.

B. Venue

In *Paunovic v. OBI Seafoods, LLC,*[7] the plaintiff fish processors filed suit in a Washington district court alleging the defendants violated the FLSA and Alaska law by failing to pay them minimum wages and by delaying the payment of their wages. The plaintiffs resided in Serbia, but they had worked for the defendants in Alaska. The defendants, who operated fish processing facilities in Alaska, were Washington limited liability companies with principal offices in Seattle. The defendants filed a motion to transfer venue to Alaska pursuant to 28 U.S.C. § 1404(a), which the court denied. In reaching its decision, the court relied on the plaintiffs' choice of forum and the location of the defendants' principal offices where the defendants' policies, procedures and pay decisions were made and created. Based on these facts, the court concluded the defendants failed to show good cause sufficient to warrant a transfer of venue from Washington to Alaska.

In *Coffin v. Magellan HRSC, Inc.*,[8] several care managers filed a class and collective action alleging the defendant health care company misclassified them as exempt and failed to pay them overtime wages in violation of the FLSA and California law. The action, which was filed in a California state court, was removed to a district court in California and then subsequently transferred to a district court in New Mexico under the first-to-file rule. The California district court transferred the case to New Mexico, in part, because the plaintiffs had opted-in to a first-filed FLSA collective action pending in federal court in New Mexico. The plaintiffs withdrew their consents from the collective action pending in New Mexico, and they filed a motion to transfer venue back to the California district court. The district court in New Mexico denied the plaintiffs'

[6] 2022 WL 1124783 (D.D.C. Apr. 14, 2022).

[7] 2021 WL 6112650 (W.D. Wash. Dec. 27, 2021).

[8] 2021 WL 2589732 (D.N.M. 2021).

motion to transfer venue. The court determined it was bound to follow the Tenth Circuit's law-of-the-case doctrine, which favors upholding the prior orders of the transferor court unless a change of law occurred, new evidence became available, or a clear error occurred. The court also declined to apply law from the Fifth Circuit holding that a transfer order may be reconsidered if an unanticipated, post transfer change in circumstances occurred, concluding that the Tenth Circuit was unlikely to adopt that principle and that the plaintiffs' withdrawal from the collective action did not constitute an unanticipated post-transfer change of circumstances. The court also rejected the plaintiffs' contention that the court did not have personal jurisdiction over them following their withdrawal from the first-filed collective action. The court concluded that beyond the filing of the consent forms, which demonstrated an explicit consent to personal jurisdiction in New Mexico, the plaintiffs impliedly consented to personal jurisdiction in New Mexico because they filed a second, similar action that had a high likelihood of being transferred to where the first-filed action was pending.

C. Consolidation and Transfer

1. Section 1404 Transfer and Forum Non Conveniens

In *Hays v. Kimco Facility Servs., LLC*, [9] the plaintiff cleaner filed a collective action lawsuit in a district court in Illinois and alleged the defendant janitorial and maintenance service company violated the FLSA by failing to pay her and other similarly situated employees overtime wages. The plaintiff also alleged the defendant retaliated against her by reducing her work assignments after she complained. The defendant moved to dismiss the case for improper venue or alternatively to transfer the case to a district court in Missouri. The court granted the defendant's motion to transfer under 28 U.S.C. § 1404(a). The court considered three factors: the parties' convenience, the witnesses' convenience, and the interests of justice; and it determined the convenience factors weighed in favor of transfer. Specifically, the court concluded the material decisions and activities concerning the merits of the case were far more connected to Missouri than Illinois, because the key business decisions were made in Missouri, the plaintiff worked in Missouri, and the plaintiff submitted her timecards in Missouri. Additionally, the convenience factors favored transferring the case to Missouri because the witnesses lived in Missouri. Finally, the court held the interest of justice consideration also weighed in favor of transfer because Missouri was at the center of the controversy and the state most interested in resolving the controversy.

In *Olin-Marquez v. Arrow Senior Living Management, LLC*,[10] the plaintiff care partner alleged the defendant senior residential facility violated the FLSA by failing to pay her and other Ohio-based employees overtime wages. The district court denied the defendant's motion to transfer the case to a district court in the defendant's home state of Missouri where a parallel collective action was pending. The court evaluated section 1404(a)'s private interest factors and concluded: (1) the plaintiff's choice of forum strongly weighed against transfer because the plaintiff worked in Ohio and had explicitly cabined her action to Ohio workers; (2) although allegations of company-wide pay

[9] 2021 WL 4459476 (N.D. Ill. Sept. 29, 2021).

[10] 2022 WL 479781 (S.D. Ohio Feb. 17, 2022).

policies that violated the FLSA might require the defendant's executives to travel to Ohio, that burden did not outweigh the burden the plaintiff and members of the FLSA collective would face if required to litigate in another state; (3) the action would require testimony from Ohio-based witnesses; and (4) the implementation of the defendant's company-wide policies took place in Ohio and allegedly injured its Ohio-based employees. The court also evaluated section 1404(a)'s public-interest factors and concluded: (1) the conservation of judicial resources did not warrant transferring the action away from the plaintiff's home state because, in holding that district courts lack specific personal jurisdiction over out-of-state plaintiffs in FLSA claims, the Sixth Circuit's *Canaday*[11] decision acknowledged that parallel state based collective actions would arise; (2) the docket-congestion factor was neutral because the court's statistically heavy caseload arose from its handling of a large multidistrict litigation; (3) Ohio's keen interest in remedying the economic injuries of its workers, particularly those arising from violations of Ohio law, was best vindicated by adjudicating the plaintiff's claims in Ohio; and (4) the transfer of the case could undermine the plaintiff's ability to pursue her relatively modest claims in her home forum and thereby chill future FLSA actions.

In *Green v. Perry's Restaurants LTD*,[12] the plaintiff servers alleged the defendant restaurants and its owner violated the minimum wages provisions of the FLSA and Colorado state law by engaging in unlawful tip-pooling practices. The plaintiffs also alleged the defendants failed to provide meal and rest periods in violation of Colorado state law. One of the corporate defendants was headquartered in Texas and the other in Colorado. The corporate defendant that was headquartered in Texas filed a motion under 28 U.S.C. § 1404(a) requesting that the case be transferred to a district court in Texas. The district court denied the defendant's motion, holding that none of the factors favored transfer under section 1404 because: (i) the defendant did not identify particular witnesses who would be inconvenienced by travel, conceded that the parties could conduct depositions remotely, and evidence demonstrated that defendant's employees routinely traveled for work; (ii) although the defendant's assets were located in a state other than the state where the action was filed, courts routinely issue judgments that require satisfaction by out-of-state parties; (iii) the defendant offered no argument or evidence that the selected forum would interfere with its right to a fair trial; (iv) the median time interval of case disposition in each forum was not significantly different; and (v) the defendant's arguments as to convenience due to practical considerations were merely conclusory and therefore insufficient to overcome the plaintiffs' choice of forum.

III. FLSA Claims in Arbitration

A. Arbitrability of FLSA Claims

In *Johnson v. Parsley Energy Operations, LLC*,[13] the plaintiff drilling fluids consultant alleged the defendant violated the FLSA by misclassifying him as an

[11] Canaday v. Anthem Companies, Inc., 9 F.4th 392 (6th Cir. 2021).

[12] 2021 WL 5038824 (D. Colo. Oct. 29, 2021).

[13] 2022 WL 113259 (W.D. Tex. Feb. 14, 2022).

independent contractor and by not paying him any overtime wages. The defendant filed a motion to compel arbitration on the basis that it was entitled to enforce an arbitration provision in an agreement between the plaintiff and a third-party staffing company that provided the plaintiff's services to the defendant. The court denied the defendant's motion, holding that intervening precedent from the Fifth Circuit in *Newman v. Plains All Am. Pipeline, L.P.*[14] provided the court, as opposed to the arbitrator, with the authority to determine whether the defendant nonsignatory customer could compel the dispute to arbitration notwithstanding the existence of a delegation clause in the arbitration agreement. The court went on to conclude the express language of the arbitration agreement did not permit the defendant customer to enforce the staffing company's arbitration agreement. The court also rejected the defendant's argument that the matter should be compelled to arbitration under a theory of intertwined claims estoppel because (1) the relationship between a staffing company and its customer did not rise to the level of a "close relationship" and; (2) the plaintiff's federal, statutory claims under the FLSA do not arise out of the employment agreement and therefore were not claims that were "'intimately founded in and intertwined with'" the agreement between the plaintiff and the third-party staffing company.

In *Rogers v. Tug Hill Operating,*[15] the plaintiff contractor alleged the defendant oil and gas company violated the FLSA by paying him and other employees a day-rate without paying any overtime wages for the time they worked over 40 hours a week. The defendant filed a motion to dismiss, arguing that the plaintiff's claims should be dismissed and compelled to arbitration because the defendant was a third party beneficiary to an arbitration provision in an independent contractor agreement between the plaintiff and another entity that facilitated the plaintiff's work for the defendant. The court granted the defendant's motion to dismiss, determining that the defendant could enforce the arbitration provision in the independent contractor agreement between the plaintiff and the third-party. As an intended third-party beneficiary of the independent contractor agreement, the defendant had the right to enforce the provisions of the agreement, and the court lacked subject matter jurisdiction over the claim.

In *Fox v. Berry*,[16] the plaintiff electrician alleged the defendants violated the FLSA and Pennsylvania state law by paying him straight time for the overtime hours he worked. The defendants filed a motion to compel arbitration, and the district court denied the motion without prejudice. Because it was not apparent that the plaintiff's claims were subject to an enforceable arbitration provision, the court ordered the parties to engage in discovery to develop facts relating to whether a valid arbitration agreement existed.

In *Ross v. Subcontracting Concepts, LLC*,[17] the plaintiff delivery driver alleged the defendants violated the FLSA by misclassifying drivers who performed last-mile delivery services as independent contractors and by failing to pay them minimum and

[14] 23 F.4th 393 (5th Cir. 2022).

[15] 2022 WL 1096620 (N.D. W. Va. Apr. 12, 2022).

[16] 2021 WL 4100353 (M.D. Pa. Sept. 8, 2021).

[17] 2021 WL 6072593 (E.D. Mich. Dec. 23, 2021).

overtime wages. The defendants filed a motion to compel arbitration, and the court granted the motion and stayed the proceedings pending arbitration. The plaintiff opposed the defendants' motion, arguing that the arbitration clause in his contract with one of the defendants was unenforceable because he was an exempt transportation worker under Section 1 of the FAA. The court rejected this argument, finding that the plaintiff was not covered by the exemption because the goods he was delivering already ended their interstate journey, and thus, he was not involved in interstate commerce. Because the plaintiff was not involved in interstate commerce, the court found that it did not need to analyze whether the at issue contract constituted a contract of employment under the FAA.

In *Mason v. Big Star Transit LLC*,[18] the plaintiff was a former rideshare driver who alleged that she was misclassified as an independent contractor in violation of the FLSA. The plaintiff filed a motion to issue notice to potential plaintiffs, and the defendants filed a motion to dismiss and compel arbitration based on a contract between the plaintiff and the defendants that included a dispute resolution clause. The court granted the defendants' motion, finding that the plaintiff's claims related to the contract and were covered by the arbitration clause. The plaintiff argued that her claims were excluded under the FAA because she was a transportation worker engaged in interstate commerce. The court disagreed, concluding that the drivers as a class on a whole did not engage in interstate commerce and the infrequent trips the plaintiff made across states did not convert her into a transportation worker who was engaged in interstate commerce.

In *Ohring v. Unisea, Inc.*,[19] the plaintiff seasonal employee alleged the defendant seafood processing business violated the FLSA and Alaska state law by failing to pay its employees for the time they took to put on and remove protective gear.[20] The defendant moved to compel arbitration, contending that the plaintiff's employment agreement incorporated a dispute resolution agreement and the dispute resolution agreement delegated the question of arbitrability to the arbitrator. The district court disagreed, held it was proper for the court to decide the question of arbitrability, and denied the motion after concluding the dispute resolution agreement was not valid because it was unconscionable. On appeal, the Ninth Circuit reversed and remanded with instructions to stay the case and compel arbitration. The Ninth Circuit held that the dispute resolution agreement contained clear and unmistakable evidence that it delegated the question of arbitrability to the arbitrator. Because the employment agreement incorporated the dispute resolution agreement by reference and because the plaintiff did not argue that the employment agreement, as opposed to the dispute resolution agreement, was procedurally unconscionable, the court held the plaintiff was bound to the delegation clause.

[18] 2021 WL 4948214 (N.D. Tex. Sept. 28, 2021).

[19] 2022 WL 1599127 (9th Cir. May 20, 2022).

[20] Ohring v. Unisea, Inc., 2021 WL 2936641, at *1–3 (W.D. Wash. July 13, 2021), *rev'd and remanded*, 2022 WL 1599127 (9th Cir. May 20, 2022).

In *Oldham v. Nova Mud, Inc.*,[21] the plaintiff filed an FLSA collective action alleging that he and other mud engineers were misclassified as independent contractors by a third-party company to perform work for the defendant and were denied overtime wages. The court denied the defendant's motion to dismiss and/or compel arbitration after rejecting the defendant's argument that it could compel arbitration under the third-party beneficiary theory. The court found that after looking at the contract as a whole, there was no indication the plaintiff and the third party company intended for the non-signatory defendant to benefit from the arbitration provision. The court concluded that the agreement's mention of third parties in other parts of the agreement did not indicate that the parties intended for third parties to benefit from the dispute resolution provision.

In *Durm v. iQor Holdings US LLC,*[22] a debt collector brought claims against her former employer and supervisor under the ADA, FMLA, FLSA, Ohio Minimum Fair Wages Standards Act, and Ohio's anti-discrimination statute for uncompensated pre-shift work, uncompensated time she waited to receive her first call at every shift, and denial of leaves and accommodations related to her osteoarthritis and degenerative joint disease. In granting the defendant's motion to compel arbitration and dismiss the action, the district court held that the arbitration agreement electronically executed by the plaintiff (by clicking "I Agree" and entering the last four digits of her social security number and her birthdate) was valid because her general denial of signing it and argument that she did not remember signing it were insufficient. The court further found that the agreement covered all employment-related claims against not only her employer, but also her supervisor because parties cannot circumvent a promise to arbitrate by simply naming non-signatories, such as plaintiff's supervisor, as defendants. The court further concluded the agreement's delegation clause required the arbitrator to decide issues concerning the agreement's enforceability.

In *Hinkle v. Phillips 66 Co.*,[23] the plaintiff pipeline inspector alleged the defendant energy company violated the FLSA by failing to pay him and other inspectors overtime pay. The third-party company that hired plaintiff to work for its customer, the defendant energy company, moved to intervene, and after that motion was granted, filed a motion to transfer the case to the forum provided in the plaintiff's employment agreement with the third-party company. The defendant energy company and the intervening third-party company also filed a motion to compel arbitration. The magistrate judge denied the motion to compel arbitration, and the district court affirmed the decision. The defendant appealed, and the Fifth Circuit affirmed the denial of the motion to compel arbitration. The Fifth Circuit, following its prior precedent, held that it was upon the court to decide whether the nonsignatory energy company could enforce the arbitration agreement between the plaintiff and the third-party intervenor. The Fifth Circuit further held the defendant energy company could not enforce the arbitration agreement because the plaintiff only promised to arbitrate claims brought against the third-party company and did not agree to arbitrate claims against other entities.

[21] 2021 WL 4066691 (D.N.M. Sept. 7, 2021).

[22] 2022 WL 219323 (N.D. Ohio Jan. 24, 2022).

[23] 35 F.4th 417 (5th Cir. 2022).

In *Ferrell v. Cypress Env't Mgmt–TIR, LL*C,[24] the plaintiff inspector filed a collective action lawsuit against the defendant energy company alleging that it failed to pay him and other employees overtime wages in violation of the FLSA. The third-party company that provided the plaintiff's services to its customer, the defendant energy company, sought and was granted permission to intervene. The defendant and the third-party company filed motions to compel the action to arbitration because the plaintiff's employment agreement with the third-party company contained an arbitration provision. The district court denied the motions to compel arbitration, and the defendant and intervening third-party appealed. The Tenth Circuit reversed the denial of the motions to compel arbitration and followed its recent precedent from *Reeves v. Enter. Prod. Partners,* LP.[25] The Tenth Circuit held that the Oklahoma Supreme Court would recognize the theory of concerted misconduct estoppel. In applying that theory to the facts of the case, the court concluded the plaintiff's claims against the defendant were inherently interdependent on the third-party's conduct given that the third-party employed and paid the plaintiff. The court also concluded that it would not be fair to allow the plaintiff to avoid the application of the arbitration clause by artfully pleading claims against only the party who was not a signatory to the employment agreement containing the arbitration clause. Accordingly, the Tenth Circuit held that the plaintiff was estopped from avoiding arbitration.

In *Scalia v. CE Sec. LLC*,[26] the Secretary of Labor sued two companies who provided parking spotholding services and their owner. The Secretary of Labor alleged that the defendants misclassified the spotholder employees as independent contractors and, in doing so, failed to pay them overtime wages and to maintain adequate records in violation of the FLSA. The defendants moved to compel the Secretary of Labor to arbitration, relying on the arbitration agreements the employees had signed with the defendants. The court denied the motion, holding that the arbitration agreements could not bind the plaintiff head of agency who was not a party to the arbitration agreements. The court further held the private agreements between the employees and the defendants could not be used to frustrate the power of the public agency that was pursuing the interests of the public in litigation.

In *Southard v. Newcomb Oil Co., LLC*,[27] the plaintiff convenience store attendant filed suit alleging the defendant violated the FLSA and Kentucky state law by failing to pay overtime wages, failing to provide meal and rest breaks, failing to timely pay all wages earned, failing to provide statements of wage deductions, and for common law unjust enrichment. The district court denied the defendant's motion to stay pending arbitration, and the Sixth Circuit affirmed, finding the parties did not enter into an enforceable arbitration agreement. In its *de novo* review, the Sixth Circuit considered the three clauses in the plaintiff's application for employment and the employee handbook that could give rise to an enforceable arbitration agreement. The first clause in the plaintiff's employment application stated that a complaint that cannot be resolved

[24] 2021 WL 5576677 (10th Cir. Nov. 30, 2021).

[25] 17 F.4th 1008 (10th Cir. 2021).

[26] 2021 WL 3774198 (E.D.N.Y. Aug. 25, 2021).

[27] 7 F.4th 451 (6th Cir. 2021).

may be referred to alternative dispute resolution. The second clause in the employee handbook stated "you agree to Alternative Dispute Resolution a forum or means for resolving disputes, as arbitration or mediation, that exists outside the state or federal judicial system;" and the third clause in the employee handbook stated that if a conflict could not be resolved, the dispute would be referred to mediation. Based on the language in these three clauses, the Sixth Circuit concluded that the plaintiff and the defendant agreed to alternative dispute resolution generally, but they did not specifically agree to the hallmark of arbitration, a final, binding remedy by a third party.

In *Ayad v. PLS Check Casher of N.Y., Inc.*,[28] the plaintiff laborer alleged the defendant failed to pay him overtime wages in violation of the FLSA and the New York Labor Law and took unlawful deductions from his wages in violation of state law. The defendant moved to compel the plaintiff's claims to arbitration, contending that the plaintiff executed an agreement where he agreed to submit any disputes relating to his employment to arbitration. The court deferred ruling on the defendant's motion to compel arbitration pending a jury trial on the question of whether a valid agreement to arbitrate existed. The court determined a genuine issue of material fact existed as to the authenticity of the arbitration agreement the defendant presented to the court and whether the plaintiff was presented with the terms of the arbitration agreement and agreed to the terms.

In *Campbell v. Keagle Inc.*,[29] the plaintiff entertainer who had signed an agreement with the defendant bar owner containing an arbitration provision filed a FLSA action in federal court in Illinois. The district court denied the defendant's motion to compel arbitration on the basis that it was unconscionable or too favorable to the employer under Illinois law, and the defendant appealed. The Seventh Circuit reversed and held the parties' arbitration agreement was enforceable. On appeal the defendant conceded the provisions allowing the defendant to choose the arbitrator and venue, and the provision requiring the plaintiff to pay all the costs of arbitration, were unenforceable. The Seventh Circuit enforced the arbitration agreement, finding that the unconscionability of certain provisions of the agreement did not make the entire contract as a whole unconscionable.

In *DeSimone v. TIAA Bank*,[30] the plaintiff mortgage loan officers alleged the defendant bank failed to pay them overtime wages in violation of the FLSA and various state laws. The defendant moved to compel three of the named plaintiffs' claims to arbitration, arguing that the arbitration agreement was unconscionable because it referenced the AAA's commercial rules as opposed to the AAA's employment rules. This disadvantaged the plaintiffs because, if applied, the AAA Commercial Rules could make the arbitration more expensive for the plaintiff employees. The plaintiffs also argued that the arbitration agreement prevented them from vindicating their FLSA claims because the agreement required the arbitrations to proceed in Florida even

[28] 2021 WL 4756091 (E.D.N.Y. July 26, 2021), *report and recommendation adopted as modified*, 2021 WL 4272472 (E.D.N.Y. Sept. 21, 2021).

[29] 27 F.4th 584 (7th Cir. 2022).

[30] 2021 WL 4198274 (S.D.N.Y. Sept. 14, 2021).

though the plaintiffs resided in other states. The court rejected the plaintiffs' concerns, finding that neither the reference to the commercial AAA rules nor the designation of venue prevented the plaintiffs from effectively vindicating their statutory FLSA rights. Even if the commercial AAA rules would result in a higher cost to the plaintiffs, the plaintiffs failed to show the commercial rules would apply or that the costs were impracticable. The court similarly found that the plaintiffs did not explain how travel to Florida would burden the plaintiffs or key witnesses in light of the defendant's willingness to conduct discovery remotely. The court also declined to blue pencil the parties' agreement to require the use of the AAA employment rules or to change the venue to the cities where the employees worked.

In *Newman v. Plains All Am. Pipeline, L.P.*,[31] the plaintiffs' employer, a pipeline inspection firm, hired the plaintiffs to work as pipeline inspectors and sent them to work for the defendant client pipeline company. The plaintiffs sued the defendant client pipeline company for various FLSA violations. The defendant client pipeline company moved to compel arbitration, arguing the plaintiffs' employment agreements with the pipeline inspection firm contained an arbitration provision that required the plaintiffs to arbitrate their claims against the defendant client pipeline company. The defendant made three arguments for why it should be allowed to enforce the arbitration agreement: (1) it was an intended third party beneficiary; (2) the theory of intertwined-claims estoppel allowed it to enforce the agreement; and (3) the theory of artful-pleading estoppel applied and allowed it to enforce the agreement. The Fifth Circuit affirmed the district court's decision to deny the motion to compel arbitration, finding the defendant could not enforce the arbitration agreement between the plaintiffs and the third-party employer-firm. First, the Fifth Circuit found that the defendant was not an intended beneficiary of the arbitration agreement because, although plaintiffs' employment contract and other documents indicated that the purpose of the plaintiffs' employment was to work for the defendant, neither clearly and fully spelled out that the defendant could take legal action to enforce the agreements or the arbitration provision. Second, the Fifth Circuit explained that for the theory of intertwined-claims estoppel to apply, the defendant and the employer must have a close relationship—which generally requires formal corporate affiliation. Here, the defendant and the third-party employer were independent business entities. Third, in Texas, the theory of artful-pleading estoppel requires that the suit, in substance, truly be against the party to the arbitration agreement. This was not the case, as plaintiffs sued the named defendant directly for its own alleged FLSA violations.

In *Daya v. Sky MRI & Diagnostics, LLC*,[32] an accountant at an MRI center brought a claim for unpaid overtime wages under the FLSA. After the plaintiff filed his lawsuit, the defendant moved to compel arbitration. The plaintiff had signed the arbitration agreement, but the defendant did not. The court denied the defendant's motion to compel arbitration. The court held that based upon the language of the arbitration agreement, a signature from both the employer and the employee were

[31] 23 F.4th 393 (5th Cir. 2022).

[32] 2021 WL 4431108 (S.D. Tex. Aug. 2, 2021), report and recommendation adopted, 2021 WL 4427045 (S.D. Tex. Sept. 27, 2021).

required. Given that the defendant never signed the arbitration agreement, no agreement had been formed.

IV. Parties

C. Intervention

2. Defendants

In *Rogers v. Tug Hill Operating, LLC*,[33] the plaintiff alleged the defendant oil and gas company violated the FLSA by paying drilling and completions consultants on a day-rate basis and by failing to pay them overtime wages. A non-party company that facilitated the plaintiff's work for the defendant moved to intervene. The district court granted the motion, holding that the non-party was entitled to intervene as a matter of right. Applying the Fourth Circuit Court of Appeals' "liberal intervention" standard, the court found the non-party had significantly protectible interests that warranted intervention: (1) the non-party's business model was sufficiently threatened, (2) it had an interest in enforcing its arbitration agreement; and (3) the defendant's demand for indemnity against the non-party raised interest sufficient to allow intervention.

E. Individuals as Defendants

In *Ocampo v. 455 Hospitality LLC,*[34] the plaintiff hotel workers alleged the defendant hotel operators violated the FLSA and the New York Labor Code by failing to pay minimum and overtime wages, failing to maintain records, and failing to distribute wage statements that complied with state law. The plaintiffs filed their claims against their direct employer and multiple other defendants, including an individual who owned part of the hotel. The individual defendant moved for summary judgment on the basis that he was not an employer under the FLSA, and the court granted the motion. The plaintiffs presented evidence that the individual defendant was present at the hotel on a regular basis and frequently toured the facilities with the general manager. The individual defendant, in contrast, presented evidence from the general manager who testified that the individual defendant never hired, fired, supervised, or controlled the work schedules or pay rates of the plaintiffs. The court dismissed the plaintiffs' FLSA claims against the individual defendant because the plaintiffs failed to establish that the individual defendant exercised any control over their employment.

In *Kennedy v. Turbo Drill Industries, Inc.*,[35] an employee alleged the defendant manufacturer of downhole drilling products and its CEO and COO violated the FLSA by failing to pay employees overtime wages. The individual defendants filed a motion to dismiss for failure to state a claim, arguing that they did not qualify as employers under the FLSA. In denying the motion, the district court applied the "economic realities" test to the relationship between the plaintiff and the individual defendants, noting that not all factors need to be present. The U.S. Magistrate Judge, on a Report and Recommendation, found that the following allegations were sufficient to withstand a

[33] 2022 WL 1096620 (N.D. W. Va. Apr. 12, 2022).

[34] 2021 WL 4267388 (S.D.N.Y. Sept. 20, 2021).

[35] 2021 WL 5261707 (W.D. Tex. July 2, 2021).

motion to dismiss: (i) the individual defendants had authority over personnel decisions such as hiring, firing, and determining employees' work schedules; (ii) the individual defendants implemented the employer's pay practices and retained control over the pay practices; and (iii) the individual defendants exercised substantial control over the corporate employer's finances and operations.

In *Baten Perez v. Ak Café of New York LLC*,[36] the plaintiff food preparer sued the defendant café turned hookah lounge and one of its individual part-owners for minimum wage and overtime violations under the FLSA. The plaintiff also asserted claims under state law for failing to pay spread of hours and failure to provide compliant wage notices and statements. The individual defendant filed a motion for summary judgment, and the court granted the motion, holding the individual defendant was not an employer under the FLSA. Although the individual defendant was present at the café several times a week and occasionally directed the plaintiff to perform work tasks, the plaintiff did not provide evidence as to the frequency of the instructions or the context in which the individual defendant assigned such tasks. The court held the uncontested facts did not demonstrate the individual defendant exercised sufficient operational control over matters impacting working conditions or compensation sufficient to create a genuine issue of fact on whether the individual defendant qualified as an employer.

F. Indemnification

In *Sanchez Oil & Gas Corp. v. Crescent Drilling & Prod., Inc.*,[37] the plaintiff oil and gas company filed a third-party complaint against a contractor alleging breach of contract after the contractor refused to indemnify the plaintiff company in an FLSA overtime action brought by a subcontractor of the contractor. The district court granted the contractor's motion for summary judgment, holding that the plaintiff oil and gas company failed to present evidence that an FLSA violation occurred that warranted indemnification and that the plaintiff failed to follow the agreement's indemnification procedures. The Fifth Circuit reversed on appeal, finding the district court failed to examine the facts the plaintiff presented that the contractor violated the FLSA and held material questions of fact existed as to whether the underlying FLSA overtime lawsuit resulted from the contractor's breach of its FLSA obligations. The Fifth Circuit also held material facts existed as to whether the contractor unreasonably withheld or delayed its approval of a settlement between the plaintiff and the subcontractor.

G. Successors

In *Al Stewart v. Picante Grille LLC*,[38] the Secretary of Labor filed suit on behalf of employees of the defendant restaurant owners, alleging the defendants failed to pay minimum and overtime wages and failed to maintain proper records. The plaintiff filed a motion for summary judgment and requested that the court find one defendant company was a successor to the other defendant company and was liable for the predecessor's

[36] 2021 WL 3475593 (S.D.N.Y. Aug. 6, 2021).

[37] 7 F.4th 301 (5th Cir. 2021).

[38] 2021 WL 5920812 (W.D. Pa. Dec. 15, 2021).

FLSA violations. The court applied the Third Circuit's three-factor federal common law standard for successor liability and found each factor established that the restaurant was a successor-employer. First, there was "continuity in operations and workforce of the successor and predecessor employers" because at least some employees were retained when the second restaurant opened, the same individuals owned both restaurants, and the second restaurant used the same name, outdoor sign, and location as the first restaurant. Second, the factor of "notice to the successor-employer of its predecessor's legal obligation" overwhelmingly supported a finding of successor liability because the defendants acknowledged notice had been provided prior to the second restaurant's acquisition of the first restaurant's restaurant and assets. Finally, the court found there was no genuine issue of material fact as to the "ability of the predecessor to provide adequate relief directly" since, while it "may technically exist, it [was] essentially judgment-proof" due to its non-operational status and because all of its interests in the restaurant had been sold to the successor restaurant.

In *Li v. New Ichiro Sushi Inc.*,[39] the plaintiff restaurant workers filed an overtime wage lawsuit under the FLSA against a sushi restaurant, a company that acquired the sushi restaurant's assets, and the acquiring company's owner. The plaintiffs alleged the acquiring company and its owner were liable for the sushi restaurant's overtime wage violations under a theory of successor liability. The district court found FLSA overtime wage violations occurred, but it held the successor company and its owner were not liable for the violations. The plaintiffs appealed, and the Second Circuit affirmed the decision to find the acquiring company and its owner not liable as successors. The Second Circuit declined to decide whether the substantial continuity test or the more restrictive traditional test for successor liability applies. The Second Circuit held the plaintiffs failed to demonstrate that the defendants met the standard for successor liability under even the more lenient substantial continuity test because the plaintiffs failed to demonstrate the acquiring company had actual or constructive notice of the prior company's wage violations.

In *Giron v. Zeytuna, Inc.*,[40] two defendants to a FLSA action, a restaurant and its owner, filed for Chapter 7 bankruptcy while the FLSA action was pending, and after the trustee found there was no property available for distribution, the bankruptcy cases were closed. The individual defendant received a discharge, but the defendant restaurant did not. Following the closure of the bankruptcy case, the individual defendant was dismissed from the FLSA action but the corporate defendant was not. The plaintiffs sought leave to amend their FLSA complaint to add an additional entity as a defendant under the theory of successor liability. The court granted the plaintiffs' motion for leave to amend, and denied the original defendant's motion to dismiss the original complaint. The court held that the filing of the amended complaint was not futile because the plaintiffs' allegations sufficiently pled successor liability under both the mere continuation and the federal common law substantial continuity tests. The amended complaint included allegations that the corporate entities were owed by the same individual, operated the same business from a similar location, and employed

[39] 2021 WL 6105491 (2d Cir. Dec. 21, 2021).

[40] 2022 WL 856385 (D.D.C. Mar. 23, 2022).

some of the same employees. The complaint further alleged that the acquiring company had notice of the wage violations and the predecessor company was unable to provide relief to the plaintiffs for their claims.

V. Pleading

B. Pleading FLSA Wage Claims Generally

In *Kammer v. CET Inc.,*[41] the plaintiff labor shop foreman filed an FLSA collective action alleging the defendant failed to pay overtime wages to its employees. The defendant filed a motion for judgment on the pleadings, seeking to bar claims outside of the FLSA's general two year statute of limitations because the plaintiff failed to sufficiently plead the alleged violations were willful. The court denied the defendant's motion. The court acknowledged that the Seventh Circuit had not directly addressed the standard for pleading willfulness under the FLSA, but recognized that the Seventh Circuit had previously held that a plaintiff need not plead facts to overcome a defendant's affirmative defenses, including statute-of-limitations defenses. The court also recognized that courts within the Seventh Circuit have held that plaintiffs do not need to plead specific facts to adequately plead a willful violation under the FLSA.

In *Malcolm v. City of New York*,[42] the plaintiffs correctional officers alleged the defendant City of New York willfully violated the FLSA by failing to timely pay them their earned overtime wages. One of the plaintiffs further alleged the defendant retaliated against him in violation of the FLSA. The defendant filed a partial motion to dismiss, arguing the plaintiffs failed to adequately plead allegations of willfulness. The court agreed and granted the defendant's motion. The court held that the plaintiffs had failed to allege facts at the pleading stage that gave rise to a plausible inference that the defendant willfully violated the FLSA. The plaintiffs' allegations that the department of corrections willfully failed to pay overtime compensation was too general, and the court dismissed FLSA claims arising prior to the two year limitations period.

C. Pleading FLSA Overtime Claims

In *Sanchez v. L'Oreal USA, Inc.*,[43] a makeup artist sued his former employer, alleging it failed to pay overtime wages required under the FLSA. The plaintiff's complaint had alleged, in relevant part, that the defendant owed him at least fifty hours of unpaid overtime compensation, failed to pay him overtime compensation at least once in a seven-month period, and occasionally asked him to work through his lunch break, and/or to stay late. In granting the defendant's motion to dismiss, the district court found that the plaintiff failed to allege facts sufficient for the court to "reasonably infer that [the plaintiff] worked more than forty hours in any given week and, if he did, what overtime pay he is due."

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[41] 2021 WL 2632441 (N.D. Ind. June 25, 2021).

[42] 2022 WL 684408 (S.D.N.Y. Mar. 8, 2022).

[43] 2022 WL 1556402 (S.D.N.Y. 2022).

In *Paleja v. KP NY Operations, LLC*,[44] the plaintiff appealed the dismissal of his claims under the FLSA for failing to state a claim upon which relief could be granted. The plaintiff alleged that he regularly worked in excess of 40 hours per week. The plaintiff also alleged that in one week the defendant paid him $1,400.00 for working approximately 70 hours. The court noted that while the plaintiff sufficiently pleaded that he worked more than 40 hours per week, he had not alleged that he was uncompensated for the hours he worked over forty in a week. Further, the one non-conclusory allegation of working approximately 70 hours and being paid $1,400.00 did not establish, without pleading his regular rate of pay, that he did not receive appropriate overtime compensation. The Second Circuit specifically noted that while the facts alleged left open the possibility of insufficient compensation, this mere possibility was not enough to make out a plausible claim under the FLSA. Because of these defects, the court affirmed the district court's dismissal of the FLSA claims for failing to state a claim upon which relief could be granted.

In *Perez v. DNC Parks & Resorts at Asilomar, Inc.*,[45] the district court addressed the plaintiffs' ongoing failure to allege specific facts relating to their overtime claims under the FLSA and state law. The court originally dismissed the plaintiffs' overtime claims with leave to amend based on the failure to plead "facts demonstrating that there was at least one workweek in which they worked in excess of forty hours and were not paid overtime wages." In the same order, the court also noted that the plaintiffs had failed to specify how often they were not paid for hours worked and had failed to allege the average rate at which they were paid or to estimate the amount of overtime owed. The plaintiffs filed a second amended complaint, in which they continued to allege that they were "often" paid less than the overtime hours worked, and in which they identified 3 particular workweeks in which this had allegedly happened. The defendant again filed a motion to dismiss. The court found that the plaintiffs had only pled threadbare allegations and legal conclusions without sufficient supporting factual allegations and therefore granted the defendant's motion, this time without leave to amend. In doing so, it pointed to the plaintiffs' ongoing failure to provide details about how often the alleged violations occurred or what their average workweek entailed, despite the court's earlier note identifying these deficiencies as the basis for the dismissal.

In *Barr v. Petrostar Services, LLC*,[46] the plaintiff, an oilfield worker, alleged that one of the two defendants, who purchased the assets of the other corporate defendant, violated the FLSA by disguising certain wages paid to him as reimbursements. The plaintiff further alleged the reimbursements should have been included in his regular rate and factored into his overtime wages. The defendant filed a motion to dismiss, arguing that the reimbursements did not need to be included in the regular rate of pay because the FLSA allows for certain expense reimbursements to be excluded from the regular rate. The court granted the defendant's motion to dismiss and held the plaintiff failed to sufficiently allege that the at-issue payments were not in fact reimbursements that the defendant was allowed to exclude from the regular rate.

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[44] 2022 WL 364037 (2d. Cir. 2022).

[45] 2022 WL 411422 (E.D. Cal. Feb. 10, 2022).

[46] 2021 WL 2688623 (W.D. Tex. June 17, 2021).

In *Thompson v. Urban Recovery House, LLC*,[47] the plaintiffs, two former employees of an addiction treatment center, claimed that they were not compensated for time spent working beyond the normal schedule or for times when they could not take breaks due to work responsibilities. In granting a motion to dismiss, the district court found that the plaintiffs' allegations fell short of alleging claims for unpaid overtime under the FLSA because neither of the plaintiffs alleged that they worked in excess of 40 hours in a workweek nor demonstrated sufficient facts that uncompensated overtime was worked. An analysis of the work schedule demonstrated that the plaintiffs' schedules amounted to only 37.5 hours per week, and they failed to allege sufficient facts to demonstrate that they worked 40 hours a week let alone overtime hours. The court considered the plaintiffs' allegations that their breaks were typically missed or interrupted speculative.

D. Pleading Affirmative Defenses

In *Cunningham v. Circle 8 Crane Servs., LLC*,[48] the plaintiff alleged his employer violated the FLSA by failing to pay him overtime wages, failing to maintain accurate records, and retaliating against him for expressing dissatisfaction with his pay. The plaintiff filed a motion for judgment on the pleadings challenging the adequacy of the defendant's affirmative defenses, which triggered a consideration of Rule 8(c) concerning the adequacy of affirmative defenses. Noting the differences of opinion among 5th Circuit courts concerning the standard for evaluating the sufficiency of pleading affirmative defenses, the district court held that the Western District of Texas uses the "fair notice" standard. The district court denied the plaintiff's motion, finding that the defendant's affirmative defenses, while lacking facts in support of the defenses, sufficiently gave the plaintiff fair notice of the nature of the defenses to allow the plaintiff to avoid an unfair surprise.

In *Calo v. G.N.P.H. # Nine, Inc.,*[49] former servers filed FLSA and related state and local claims against the defendant restaurant. The plaintiffs filed a motion to strike affirmative defenses under Federal Rule of Civil Procedure 12(f). The district court noted that it had discretion in ruling on such motions and that striking affirmative defenses was appropriate where it removes irrelevant issues from consideration. Although the Seventh Circuit had not addressed whether the *Iqbal-Twombly* standard applies to affirmative defenses, the court concluded, like other courts in the district, that it does apply and only those affirmative defenses which included sufficient factual matter will survive a motion to strike. The court then dismissed several of the defendant's affirmative defenses without prejudice for lack of a sufficient factual predicate. Other affirmative defenses were dismissed with prejudice where the court ruled they were mere restatements of denials of liability.

[47] 2022 WL 589957 (S.D.N.Y. Feb. 28, 2022).

[48] 2022 WL 577256 (W.D. Tex. Jan. 28, 2022).

[49] 2022 WL 1487401 (N.D. Ill. May 11, 2022).

VI. Statute of Limitations

B. Willful and Nonwillful Violations

1. Willfulness Standard

In *Walsh v. Wellfleet Commc'ns*,[50] the plaintiff employees sued their employers under the FLSA for minimum and overtime wage violations. The Ninth Circuit heard the defendants' appeal of the Nevada district court's judgment against the defendants on the issue of willfulness, and it affirmed the lower court's decision. The Ninth Circuit held that the district court properly classified the defendants' violations as willful and properly applied the three year statute of limitations as the defendants were clearly aware of the ongoing violations because they required employees to waive their minimum wage and overtime rights, paid state-imposed fines for violations of state wage-and-hour laws, received around ten to twelve wage-and-hour complaints a year, settled small claims regarding wage-and-hour violations, and were well aware that their ongoing actions violated the FLSA but did not take steps to investigate compliance. Because the violations were willful, they could not have been committed in good faith, and liquidated damages were determined to be mandatory.

In *Doyle v. Ensite USA, Inc.*,[51] the plaintiff safety inspector brought suit against his employer alleging violations of the FLSA for failure to pay overtime. In moving for summary judgment, the defendant argued that the plaintiff was properly classified as exempt and that the claims were barred by the two-year statute of limitations because there was no evidence of willful violations. In determining whether the alleged violations were willful, the district court considered whether the knowledge of an executive for the defendant of an unrelated FLSA lawsuit alleging similar claims against an unrelated former employer was sufficient to support the application of the willful violation standard to the plaintiff's otherwise untimely claim. The court concluded the participation of the executive, who was not in charge of the plaintiff's department, in a lawsuit that concerned a different company, that was not reduced to any orders from the court, was insufficient to impute knowledge that the defendant's executive knew the defendant's pay practices were unlawful.

2. Determination of Willfulness by Judge or Jury

In *Menge v. Simon's Trucking, Inc.*,[52] a maintenance coordinator for a trucking company sued his employer for various claims including a claim for overtime under the FLSA. The plaintiff brought a claim for overtime because the employer paid him straight time for the first 50 hours and time and one-half for hours worked over 50. The plaintiff argued this was a willful violation that merited application of the three-year statute of limitations. The defendant countered it believed the plaintiff was exempt after it made a sincere attempt to ascertain the FLSA's requirements. The district court held there was a genuine dispute of material fact and summary judgment should not be granted. The finding hinged upon the good faith effort undertaken by the defendant because good

[50] 2021 WL 4796537 (9th Cir. Oct. 14, 2021). This case has not been designated for publication.

[51] 2021 WL 3725982 (S.D. Tex. Aug. 23, 2021).

[52] 2021 WL 3921346 (N.D. Iowa Sept. 1, 2021).

faith and willfulness are intertwined. The court thus found that the jury must decide this issue.

C. Commencement of Action

In *Blair v. Comprehensive Healthcare Mgmt. Servs., LLC*,[53] assisted care facility workers brought overtime claims under the FLSA and Pennsylvania law, and breach of contract claims under Pennsylvania law, against an assisted care facility and several individual defendants. The defendants moved to dismiss two plaintiffs' FLSA claims, arguing that the claims were barred by the statute of limitations because the plaintiffs had previously stipulated to the dismissal of the individual defendants, and then sought to amend their complaint to add the same individual defendants after the statute of limitations had run. In denying the motion to dismiss, the district court reasoned that the stipulation of dismissal did not adjudicate all of the claims of all of the parties and thus was not a final judgment under Federal Rule of Civil Procedure 54(b). As such, the individual defendants remained parties to the action from the time the plaintiffs initially brought suit against them, and therefore the statute of limitations had not run on the plaintiffs' FLSA claims.

In *Morales v. Construction Directions LLC*,[54] the plaintiff rebar workers and general laborers filed suit against the defendant construction company, alleging violations of the FLSA and the New York Labor Law for failure to pay overtime wages and alleging violations of New York state law for failing to provide wage statements, wage notices, and failing to keep records. The defendant filed a motion to dismiss, contending that the plaintiffs' FLSA claims were time-barred because no plaintiff had filed a consent form within three years of when their claims accrued. The district court agreed and granted the defendant's motion, stating that pursuant to 29 U.S.C. § 256, the statute of limitations continues to run for each plaintiff, including the named plaintiffs, until that plaintiff files a written consent form with the court. Because the plaintiffs never filed written consent forms, they never commenced the collective action for statute of limitations purposes and their claims were time-barred.

E. Application of Doctrines of Equitable Estoppel and Tolling to Limitations Period

In *Figueroa v. Cactus Mexican Grill LLC*,[55] the plaintiff food preparer filed suit against the defendant restaurant and its owner alleging a claim for unpaid overtime wages and for retaliation under the FLSA. The plaintiff also asserted claims under state law for untimely payment of wages, unjust enrichment, and failure to pay sick time. The alleged wage violations occurred between 2013 and March 2020, and the plaintiff filed suit on December 8, 2020. The defendants moved to dismiss the plaintiff's claims as untimely and argued that the plaintiff failed to plead sufficient facts to support a claim for equitable tolling under the FLSA. The court held the plaintiff's pleading was sufficient.

[53] 2021 WL 3855931 (W.D. Pa. Aug. 27, 2021).

[54] 2021 WL 8317096 (E.D.N.Y. Aug. 27, 2021).

[55] 2021 WL 5868277 (D. Mass. Dec. 10, 2021).

The plaintiff alleged: (1) the defendants failed to post the required FLSA notices, (2) the plaintiff was unaware of her rights and the defendants never informed her, and (3) the defendants threatened to fire her if she participated in an investigation the Department of Labor was conducting and told her she only deserved the amount of the settlement check she received from the Department of Labor.

In *Kennedy v. Pioneer Nat. Res. Co.*,[56] the plaintiff construction manager alleged the defendant oil and gas production company violated the FLSA by classifying him as an independent contractor and by not paying him overtime wages when he worked over forty hours a week. The defendant filed a motion to compel arbitration and several motions to stay, some of which were granted. Due to these delays, the plaintiff filed a motion for tolling and argued that the statute of limitations should be tolled for potential collective members from the date of the filing of the motion for conditional certification. The district court granted the plaintiff's motion, finding that the plaintiff had demonstrated diligence and timeliness in filing his motion for conditional certification and that the defendant's multiple delays, considered by the court to be a pattern of litigation delay, constituted extraordinary circumstances which warranted equitable tolling for potential collective members.

In *Kibler v. The Kroger Cos.*,[57] the plaintiff grocery store supervisor alleged that the defendants improperly classified her and other supervisors as overtime-exempt and violated the FLSA by failing to pay them overtime wages. In seeking conditional certification of a collective action, the plaintiff requested that the court equitably toll the limitations period. The court granted the plaintiff's motion for conditional certification but denied the request for equitable tolling. The court emphasized that the doctrine of equitable tolling should be used sparingly and was not justified by normal inefficiencies inherent in motion practice. The court also found that members of the putative collective had notice that they were not paid for the overtime hours they worked at the end of each pay period and no evidence was presented to show that members of the putative collective were ignorant of their rights.

In *Thomas v. Maximus, Inc.*,[58] the plaintiffs sought unpaid wages from the defendant under the FLSA and eight different state laws. The plaintiffs moved for conditional certification, and the court granted the motion. The defendant sought and was granted permission to file a motion for interlocutory appeal to the Fourth Circuit Court of Appeals to address the standard for certifying FLSA collective actions. The court stayed the case pending the interlocutory appeal. The plaintiffs filed a motion to equitably toll the statute of limitations, and the court granted the motion. The court determined the stay, coupled with the certification of the interlocutory appeal, constituted extraordinary circumstances beyond the plaintiffs' control and warranted equitable tolling to prevent members of the collective from being time barred in pursuing their claims.

[56] 2021 WL 8442021 (W.D. Tex. Nov. 5, 2021).

[57] 2022 WL 268056 (D. Colo. Jan. 28, 2022).

[58] 2022 WL 1481853 (E.D. Va. May 10, 2022).

VII. Defenses

A. Good Faith Defenses to Overtime and Minimum Wage Violations

2. Section 11 (29 U.S.C. § 260) Good Faith Defenses to Liquidated Damages

In *Gelber v. Akal Sec., Inc.*,[59] the Eleventh Circuit Court of Appeals affirmed the district court's ruling that the security company acted in good faith when it automatically subtracted a one-hour meal break period from the plaintiff air security guards' work hours during empty return flights. The district court held a bench trial and heard from witnesses on the issue, including outside counsel who testified that a company executive sought his advice regarding the meal deduction policy. The outside counsel testified that he advised the executive that the policy comported with the FLSA. The appellate court concluded that it found no error in the district court's conclusion that the defendant acted in good faith when it violated the FLSA and, further, the outside counsel's advice was not "objectively unreasonable" given that the court had never before addressed the relevant questions.

In *Walsh v. Sofia & Gicelle, Inc.*,[60] the Secretary sought back wages and liquidated damages from the defendant bar and restaurant and its owner under the FLSA. The court entered partial summary judgment in the Secretary's favor and held a three-day bench trial to determine liability on the remaining issues and the award of damages. After the court conducted a three-day bench trial, it rejected the defendants' affirmative defense of good faith and awarded liquidated damages to the plaintiff. The evidence at trial showed that the individual defendant received guidance from two accounting firms about the defendants' obligations under the FLSA but chose not to follow it. Further, the individual defendant received Fact Sheets from the Department of Labor reflecting the minimum wage, overtime, and tip credit requirements, yet she chose to follow some but not all of the requirements.

In *Lopez v. Fun Eats & Drinks, LLC*,[61] a class of servers and bartenders alleged the defendant restaurant violated the minimum wage provisions of the FLSA by requiring the plaintiffs to pay for uniforms, cash register shortages, and the tabs of customers who walked out without paying their bill. The plaintiffs filed a motion for partial summary judgment on their claim for liquidated damages, and the court granted the motion. Although the defendant claimed that the deductions from employees' pay went against the restaurant's handbook policies, the actual policies that were carried out in the restaurant were well-known among managers and staff and the actual policies were never reviewed by the new owners for compliance with the FLSA.

In *Mackie v. Coconut Joe's IOP LLC*,[62] the plaintiff restaurant employee claimed the defendants' restaurant's tip pooling scheme was invalid because the pool included expediters – ineligible employees who do not customarily and regularly interact with customers. The defendants moved for summary judgment on the plaintiff's claim for

[59] 14 F.4th 1279 (11th Cir. 2021).

[60] 2021 WL 3472649 (D. Md. Aug. 5, 2021).

[61] 2021 WL 3502361 (N.D. Tex. July 16, 2021).

[62] 2021 WL 4993538 (D.S.C. Oct. 27, 2021).

liquidated damages, arguing their actions were in good faith and reasonable. The court denied the defendants' motion for summary judgment. The court found the individual defendant owner's actions to make changes to the defendants' restaurant's tip pool practices after he learned another restaurant was sued in 2016 for having an invalid tip pool showed the defendants took little action to ensure their tip pool complied with the FLSA in the many years prior to learning about the 2016 lawsuit. The court also concluded the defendants failed to show the efforts they took to comply with the FLSA since 2016.

D. Claim and Issue Preclusion

In *Pimpanit v. Phumswarng, Inc.*,[63] the plaintiff server alleged the defendant restaurant retaliated against her in violation of the FLSA. The plaintiff server had previously joined an FLSA lawsuit pending in state court to seek payment of unpaid minimum and unpaid wages. The plaintiff originally included the retaliation claim in the state court action, but she dismissed that claim from the action and settled the wage claims. The plaintiff later filed the FLSA retaliation claim in federal court, and the defendant moved for summary judgment. The court granted the defendant's motion, concluded that the settlement of the unpaid and minimum wage claims in the prior lawsuit precluded the restaurant plaintiff's retaliation claim. On appeal, the Fifth Circuit Court of Appeals reversed and remanded, finding that although the retaliation and unpaid wage claims involved related facts, the claims did not arise out of the same transaction. The court concluded that the plaintiff could have brought the retaliation claim in the prior action, and in fact she did, but she was not required to do so.

In *Simmons v. Trans Express Inc.*,[64] the plaintiff alleged her employer violated the FLSA and state law by failing to pay her overtime wages. The defendant moved to dismiss the lawsuit, arguing that the plaintiff's claims were precluded by a judgment she previously obtained against the defendant in small claims court. The district court granted the defendant's motion and dismissed the plaintiff's claims. The plaintiff appealed, and the Second Circuit Court of Appeals affirmed the lower court's decision. The plaintiff argued section 1808 of the New York City Civil Court Act rendered the prior small claims judgment non-preclusive, but the Second Circuit held that section 1808 did not replace the traditional claim preclusion analysis. The court went on to hold that the claims raised in the federal court action arose out of the same transaction as the claims raised in small claims court. Additionally, the Second Circuit found that the FLSA did not bar the defendant's ability to raise the affirmative defense of claim preclusion.

In *Figueroa-Torres v. Kleiner,*[65] the plaintiff employees sued their employers for, among other things, minimum and overtime wage violations under the FLSA. The plaintiffs subsequently amended their complaint to include a claim for retaliation under the FLSA, alleging that the defendants retaliated against them by tricking and coercing them into joining a labor union and by negotiating collective bargaining agreements that

[63] 2022 WL 866290 (5th Cir. Mar. 23, 2022).

[64] 16 F.4th 357 (2d Cir. 2021).

[65] 2022 WL 768483 (S.D.N.Y Mar. 14, 2022).

included mandatory arbitration provisions. During the course of the litigation, the plaintiffs also filed a charge with the NLRB contesting the validity of the collective bargaining agreements. The defendants moved to dismiss the FLSA retaliation claim for lack of subject matter jurisdiction, and the court granted the motion. The court held the merit of the retaliation claim turned on whether the collective bargaining representative was validly selected and whether the union was authorized to enter into the collective bargaining agreement with the defendants. Because these were issues the NLRB must resolve, the court found the FLSA retaliation claim was precluded by the National Labor Relations Act.

E. Preemption

In *Adams v. Aztar Indiana Gaming Co.*, LLC,[66] the plaintiff dealers alleged the defendant casino violated the FLSA by failing to pay minimum and overtime wages. The plaintiffs also raised class action claims under the Indiana Wage Payment Statute that were derivative of the plaintiffs' FLSA claims. The court declined to dismiss the state law claims that sought recovery based on the defendant's failure to pay the plaintiffs all wages due to the employees, holding that no precedential authority barred the plaintiffs from bringing a state law claim that was derivative of their FLSA claims. The court also declined to dismiss the state law claims alleging the defendant failed to pay all earned wages because it took deductions from the plaintiffs' wages to cover the cost of state-issued gaming licenses. The court held that the FLSA's prohibition on deductions that reduce an employee's income below the minimum wage preempts Indiana law allowing for the deductions to the extent that the licensing deduction reduced the employee's income below the minimum wage. Finally, the court declined to dismiss the plaintiffs' state law claim for unlawful timeclock rounding, finding that the court did not need to interpret the collective bargaining agreement to evaluate the claim, and thus, the claim was not preempted by the Labor Management Relations Act.

In *Weeks v. Matrix Absence Mgmt. Inc.*,[67] the plaintiffs alleged the defendant violated the FLSA by misclassifying them as exempt and by failing to pay them overtime wages. After the district court conditionally certified a class, the plaintiffs moved to amend the complaint to add an additional named plaintiff, who intended to bring additional overtime claims under Oregon state law. The defendant filed a motion for judgment on the pleadings, arguing the state law claims were preempted by the FLSA. The court denied the defendant's motion. The court held that the state law claims were not preempted by the FLSA because the state law claims furthered the FLSA's purpose of protecting employees, the FLSA applied squarely to the state-law claims, and the state-law claims borrowed the FLSA standard.

[66] 2021 WL 4316906 (S.D. Ind. Sept. 22, 2021).

[67] 2022 WL 523323 (D. Az. Feb. 22, 2022).

VIII. Burden of Proof

C. Proving the Number of Hours Worked

1. Generally

In *Mazurek v. Metalcraft of Mayville, Inc.*,[68] the plaintiff metal workers filed individual suits against the defendant alleging overtime violations of the FLSA. Following the consolidation of numerous cases, the defendant moved for summary judgment against multiple plaintiffs. In granting the defendant's motion, the court noted that where there is a discrepancy between the employee's alleged work hours and the employer's records of hours worked, the employee must tender some evidence to substantiate his version of the events. The court opined that unreported work time can be reconstructed from memory, inferred from the particulars of the job or estimated in other ways that enables the trier of fact to draw a just and reasonable inference concerning the time worked. Although the court acknowledged this was a lenient standard, the court ultimately concluded that the plaintiffs could only offer unreliable speculation and guesswork which it found, as a matter of law, insufficient to prove damages. In so holding, the court also relied on the plaintiffs' testimony that they had no access to memories regarding the time they worked and admitted they had no prospects of recovering such memories from potential triggering events.

2. Inadequate or Inaccurate Records

In *Guzman v. Laredo Sys., Inc.*,[69] landscaping employees brought a putative collective action against the defendant landscaping company alleging failure to properly pay overtime under the FLSA in addition to state law claims. The court noted that the defendant was required to keep accurate records of "persons employed by it and of the wages, hours, and other conditions and practices of employment." The defendant admitted that its records were based on "estimates and guesses" as to the amount of time employees spent at job sites and did not include time employees spent traveling, loading equipment at the beginning of each shift, and unloading equipment at the end of each shift. The court found the defendant's records were inaccurate and unreliable, and as a result, the plaintiffs were allowed to prove the number of hours they worked as a matter of just and reasonable inference. The plaintiffs satisfied this standard by using the employer's pay records to demonstrate how many days they worked each week and the plaintiffs' testimony regarding the time they typically arrived at the shop in the morning and the time they typically returned to the shop at the end of the day.

D. Proving Exemptions and Other Defenses

In *Julian v. MetLife, Inc.*,[70] the plaintiff disability claims specialists filed a collective action under the FLSA for failure to pay overtime, alleging they were misclassified as exempt employees. The defendants moved for summary judgment as to select named and opt-in plaintiffs, contending their claims were barred by the

[68] 2021 WL 5964541 (E.D. Wis. Dec. 16, 2021).

[69] 2022 WL 971564 (N.D. Ill. Mar. 31, 2022).

[70] 2021 WL 3887763 (S.D.N.Y. Aug. 31, 2021).

administrative exemption, and the court granted the defendants' motion. The court found the plaintiffs' primary duties required the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers because the claims specialists had no involvement in producing or selling policies but instead processed claims submitted by the defendants' customers. The court also found that the work the plaintiffs' performed involved the exercise of discretion and independent judgment with respect to matters of significance because their job duties required them to gather large amounts of information, including from initial and follow up witnesses, medical reports, employer data, and data from resources such as clinical experts, vocational rehabilitation experts and other internal resources. The court found the plaintiffs assessed and evaluated that information and made various judgments, including whether the individual had a disability covered by the plan, whether claims should be approved or denied, and the amount of benefits that should be provided under the policy.

IX. Remedies

B. Monetary Damages for Unpaid Minimum Wages and Overtime

In *Billingsley v. Emmons*,[71] the plaintiff alleged he was a non-exempt employee of the defendant magazine subscription service and was owed unpaid overtime wages under the FLSA. The defendant alleged the plaintiff was an independent contractor who impermissibly accessed the company's bank account and wrote over $31,000 worth of checks to himself. The defendant asserted counterclaims against the plaintiff for violations of the Computer Fraud and Abuse Act, conversion, breach of fiduciary duty, and fraud. The plaintiff filed a motion to dismiss the counterclaims, arguing that the defendants were prohibited from alleging counterclaims that might result in an offset to the plaintiff's owed overtime wages. The court denied the plaintiff's motion to dismiss, reasoning that the parties disputed whether the plaintiff was the defendant's employee under the FLSA. The court found the motion to dismiss was premature because the counterclaims were plausibly pled and could be raised if the plaintiff was found to be properly classified as an independent contractor.

C. Liquidated Damages

1. Availability

In *Walsh v. Devilbiss Landscape Architects, Inc.*,[72] a jury returned a verdict against a landscaping company and its owner in his individual capacity in an FLSA action for unpaid overtime wages. The parties filed cross-post-trial motions. The plaintiff, the Secretary of Labor, filed a cross-motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), requesting to amend the judgment to include liquidated damages. The court granted the plaintiff's motion. The defendants argued they satisfied the standard for subjective good faith because the jury held the violations were not willfull. The court disagreed, holding that standards for willfulness and good faith are different. The court went on to alter the judgment to include liquidated damages

[71] 2021 WL 3493625 (M.D. Fla. Aug. 9, 2021).

[72] 2022 WL 903888 (D. Del. Mar. 28, 2022).

because the defendant failed to provide evidence at trial that it took any affirmative steps to ascertain that it complied with the FLSA.

3. Section 11 Defense to Liquidated Damages: Actions Taken in Good Faith and With Reasonable Grounds for Believing They Were Not in Violation of the FLSA

d. Subjective Good Faith

In *Rood v. R&R Express, Inc.*,[73] the plaintiff logistics coordinator alleged the defendant contract motor carrier failed to pay overtime wages to him and other similarly situated employees in violation of the FLSA and the Pennsylvania Minimum Wage Act. The parties filed cross-motions for summary judgment as to liability, in which the defendant argued that it was entitled to the good faith affirmative defense to liquidated damages. The court disagreed and denied the defendant's motion for summary judgment on the issue of liquidated damages. The court recognized the FLSA provides courts with limited discretion to award no liquidated damages but stated that the employer bears the "plain and substantial" burden of proving that it took affirmative steps to adhere to the Act's requirements, but nonetheless, violated its provisions. Here, the court found the showing of affirmative effort required more than a showing that a human resources professional was hired and tasked with compliance, noting the defendant's submission lacked the identification of any materials that were reviewed to determine the pay policy complied with the FLSA.

F. Attorneys' Fees

2. Prevailing Plaintiff Requirement Under Section 216(b)

In *Monroe v. FTS USA, LLC*,[74] the plaintiff technicians obtained a judgment for unpaid overtime. After repeated post-judgment appeals, the plaintiffs sought an award of attorney's fees for the work they performed during the appeals, and the district court awarded them fees. The defendant appealed, arguing that the plaintiffs were not a prevailing party on appeal and were not entitled to the fees they sought. The Sixth Circuit affirmed the district court's award, finding the plaintiffs to be a prevailing party based on their continued success in protecting the judgment through the lengthy appeals process, even though the defendant prevailed on an appellate issue regarding how back wages should be calculated.

3. Calculating "Reasonable" Attorneys' Fees

In *Carrera v. EMD Sales, Inc.*,[75] the plaintiffs, three current and former sales representatives, prevailed in a bench trial against the defendant and its CEO for failing to pay overtime wages under the FLSA. The court, citing 29 U.S.C. § 216(b), held that an award of attorneys' fees and costs is mandatory to a prevailing plaintiff under the FLSA. The plaintiffs requested $957,861 in attorneys' fees, and the court awarding them

[73] 2022 WL 1082481 (W.D. Pa. Apr. 11, 2022).

[74] 17 F.4th 664 (6th Cir. 2021).

[75] 2021 WL 3856287 (D. Md. Aug. 27, 2021)

$472,948 in fees. The court applied the *Johnson* factors and reduced the requested fees by applying a lower hourly rate the court found to be reasonable within that district and by applying a global reduction because the court determined the requested hours were excessive for a relatively straightforward wage and hour dispute.

In *Feuer v. Cornerstone Hotels Corp.*,[76] the two plaintiffs were awarded just over $5,000 in unpaid wages, liquidated damages, and statutory penalties following a bench trial. Plaintiffs' counsel sought over $50,000 in fees and costs. The defendants objected because the fees were significantly more than the plaintiffs' award, and the court agreed. It found plaintiffs' counsels' fees were excessive for some items, and it reduced plaintiffs' counsels' fee award by 40% due to the overall limited success of the claims.

In *Koch v. Jerry W. Bailey Trucking, Inc.*,[77] after five years of litigation, the plaintiffs moved for attorney's fees in the amount of $201,820.00 following a settlement and judgment in an ongoing class and collective action. The court awarded only $70,000.00 in attorney's fees. In arriving at this decision, the court noted the record contained no evidence of clients having actually paid the requested $400 per hour and relied on his own prior private practice in labor and employment law in the jurisdiction before taking the bench in reducing the rate used in the lodestar calculation to defendant's counsel's rate of $350 per hour. The court found affidavits submitted from two attorneys with similar practice areas lacked probative value of plaintiff's counsel's market rate. In further reducing the lodestar, the court found a failure to exercise billing judgment, noting hours claimed included efforts to convince the court of competency to serve as class counsel, duplicate hours preparing and reviewing damages spreadsheets, and duplicative and excessive billing for multiple cross-motions for summary judgment. The court additionally adjusted the lodestar downward for limited success on the merits for fractional success on the class claims and damages requested.

In *Smith v. WBY, Inc.*,[78] two strip club waitresses filed FLSA claims in bankruptcy court for unpaid minimum wages by filing proofs of claims on behalf of themselves and 14 other plaintiffs. Subsequently, two fee petitions were filed seeking approximately $620,000 in attorneys' fees. One firm (firm 1) sought $199,894.50 in fees and the other firm (firm 2) sought $390,797 in fees. The defendants argued the plaintiffs' attorneys were seeking compensation for: (1) non-compensable bankruptcy work; (2) work on behalf of other plaintiffs; (3) impermissible block billing/vague billing; and (4) clerical/administrative work. The defendants also objected to firm 2 recovering fees, arguing they did not have a proper attorney-client relationship with the plaintiffs. The court granted in part and denied in part the motions, exercising its discretion to determine whether the number of hours expended during litigation was reasonable. After a detailed analysis, the court concluded the attorneys' hourly rates were reasonable, but exercised discretion and reduced firm 1's fee to $111,843.94 and reduced firm 2's fee to $21,467.77.

[76] 2021 WL 4894181 (E.D.N.Y. Oct. 20, 2021).

[77] 2021 WL 3012936 (N.D. Ind. Jul. 16, 2021).

[78] 2021 WL 4224012 (N.D. Ga. Sept. 16, 2021).

In *Sifuentes v. KC Renovations, Inc.*,[79] the plaintiff sued his former employer alleging violations of the FLSA's overtime and minimum wage requirements. Two years after the action was initiated, the parties successfully mediated and jointly agreed to a stipulated judgment awarding the plaintiff $16,000 in damages and reserving the adjudication of the plaintiff's claim for attorneys' fees to the court. The plaintiff filed his motion for attorneys' fees seeking $66,982.00. In calculating the loadstar, the court reviewed the "2015 State Bar of Texas Attorney Hourly Rate Survey," the affidavits submitted by plaintiff's counsel of two similarly-situated employment law attorneys, awards in similar cases, and the "State Bar's 2014 Paralegal Division Compensation Survey" to reduce lead counsel's rate from $450.00/hour to $350.00/hour, reduce supporting counsel's rate from $345.00/hour to $300.00/hour, and reduce the paralegal's rate from $200.00/hour to $135.00/hour. The court also reduced the hours worked by 15% to account for "slightly excessive" billing on what should have been a "fairly simple case." The court declined to adjust the lodestar because the factors a court must consider for adjustment had already been accounted for in the adjustments prior to determining the lodestar.

In *Fleming v. Elliot Sec. Sols., LLC*,[80] former employees alleged that the defendants failed to pay overtime in violation of the FLSA and failed to timely pay wages, including final wages, in violation of the Louisiana Final Wage Payment Act. After settling their claims with the defendants, the plaintiffs sought to recover $99,109.54 in attorney's fees, but the court awarded $37,240 in attorneys' fees. In awarding less than the amount requested, the court first determined that the plaintiffs did not provide sufficient support for their customary rates. Accordingly, the court looked to cases in the district, including other cases involving plaintiffs' counsel, and determined a reasonable rate amounted to $300.00 per hour. The court also found that the billing entries on plaintiffs' fee application were not reasonable as stated, and conducted a line-by-line analysis of the bill, considering: (1) whether plaintiffs' counsel's work was successful; (2) mitigation to potential exposure; (3) vague entries and administrative tasks; (4) entry level work performed; (5) partial summary judgment; (6) administrative and substantive work combined; (7) research and substantive work combined; and (8) excessive or irrelevant time. After deductions, the district court determined the plaintiffs' reasonable attorney's fees amounted to $46,550.00.

In *Winslow v. Indiheartandmind, Inc.*,[81] the plaintiffs brought a motion for attorneys' fees. In analyzing the number of hours reasonably expended, the court reduced the hours by 15%. The court reduced the hours due to several factors: (1) the attorneys performed duplicative work; (2) the attorneys billed for internal conferences, which the court regarded as improper; (3) the attorneys engaged in block billing; and (4) the attorneys billed for filing various documents with the court, which are clerical or administrative tasks.

[79] 2022 WL 1050381 (W.D. Tex. Apr. 6, 2022).

[80] 2021 WL 4908875 (E.D. La. Oct. 21, 2021).

[81] 2022 WL 426513 (S.D. Fla. Feb. 11, 2022).

In *Bocangel v. Warm Heart Fam. Assistance Living, Inc.,*[82] the plaintiff nursing home employees alleged the defendant violated the FLSA by failing to pay them minimum and overtime wages. The court granted the plaintiffs' motion for partial summary judgment, and the plaintiffs sought an award of attorney's fees. The district court granted the motion, but reduced the requested attorney's fees by approximately twenty percent, reasoning that some of the billing entries were duplicative, vague, or disproportionate to the needs of the matter.

b. Adjusting the Lodestar Amount
(iii.) Effects of Rejecting Settlement Offers and Offers of Judgment

In *Pierre-Louis v. Baggage Airline Guest Servs., Inc.*,[83] the plaintiff wheelchair attendants sought backpay under the FLSA. After more than a year of litigation, the plaintiffs settled with the defendant for substantially less than they previously demanded, and the parties agreed to have the district court decide the amount of attorney's fees. The court rejected the defendant's argument that the plaintiffs' request for attorney's fees should be denied because plaintiffs' counsel had engaged in improper litigation tactics and made unreasonable settlement demands. The court held that the defendant was precluded from arguing that the plaintiffs' unreasonable settlement position warranted a reduction in the amount of requested fees because the defendant failed to make any prior settlement offers.

In *Fleming v. Elliot Sec. Sols., LLC*,[84] former employees alleged that the defendants failed to pay overtime in violation of the FLSA and failed to timely pay wages, including final wages, in violation of the Louisiana Final Wage Payment Act. After settling their claims with the defendants, the plaintiffs sought to recover $99,109.54 in attorney's fees. The court determined the reasonable fees amounted to $46,550.00. The court further reduced the fee award by 20% because the plaintiffs rejected Rule 68 Offers of Judgments earlier in the litigation which approximated the amounts the plaintiffs ultimately recovered through the settlement.

(iv.) Wealth Disparity [proposed new topic]

In *Li v. Roger Holler Chevrolet Co*.,[85] the plaintiff alleged the defendant car dealership violated the FLSA, the Florida Constitution, the Family Medical Leave Act and the Florida Whistleblower Act. The court granted the defendant's motion for summary judgment, and it allowed the defendant to file a petition for attorneys' fees for having to defend itself against the claims the plaintiff raised under the FLSA and the Florida Constitution. The court found that the hourly rates and time entries defendant's counsel sought payment for were mostly reasonable, but it further recognized that courts within the Eleventh Circuit Court of Appeals consider wealth disparity between

[82] 561 F. Supp. 3d 534 (D. Md. 2021).

[83] 2021 WL 3710139 (S.D. Fla. Aug. 4, 2021).

[84] 2021 WL 4908875 (E.D. La. Oct. 21, 2021).

[85] 2022 WL 1094830 (M.D. Fla. Feb. 17, 2022), *report and recommendation adopted*, 2022 WL 909759 (M.D. Fla. March 29, 2022).

the parties when determining the amount of attorney's fees to award. Here, taking into account the plaintiff's meager income and his reliance on social security and other resources, the court recommended an adjustment of the lodestar to account for the wealth disparity with an across-the-board reduction of 75% resulting in an attorney's fee award of $29,217.25.

4. Appellate Review of Attorneys' Fees

In *Oden v. Shane Smith Enters., Inc.*,[86] the parties settled the plaintiff's FLSA wage claims, and they agreed to have the district court determine the appropriate attorney's fees award. The plaintiffs sought $4,435 in attorneys' fees. The district court thought the amount requested was excessive, and it excluded unnecessary work and then imposed a twenty percent across the board reduction. The district court awarded fees in the amount of $1,080, and the plaintiff appealed. The Eighth Circuit affirmed the district court's award, finding plaintiffs' counsel engaged in tactics to delay the litigation, which warranted a reduction in the lodestar.

In *Hoenninger v. Leasing Enters., Ltd*.,[87] the plaintiff servers alleged the defendant restaurant violated the minimum wage provisions of the FLSA by taking deductions from the plaintiffs' credit-card tips. The district court awarded judgment in favor of the plaintiffs, and the plaintiffs' sought $759,479 in attorneys' fees, but the district court awarded $623,785 in fees. The defendant challenged the award of attorneys' fees on appeal, the Fifth Circuit Court of Appeals vacated the decision and remanded for a recalculation of the award for attorneys' fees. The Fifth Circuit found that the lower court failed to determine the reasonable lodestar fee before it made adjustments to the fee and failed to apply the *Johnson* factors to either increase or decrease the lodestar.

[86] 27 F.4th 631 (8th Cir. 2022).

[87] 2022 WL 340593 (5th Cir. Feb. 4, 2022).

Chapter 17

COLLECTIVE ACTIONS AND "HYBRID" CLASS ACTIONS

II. Procedural Requirements of Section 216(b)

In *Smith v. Pro. Transp., Inc.*,[1] a shuttle driver filed an action individually and as a putative collective action, alleging she was misclassified and in turn did not receive overtime in violation of the FLSA. The district court granted the defendant's motion to dismiss the named plaintiff's claim because she did not file a consent to join form. On appeal, the Seventh Circuit, vacated the district court's decision holding that the plaintiff satisfied the requirements of section 216(b) because the complaint contained sufficient factual allegations relating to her individual claims to put defendants on notice that she intended to sue in her individual and representative capacities.

III. The Two-Stage Process Used to Determine if a Collective Action May Proceed to Trial

A. Overview

In *Eltayeb v. Deli Mgmt., Inc.*,[2] a delivery driver brought unpaid minimum wage claims under the FLSA arising out of a restaurant chain's method of reimbursing expenses for the use of personal vehicles. The district court denied the plaintiff's motion for conditional certification relying on the Fifth Circuit's *Swales*[3] analysis, which requires courts to identify at the outset of the case, the factual and legal considerations material to determining whether a there are similarly situated employees. The court reasoned that the putative nationwide collective was too dissimilar because it would require individualized determinations for each putative opt-in regarding the vehicle's make, model, and year, the maintenance and repair costs, and the number of miles driven in performing their duties.

In *Ison v. Markwest Energy Partners, LP*,[4] natural gas pipeline inspectors and handlers sought conditional certification. The defendant opposed arguing that the district court should adopt the Fifth Circuit's analysis in *Swales*,[5] which mandates an exacting standard for conditional certification motions. The court rejected the defendants' argument in favor of the two-step approach to conditional certification motions, and granted the plaintiffs' motion because they satisfied the modest evidentiary standard.

In re New Albertsons, Inc.,[6] the defendant petitioned the Seventh Circuit for a writ of mandamus arguing that the district court improperly employed a two-step

[1] 5 F.4th 700 (7th Circ. 2021).

[2] 2021 WL 5907781 (E.D. Tex. Dec. 14, 2021).

[3] Swales v. KLLM Transp. Servs., 985 F.3d 430 (5th Cir. 2021).

[4] 2021 WL 5989084 (S.D. W. Va. Dec. 17, 2021).

[5] 985 F.3d 430 (5th Cir. 2021).

[6] 2021 WL 4028428 (7th Cir. Sept. 1, 2021).

process for determining the conditional certification motion. The Seventh Circuit denied the defendant's petition reasoning that the two-step process followed by the district court is widely approved by other circuits.

In *Rosales v. Indus. Sales & Servs., LLC*,[7] the defendant opposed the plaintiff's conditional certification motion arguing that there was insufficient evidence to demonstrate there were similarly situated employees. Relying on *Swales*,[8] the court denied the motion because the plaintiff failed to demonstrate that the putative collective was misclassified, and that the defendants engaged in a common practice of denying overtime pay to other nonexempt employees.

B. Stage I: Standard for Determining Whether Conditional Certification Should Be Granted

In *Guzman v. GF, Inc.*,[9] kitchen workers and waitstaff at the defendants' restaurant group sought conditional certification of a putative collective which included all defendants' restaurant workers. The district court granted conditional certification for kitchen workers and waitstaff, but excluded bartenders, determining that the plaintiffs failed to provide evidence that FLSA violations applied to job titles other than their own.

In *Bah v. Enter. Rent-A-Car Co. of Boston, LLC*,[10] the defendant opposed the plaintiffs' motion for conditional certification, arguing that the court should adopt the Fifth Circuit's *Swales*[11] analysis. The district court rejected the defendants' argument explaining that there was no basis to depart from the two-step approach to conditional certification motions.

In *Fuller v. Jumpstar Enters., LLC*,[12] delivery drivers sought conditional certification. The district court denied the motion, reasoning that although there were some common job duties between the plaintiffs and the putative collective, there was no evidence that other drivers' worked overtime. While acknowledging that the plaintiffs faced challenges in obtaining evidence related to overtime, the court found that under the exacting standard set forth in *Swales*, the plaintiffs' affidavits did not satisfy their burden to show that putative collective action members were similarly situated.

1. The "Modest Factual Showing" Standard

In *Bliss v. Patterson*,[13] a driver and construction laborer, on behalf of himself and similarly situated workers, brought an unpaid overtime claim under the FLSA and unpaid overtime and notice violations under New York law against a contracting

[7] 2021 WL 4480747 (S.D. Tex. Sept. 30, 2021).

[8] 985 F.3d 430 (5th Cir. 2021).

[9] 2021 WL 2439277 (D.D.C. June 14, 2021).

[10] 560 F. Supp. 3d 366 (D. Mass. Aug. 18, 2021).

[11] 985 F.3d 430 (5th Cir. 2021).

[12] 2021 WL 5771935 (S.D. Tex. Dec. 6, 2021).

[13] 2022 WL 523547 (E.D.N.Y. Feb. 22, 2022).

company and several individual defendants. In denying the plaintiff's motion for conditional certification of the FLSA collective, the magistrate judge explained that the legal standard in resolving the motion was "lenient," with the plaintiff needing to make a "modest factual showing" that the potential collective members were "victims of a common policy or plan that violated the law."[14] Here, the magistrate judge found that the named plaintiff's own affidavit demonstrated that the defendants paid him on an hourly basis by check while the defendants paid the other putative opt-in plaintiffs on a day rate basis in cash, warranting denial of the motion.

In *Reyes v. Strada Servs. Inc.*,[15] the district court denied the plaintiff's motion seeking conditional certification under the FLSA. Plaintiff sought conditional certification of a collective of similarly situated employees for alleged violations of the FLSA's overtime provisions. In making collective action certification determinations under the FLSA, the court used a "fairly lenient standard" and found the plaintiff bears the burden of showing a reasonable basis for the claim that other employees job requirements and pay provisions were similarly situated. The court held that the putative class members were subject to different supervisors, different timekeeping practices and different job obligations and responsibilities and thus found that the plaintiff did not meet his burden.

In *Bernstein v. Town of Jupiter*, [16] the district court denied plaintiffs' motion for conditional certification because the plaintiffs failed to meet their burden of demonstrating that employees who would opt-in were similarly situated. The putative opt-in plaintiffs submitted generic, boilerplate declarations in support of their claims for unpaid overtime wages stating only that they were law enforcement officers for the town and believed that the defendant did not properly pay them overtime compensation. The court determined it was difficult to find them similarly situated absent specific factual support regarding their job titles, job duties, pay provisions, or other potentially relevant facts.

In *Santos v. E&R Servs., Inc*., [17] construction workers brought minimum wage and overtime claims against a construction company for allegedly requiring its employees to work off the clock and shaving time off of their timecards. The plaintiffs sought conditional certification of a collective consisting of all hourly-paid construction employees.[18] In support of their motion, the plaintiffs submitted the allegations in the complaint, their declaration, and deposition testimony from the defendant's office manager. The district court conditionally certified the collective, finding that the construction workers had met their lenient burden to show that they were similarly situated to the other construction workers who were subjected to the same policies. In doing so, the court rejected the defendants' request that the court apply the more stringent standard used by the Fifth Circuit because the district court need not "engage in a highly individualized analysis" to determine if the plaintiffs are employees in this

[14] *Id.* at *4.

[15] 2021 WL 4427079 (M.D. Fla. Sept. 27, 2021).

[16] 2021 WL 6135185 (S.D. Fla. Oct 13, 2021).

[17] 2021 WL 6073039 (D. Md. Dec. 23, 2021).

[18] *Id*. at *1.

case, and the district court could determine that the employees were similarly situated based on the evidence submitted.[19]

In *Santos v. Nuve Miguel Corp.*,[20] a supermarket stock person, alleging overtime violations resulting from off-the-clock work and time shaving, sought to conditionally certify a collective of non-managerial employees. The district court denied the plaintiff's motion because his lone declaration fell short of the modest burden required at the conditional certification stage.[21] The court found the plaintiff's allegations conclusory and unsubstantiated, as he failed to identify any other individuals who had the same duties or position as him and he did not describe the personal observations that formed the basis of his belief that his coworkers were similarly situated to him.[22] He also failed to provide details about his conversations with the three coworkers he named, such as what off-the-clock work these coworkers were complaining about, and when and where the conversations occurred.[23]

In *Hopkins v. Calais Forest Equity Enterprises, LLC.*,[24] a leasing consultant brought a collective action claim against her employer, a property management company, for failing to include commissions earned during the relevant pay period when calculating overtime wages. Plaintiff sought to have the court certify a collective of "all leasing consultants and assistant property managers who have been employed by Defendants at any time since January 8, 2018." The court denied the motion, holding that while the certification standard is lenient, it is "not the equivalent of a rubber stamp." The court noted that plaintiff filed a single declaration in support of her motion and that declaration failed to identify a single other employee who worked overtime hours in a week for which that employee earned commissions. The court found that simply pointing to an asserted common policy (such as not including commissions in the overtime calculations) does not justify conditional certification if there is no evidence of a policy that resulted in an actual FLSA violation for multiple employees.

In Peer v. Rick's Custom Fencing & Decking, Inc.,[25] the employer opposed construction project employee's motion for conditional certification of an FLSA collective that would include all employees who were paid using the employer's commission structure. The court noted that at the first stage conditional certification stage, all that is required are substantial allegations that the putative class members were all subjected to the same policies. The court rejected defendant's arguments that conditional certification should be denied based on (1) the class definition included some exempt employees and was thus too broad, (2) plaintiff had not submitted affidavits or other

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[19] *Id.* at *3-4 (declining invitation to adopt the more rigorous analysis set forth in *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430 (5th Cir. 2021)).

[20] 2021 WL 5316007 (S.D.N.Y. Nov. 16, 2021).

[21] *Id.* at *5.

[22] *Id.* at *5-6.

[23] *Id*. at *6-7.

[24] 2021 WL 4953248 (E.D. Ark. Oct. 25, 2021).

[25] 2021 WL 4203658 (D. Or. Aug. 13, 2021), *report and recommendation adopted*, 2021 WL 4199958 (D. Or. Sept. 15, 2021).

evidence showing that other putative collective members desired to opt-in to the lawsuit, and (3) conditional certification of a class including exempt employees would deny due process. The court rejected each of these arguments at the conditional certification stage, noting that the employee had alleged plausible legal theories based on a common scheme, and this was sufficient to allow the court to conditionally certify a collective.

Austin v. N3,[26] involved a motion for conditional certification. Plaintiff was employed through a temporary staffing company as a Business Development Representative tasked with making outbound solicitations on behalf of N3's clients. N3 is an "outsourced inside sales firm" and a wholly owned subsidiary of defendant Accenture LLP ("Accenture"). To meet key performance metrics and complete his duties, plaintiff routinely worked through his lunch, and continued working after his shift and on weekends. Plaintiff argued that there existed a group of employees with various titles but comparable duties who were similarly denied overtime compensation. The court found that plaintiff left his position before N3 was acquired by Accenture and therefore plaintiff was not similarly situated to any Accenture employee. Thus, the court denied certification as to Accenture.

In *Callier v. Outokumpu Stainless USA, LLC*,[27] three hourly employees of a steel manufacturer filed a complaint under the FLSA and moved for conditional certification. The case was the third such case filed against the defendant. In one of the earlier filed cases, the court entered a default judgment pursuant to its inherent power to issue case-ending sanctions and for discovery abuses. Noting that the initial step in certifying a FLSA collective action is to determine whether notice should be given to potential class members, which is a fairly lenient standard, the court nonetheless held plaintiffs' reliance on general allegations was insufficient to meet the burden of submitting evidence to establish a colorable basis for concluding that a class of similarly situated plaintiffs exist. The court rejected plaintiffs' argument that it should take judicial notice of facts established in the other case, holding that the default in the other case had no bearing on plaintiffs' burden of proof here.

In *Baker v. APC PASSE, LLC*,[28] the plaintiff was an hourly-paid care coordinator supervisor working in connection with the defendant's business providing healthcare management for individuals with developmental disabilities. The plaintiff alleged that the defendant's required care coordinator supervisors and care coordinators to clock out after forty hours, but to also work "off-the-clock" approximately fifty hours per week. The plaintiff sought conditional certification, and the court found that the plaintiff had not carried her lenient burden under the first step standard of 29 U.S.C. § 216(b) because supervisors' job duties differed from care coordinators and because there was a conflict of interest between the two groups because the supervisors were "potentially complicit in the allegedly unlawful practice of failing to report overtime."[29] Critically, the plaintiff

[26] 2022 WL 613164 (N.D. Ga. Mar. 2, 2022).

[27] 2022 WL 885037 (S.D. Ala. Mar. 24, 2022).

[28] 2021 WL 4255306 (E.D. Ark. Sept. 17, 2021).

[29] *Id.* (quoting White v. Osmose, Inc., 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002)).

admitted that she was responsible for enforcing defendants' policies regarding hours worked and overtime pay as to care coordinators. Owing to the perceived conflict of interest, the court conditionally certified a collective action comprised solely of care coordinator supervisors.

In *Bancroft v. 217 Bourbon, LLC*,[30] the plaintiffs were bartenders at defendants' bar who alleged that the defendants failed to pay overtime and minimum wages under the FLSA, docked pay and misappropriated tips in violation of Louisiana law, and fired the plaintiffs in retaliation for questioning the defendants' wage payment practices. The plaintiffs moved for issuance of notice under *Swales v. KLLM Transportation Services, L.L.C.*,[31] to two subclasses: 1) all employees who received a tip credit and 2) all employees who were not paid overtime for hours worked over forty in a workweek. The court "conditionally certified" a collective of bartenders, finding that the plaintiffs established only that the plaintiffs were similarly situated to other bartenders because there was no information as to whether other workers (bar-backs and security personnel who also participated in the tip pool, and management workers) were subject to the same tip and overtime pay policies.

In *Copley v. Evolution Well Servs. Operating, LLC*,[32] oil and gas industry electricians and equipment operators were employed at remote work sites. They brought overtime claims for time spent traveling from employer-controlled housing to the site, daily pre- and postliminary activities, and travel to/from home and employer housing. They also brought claims under Ohio and Pennsylvania state wage and hour laws. The district court conditionally certified the FLSA claims because the employees satisfied the modest factual showing for the first stage analysis. The court refused to resolve factual disputes raised by the employer. Further, in granting the plaintiffs' motion, the court noted that conditional certification was proper because, although the employer may prevail in the future, the court could not conclude as a matter of law that plaintiffs' claim for additional work was not compensable. Relying on the employees' declarations and findings in an earlier resolved motion to dismiss, the court rejected the employer's argument that the employees failed to offer sufficient evidence that the same policy impacted other workers.

In *Cowley v. Prudential Sec., Inc.*,[33] security guards sought overtime wages under the FLSA and California law for off-the-clock work, including work during meal periods. The court granted the motion for FLSA conditional certification of a nationwide class. The court rejected the defendants' arguments that the security guards failed to show a decision, policy, or plan that violated the FLSA because the defendants relied on out-of-circuit cases, and cases that addressed the second stage analysis, instead of the first stage standard. The court also rejected defendants' argument that an analysis of several factors identified by the Sixth Circuit was more appropriate for the second stage analysis. The factors include: the factual and employment setting of the

[30] 2022 WL 124025 (E.D. La. Jan. 13, 2022).

[31] 985 F.3d 430 (5th Cir. 2021).

[32] 2022 WL 295848 (W.D. Pa. Jan. 31, 2022).

[33] 2022 WL 1567314 (E.D. Mich. May 18, 2022).

employees; the different defenses to which the employees may be subject to an on individual basis; and the degree of fairness and procedural impact of certifying the collective action. The court held that the security guards met their burden based on the 12 opt-in declarations who worked in different locations across the country over the span of 10 years, and each opt-in suffered the same alleged FLSA violations.

In *Rodriguez v. Cutchall,*[34] the plaintiffs alleged violations of the FLSA on behalf of himself and other similarly situated delivery drivers working for a chain pizza restaurant. The plaintiffs alleged that the defendants failed to reimburse delivery drivers for vehicle expenses, which resulted in drivers being paid less than minimum wage. The plaintiffs moved for conditional certification. The district court declined to adopt the Fifth Circuit's *Swales* test,[35] and found that the plaintiffs established a "colorable basis" that the class members were victims of "a single decision, policy, or plan." The plaintiffs provided evidence of the defendants' policies governing all delivery drivers, which was sufficient for the court to grant conditional certification.

In *Hickmon v. Fun & Fit LLC*,[36] plaintiffs moved for conditional certification of a collective action on behalf of all the defendant's non-exempt health-aide employees. The court found that the plaintiffs did not meet the modest factual showing standard and denied the motion accordingly. In its analysis, the court explained that while the burden of proof is low, it was not non-existent, and satisfying the burden requires more than unsupported assertions or conclusory allegations. The court found that the plaintiffs failed to provide sufficient factual details to support their assertions that other employees were similarly situated. The court held that plaintiffs' assertions about the other health aides "are precisely the kind of unsupported assertions and conclusory allegations that courts in this [d]istrict have found to be insufficient to conditionally certify a class."[37] Further, the plaintiffs did not provide necessary probative information, like names, duties, or hours worked of other employees. The court therefore declined to certify the collective.

In *Thompson v. Glob. Contract Servs.*,[38] plaintiff worked at defendant's call center. She filed suit claiming that the timekeeping systems used by the defendant was often defective resulting in her, and her co-workers, not being paid for all hours worked. She further claimed that it took several minutes each day to log on to the timekeeping systems which was not compensated among other claims. In support of her motion for conditional, the plaintiff relied solely on her own affidavit wherein she made conclusory allegations that "all" employees were subject to the same policies. The court held that this was insufficient to meet even the modest factual showing required to demonstrate

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[34] 2021 WL 5911322 (D. Neb. Nov. 16, 2021).

[35] In *Swales*, the Fifth Circuit held that instead of adhering to the two-step conditional certification framework, a district court should enforce the "similarity requirement" at the outset of the litigation. Swales v. KLLM Transport. Services., LLC, 985 F.3d 430, 441 (5th Cir. 2021).

[36] 2021 WL 3578296 (S.D.N.Y. Aug. 13, 2021).

[37] *Id.* (quoting Sanchez v. JMP Ventures, L.L.C., 2014 WL 465542, at *1, *2 (S.D.N.Y. Jan. 27, 2014)).

[38] 2021 WL 3087568 (E.D.N.Y. July 21, 2021).

that she and other employees were subject to a common policy or plan. Plaintiff mentioned six co-workers in her affidavit only two of whom had stated any concerns regarding pay, and for those two employees the plaintiff lacked any detail about the statements. Thus, her motion for conditional certification was denied.

In *Ricketts v. NV5, LLC*,[39] plaintiff worked as an inspector for defendant and alleged that defendant violated the FLSA "by paying him a day rate disguised as an hourly rate and failing to pay overtime for time he worked in excess of forty hours per week."[40] The court considered whether plaintiff satisfied the burden to show the proposed members were so "similarly situated" as to warrant conditional certification. To support the allegation that the defendant paid a day rate disguised as hourly pay, the plaintiff provided a timesheet and paystub showing that he recorded exactly 10 hours per day, seven days a week, and that other inspectors were required to do the same. To support that allegation that other inspectors were also impacted by this scheme, plaintiff cited conversations with co-workers and observations he made on job sites. The court concluded that the allegations based on plaintiff's personal conversations with co-workers were sufficient to meet the lenient burden for conditional certification.

In *Hamm v. Acadia Healthcare Co., Inc.*,[41] the court considered plaintiff's motion to apply the traditional, lenient two-step certification process for collective action treatment and clarify the scope of discovery. The Fifth Circuit *Swales* decision rejected mandatory application of the two-stage certification approach for FLSA collective actions. Rather, *Swales* suggests that "district court should identify, at the outset of the case, what facts and legal considerations will be material to determining when a group of 'employees' is 'similarly situated[,]' [a]nd then it should authorize preliminary discovery accordingly."[42] The lenient evidentiary standard is appropriate where "all the plaintiffs have similar job descriptions and the allegations revolve around the same aspect of that job."[43] The court found that this was not such a case, and that limited discovery was needed. The plaintiff's description of persons in the proposed collective action encompassed an expansive number of employees with different job titles and duties. Even though the allegations "all revolve around lunch breaks, the policies and practices related to each category of employees may differ."[44] Accordingly, the court stated that it required more evidence to decide if the proposed collective was similarly situated. Next, the court clarified the scope of discovery. The court concluded that "collection and review of policy documents alone will be insufficient for conducting the rigorous similarly situated analysis required under *Swales*."[45] Instead, the court determined that an analysis of the policies and practices at play was necessary and allowed for the plaintiff to conduct phased discovery.

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[39] 2022 WL 949947 (S.D. W. Va., Mar. 29, 2022).

[40] *Id.*

[41] 2021 WL 5749900 (E.D. La. Oct. 19, 2021).

[42] *Id.* (quoting *Swales*, 985 F.3d at 441)).

[43] *Id.* at *2.

[44] *Id.*

[45] *Id.* at *4.

In *Han v. Shang Noodle House, Inc.*,[46] the court considered plaintiff's motion for conditional certification of FLSA unpaid minimum wage and overtime claims as a collective action on behalf of all "current and former chefs, cooks, meat cutters, food preparers, material preparers, dishwashers (collectively "Kitchen Workers"), waiters and waitresses (collectively "Wait Staff") who worked for [d]efendants."[47] The court denied the motion for conditional certification of an FLSA collective action for the alleged minimum wage violations for all proposed collective action members and denied certification of the overtime claims for the Wait Staff. The court granted conditional certification for the overtime violations alleged by the Kitchen Workers. As to the denial to certify the minimum wage violations as a collective action, the court explained that the plaintiff is unable to show that he was personally subject to a FLSA violation which is a prerequisite to bringing a collective action. The plaintiff's evidence in support of the minimum wage violation showed that he was paid well over the $7.25 federal minimum wage required by the FLSA and therefore plaintiff did not suffer a minimum wage violation. As to the denial of the overtime claim for the Wait Staff, the court explained that the plaintiff's conclusory allegations were insufficient to warrant certification and did not meet even the modest factual showing. As for the alleged overtime violations, the court found that conditional certification was permissible. Plaintiff sufficiently alleged that defendant paid a flat monthly salary but not one-and-a-half times the regular rate for the hours worked over 40 hours a week. Plaintiff carried his burden of demonstrating a "'modest factual showing' that [d]efendants' other Kitchen Workers at the Restaurant . . . are similarly situated to him in terms of their general duties and as possible victims of a common policy or plan to not pay overtime premiums that violated the FLSA."[48]

In *Manasco v. Best In Town, Inc.,*[49] plaintiffs were all employed by defendant as exotic dancers at a club. The plaintiffs alleged that they were misclassified as independent contractors, resulting in FLSA violations. The court found the plaintiffs met their burden of showing that the prospective opt-in plaintiffs were "similarly situated" for conditional certification. In support of the motion, plaintiffs provided "three declarations with identical allegations regarding the degree of control Defendants exercised over each of them, including, *inter alia*, controlling hours and shifts, setting the rates each dancer could earn, setting tip policies, and requiring dancers to accept 'Furnace Bucks' in lieu of other payments."[50] The court explained that at this stage, it will not resolve the parties' factual disputes as to the merits of the case and concluded "that [p]laintiffs have demonstrated a 'reasonable basis' for determining other potential plaintiffs are 'similarly situated' to them in performing the duties of the position as they have described it."[51] Additionally, the court found that plaintiffs met their burden to show that others desired to opt-in by providing evidence that six additional plaintiffs had opted in since the case was filed.

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[46] 2021 WL 3774186 (E.D.N.Y. Aug. 24, 2021).

[47] *Id.* at *1.

[48] *Id.* at *11.

[49] 2022 WL 816469 (N.D. Ala. Mar. 17, 2022).

[50] *Id.* at *7.

[51] *Id.* at *7.

2. The "Intermediate" or "Heightened" Standard for Conditional Certification Where Discovery Has Occurred

In *Smith v. Guidant Glob. Inc.,*[52] the court applied a "modest-plus" standard in evaluating the plaintiff's motion for conditional certification and court-authorized notice. The court reasoned that this heightened standard is appropriate where the parties participate in discovery related to the issue of conditional certification. In applying the "modest-plus" standard the court found that through the submission of eight workers' declarations, 30(b)(6) deposition testimony, and uniform staffing agreements the plaintiff had sufficiently "advance[d] the ball down the field" in demonstrating he and the putative collective were similarly situated.

3. Scope of Discovery Prior to Conditional Certification

a. Cases Denying Discovery

(i.) Cases Explicitly Denying Discovery

In *Piazza v. New Albertsons, Inc.*,[53] the grocery store employer sought discovery prior to conditional certification on the grounds that it should be permitted to aid the court in determining whether the putative collective of assistant store directors were similarly situated to the named plaintiff at an early stage of the case and thus streamline the litigation. The court denied discovery following which the employer brought an interlocutory appeal. The appellate court found that the lower court's order denying discovery could not be certified for interlocutory appeal. For an interlocutory appeal to be proper, four criteria must be met: (1) there must be a question of law; (2) it must be controlling; (3) it must be contestable; and (4) its resolution must promise to speed up the litigation. The court found that the question the employer sought to certify did not meet these criteria. First, the question was not "controlling" because a decision on conditional certification is subject to reversal at decertification. In addition, there was no "contestable" question (i.e., a question on which courts had come to different conclusions) because there was not a substantial difference of opinion within the circuit on whether the two-step conditional certification process should be used (allowing for conditional certification under a lenient standard without looking at the merits).

4. Issues Courts Have Considered in Determining Whether to Grant Conditional Certification

a. Geographical Scope

In *Brayman v. KeyPoint Gov't Sols., Inc.,*[54] individuals who worked as field investigators for a government contractor sued for unpaid overtime pay. The court, in deciding whether to grant final certification, determined that despite the plaintiffs working in different geographic settings, the close similarity in job functions and allegations from around the country weighed in favor of certification. The court determined that the defenses asserted by the defendant to the individual plaintiffs were

[52] 2021 WL 3240391 (E.D. Mich. July 30, 2021).

[53] 2021 WL 3645526 (N.D. Ill. Aug. 16, 2021).

[54] 595 F. Supp. 3d 983 (D. Colo. 2022).

not so different as to prevent certification, and that procedural and fairness considerations weighed in favor of final certification of the FLSA collective. The court also certified a Rule 23 class under California law.

In *Clark v. Southwestern Energy Co.,*[55] a well tender pumper for an oil and natural gas company filed a lawsuit under the FLSA alleging that he and similarly situated employees were not paid for overtime work they were required to perform before and after their scheduled shifts. Joining other district courts 8th Circuit, the Eastern District of Arkansas said the plaintiff was entitled to conditional certification of a collective action under the FLSA because he was only required to make a modest factual showing that there were similarly situated individuals subject to the employer's pay practices.

In *Loschiavo v. Advanced Drainage Sys., Inc.*, [56] hourly workers employed by a manufacturer of corrugated pipes and other storm and water waste services and products filed suit alleging they performed unpaid work during their meal breaks and performed unpaid work before or after their shifts due to their employer's rounding policy in violation of the FLSA. The employees sought conditional certification of a nationwide class based on these allegations, but the district court denied their motion in part, limiting the conditionally certified collective action class to eight locations. The court reasoned that the plaintiffs' declarations supported issuing notice to the locations where the declarants worked, but the declarations did not show actual knowledge of a company-wide policy that would support issuance of nationwide notice.[57]

In *Villarino v. Pacesetter Personnel Service, Inc.*,[58] the plaintiff, employed by a temporary staffing agency, filed a renewed expedited motion to certify a nationwide class of employees in a collective FLSA action seeking unpaid overtime and minimum wages. The court, having previously granted the plaintiff conditional certification for employees at the defendant's Fort Lauderdale location, denied the renewed motion, reasoning that the plaintiff failed to satisfy the requisite burden of proof to prove that the purported class of employees at other locations were similarly situated to the plaintiff.

b. Variance in Job Duties

In *Moxley v. OS Rest. Servs., LLC*,[59] assistant restaurant managers brought overtime claims contending that they were misclassified as exempt employees. Citing declarations from the plaintiffs stating they performed similar job duties and worked unpaid overtime, the district court found they were similar to one another and granted the motion for conditional certification. The district court acknowledged declarations submitted by the defendant that showed variance in assistant manager job duties but refused to allow that evidence to collapse the first and second stages of the certification

[55] 2022 WL 993755 (E.D. Ark. Mar. 31, 2022).

[56] 2022 WL 1749049, *1 (S.D. Ohio May 2, 2022).

[57] *Id.* at *3.

[58] 2021 WL 8946184 (S.D. Fla. Sept. 24, 2021).

[59] 2022 WL 1487589 (M.D. Fla. May 11, 2022).

inquiry. The court found the plaintiffs' burden at the initial notice stage was only to show that they are similar (not identical) to one another, and the plaintiffs' declarations had done so.

In *Marquis v. Sadeghian*,[60] a putative class of employees asserted claims alleging defendant paid each less than they were promised and less than the FLSA required. Plaintiffs requested the court certify a collective action. The court denied the motion because plaintiffs could not establish that they were similarly situated. While each plaintiff was employed as a handyman or handywoman, plaintiffs did not establish they each performed similar job duties and that plaintiffs' contention that they each performed "repairs" on the defendant's properties was "far too generalized" for the court to find that the plaintiffs were similarly situated.[61] Additionally, plaintiffs failed to establish that each member of the proposed collective was subject to the same pay policy and therefore similarly paid.[62]

In *Torres v. Chambers Protective Servs., Inc.*,[63] hourly gate guards brought claims for failure to pay overtime wages against a security services company, who argued that it had no obligation to pay overtime wages because the gate guards were independent contractors and not employees. In granting plaintiffs' motion for conditional certification, the district court concluded that in light of the Fifth Circuit's decision in *Swales*,[64] district courts consider three factors in deciding if a putative collective is similarly situated: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. The court determined that all three factors weighed in favor of authorizing notice and that plaintiff was an appropriate lead plaintiff

c. Individualized Allegations or Defenses

In *Pugliese v. Gov't Emps. Insurance Co.*,[65] two insurance adjusters sued their employer alleging that they were directed to enter 7.75-hour days and 38.75-hour weeks, with a forty-five-minute meal deduction, despite working more than forty-hour weeks without a meal break, and that if they failed to do so, they were subject to discipline. In considering the plaintiffs' motion to certify a collective action, the district court applied the two-step certification approach used by numerous courts. The court rejected the employer's contention that the claims were too individualized for class certification because the adjusters had different work habits, abilities and workloads. In granting the plaintiffs' motion, the court found that the plaintiffs had made a "modest" showing that they were subjected to a company practice of directing employees to

[60] 2021 WL 6621686 (E.D. Tex Dec. 30, 2021).

[61] *Id*. at *6.

[62] *Id*. at *6-7.

[63] 2021 WL 3419705 (N.D. Tex., Aug. 5, 2021).

[64] 985 F.3d 430 (5th Cir. 2021).

[65] 2022 WL 1129341 (D. Mass. Apr. 15, 2022).

report they had worked less than forty hours per week despite rather than actual time worked.

In *Smith v. Smithfield Foods, Inc.*,[66] current and former food production employees alleged they were non-exempt employees owed overtime wage under the FLSA for pre and post shift work performed. The plaintiffs filed a motion to conditionally certify a class of similarly situated employees, and permit court-supervised notice of opt-in rights to those persons, which defendants opposed. In opposition, defendants argued one named plaintiff and six opt-in plaintiffs were time barred under the FLSA, and that some putative plaintiffs released their FLSA claims during prior class action litigation against defendants, and that defendant did not employ some plaintiffs. On report and recommendation, the court recommended the plaintiffs' motion for conditional certification be denied because the plaintiffs failed to meet their burden to establish that a nationwide class be conditionally certified. The court chose not to factor in defendants' arguments singling out specific named and opt-in plaintiffs because a significant portion of defendants' case law concerned the second stage of class certification, decertification, not notice.

d. Interest in Joining the Action

In a collective action brought by several truck drivers and technicians, the district court in *Collins v. Pel-State Bulk Plant, LLC*,[67] after finding that the plaintiffs were similarly situated to a group of potential opt-ins, rejected defendant's argument that plaintiffs needed to show that there were potential opt-ins interested in joining prior to granting motion for conditional certification.

e. Similar Practices or Policies

In *Quint v. Vail Resorts, Inc.*,[68] ski resort employees alleged their employer failed to pay its hourly employees for all hours worked. The plaintiffs alleged: (1) ski and snowboard instructors were not properly paid for travel time, donning and doffing time for uniforms and equipment, training, and "off the clock" work before and after shifts; (2) other hourly employees were not paid for donning and doffing, and travel time to and from parking lots; and (3) instructors and other hourly employees were not paid for "tools of their trade" or the use of their smartphones. The plaintiffs sought nationwide class certification and at least 18 persons had filed opt-in notices, which failed to include their job titles or locations. The district court applied the two-step approach when considering the plaintiffs' motion for preliminary certification, emphasizing that at the initial notice stage, the court "require[s] nothing more than substantial allegations that the putative [collective] members were together victims of a single decision, policy, or plan"[69] and "does not weigh evidence, resolve factual disputes, or rule on the merits of

[66] 2021 WL 6881062 (E.D. Va. Dec. 21, 2021), *report and recommendation adopted*, 2022 WL 407378 (E.D. Va. Feb. 9, 2022).

[67] 2021 WL 5234968 (W.D. Tex. Sept. 29, 2021).

[68] 2022 WL 2753637 (D. Colo. Feb. 21, 2022).

[69] *Id.* at *3 (citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095,1102 (10th Cir. 2001)).

plaintiffs' claims."[70] The district court denied the plaintiffs' motion without prejudice concluding that the plaintiff failed to allege that there were substantial similarities between approximately 36,000 seasonal employees, whose job titles significantly varied, working across approximately thirty-three resorts. The court did note that conditional certification may be appropriate for a more narrowly tailored subset of employees, but that it was not the court's responsibility to trim down the collective to one that is similarly situated.[71]

In *Brown v. 1888 Mills, LLC,*[72] plaintiff employee alleged FLSA claims for unpaid overtime wages, that the timekeeping system used by the employer improperly rounded down employees' hours worked to the nearest 15-minute interval, and that the same system automatically adjusted employees' clock-out time to, and deprived them of, compensation for any time worked beyond their shift end. In granting the plaintiff's motion for conditional certification, the district court held that, although the plaintiff conceded that the opt-in plaintiffs performed different duties and worked different supervisors, the court, "particularly at the notice stage, need not engage in fact finding to determine whether their duties are sufficiently similar to constitute being 'similarly situated'" and instead, "must simply determine whether [the named plaintiff] and the opt-in Plaintiffs are subject to a common timekeeping practice such that conditional certification is proper."[73] The court concluded that, because the defendant's interrogatory response stated that all hourly employees used and were subject to the same timekeeping system, the plaintiff had provided a sufficient reasonable basis for finding that there was a similarly situated group of aggrieved individuals.[74]

In *Buffington v. Ovintiv USA Inc.*,[75] plaintiff alleged FLSA claims on behalf of safety consultants that large and oil gas companies misclassified the workers as independent contractors, paid them a flat sum or "day-rate" for each day that they worked regardless of the number of hours worked each day or week and failed to pay overtime wages. In opposition to the plaintiff's motion for conditional certification, the defendants argued that the district court should apply the standard announced by the Fifth Circuit to stay any decision on the motion to allow them to conduct discovery on the issue of whether the plaintiff and others who had opted-in were similarly situated to the proposed nationwide class.[76] The district court rejected the defendants' argument and found no reason to deviate from the Tenth Circuit's two-stage *ad hoc* approach

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[70] *Id.* at *3 (quoting Ortez v. United Parcel Serv., Inc., 2018 WL 4328170, at *2 (D. Colo. Sept. 11, 2018)).

[71] The court also denied the plaintiffs' argument, which plaintiffs based on a Ninth Circuit decision (*Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100-02 (9th Cir. 2018)), that conditional certification is not required prior to giving prospective collective members notice and opportunity to opt-in. *Id*. at *3–4.

[72] 339 F.R.D. 692 (N.D. Ga. 2021).

[73] *Id*. at 699 (citing Scott v. Heartland Home Finance, Inc., 2006 WL 1209813, at *3 (N.D. Ga. May 3, 2006)).

[74] *Id*.

[75] 2021 WL 3021464 (D. Colo. July 16, 2021), *motion to certify appeal denied*, 2021 WL 3726195 (D. Colo. Aug. 23, 2021).

[76] *Id*. at *2 (discussing Swales v. KLLM Transport Services, L.L.C., 985 F.3d 430, 434 (5th Cir. 2021)).

pursuant to which "at the initial notice stage, 'a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'"[77]

In *Clark v. Southwestern Energy Co.,*[78] a well tender pumper for an oil and natural gas company filed a lawsuit under the FLSA alleging that he and similarly situated employees were not paid for overtime work they were required to perform before and after their scheduled shifts. Joining other district courts in the Eighth Circuit, court said the plaintiff was entitled to conditional certification of a collective action because the Eighth Circuit's two-step certification approach to FLSA cases initially requires only that a plaintiff make a modest factual showing that there were similarly situated individuals subject to the employer's pay practices. The district court rejected the employer's request that it follow a recent Fifth Circuit opinion [79] that abandoned the two-step inquiry in favor of requiring district courts to "rigorously enforce" the similarity requirement at the outset of the litigation.

In *Rios-Gutierrez v. Briggs Traditional Turf Farm, Inc*,[80] the court considered plaintiffs' motion for conditional collective action certification under the FLSA. The plaintiffs, H-2A visa holders, are required to perform agriculture labor or services. While working for the defendants, the plaintiffs allege that they worked more than 40 hours per week. While agricultural workers are generally exempt from overtime, the plaintiffs argued that even though they are working under an agricultural visa, the fact that the defendants required them to perform landscaping work should make them eligible for overtime payments. In support of certification, the named plaintiffs asserted that they and other members of the putative FLSA opt-in class were foreign workers brought to the United States on H-2A visas to perform agricultural work on defendants' farm, but that they were directed to perform landscaping rather than agricultural work, which was often for more than 40 hours a week and were not paid overtime. Further, plaintiffs asserted that defendants had a policy, that applied equally to all foreign nationals, "of saying on the H-2A visa applications that their employees would be performing exempt agricultural work, and then directing those same employees to perform non-exempt work."[81] The defendant argued that only one of the named defendants is truly the employer. Plaintiffs countered that this argument ignored the expansive definition of employer under the FLSA. The court found that the allegations are sufficient to conclude that all named defendants potentially qualify as an employer. The court did not entertain defendant's second argument because doing so would have required the court make an improper credibility determination at too early of a stage in the proceedings. The court found that the plaintiffs met their burden and granted conditional certification.

[77] *Id*. (quoting Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)).

[78] 2022 WL 993755 (E.D. Ark. 2022).

[79] Swales v. KLLM Trans. Servs., L.L.C., 985 F.3d 430 (5th Cir. 2021).

[80] 585 F. Supp. 3d 1209 (W.D. Mo. 2022).

[81] *Id.* at *3.

In *Robertson v. REP Processing, LLC*,[82] the court addressed plaintiff's motion for conditional certification. The plaintiff sought to represent a class of "Day Rate Inspectors" who were required to work more than 40 hours per week but were paid a day rate with no weekly guarantee of hours or days worked and were paid improper and inconsistent overtime. To support the allegations, plaintiff provided a declaration that he worked 60-72 hours per week yet was paid a flat sum and that through conversations with co-workers he learned that they were paid the same. Additionally, plaintiff provided a daily pay rate schedule from 2019 which shows that he and other inspectors were paid a flat amount regardless of number of hours worked. After considering the evidence, the court found "that plaintiff presented substantial allegations that members of the putative collective were subject to a single policy – the 2019 Rate Schedule – that violated the FLSA. These allegations satisfy the 'lenient' standard for the first stage of collective action certification."[83]

In *Phillips v. Cnty. of Riverside*,[84] the employer brought a motion to decertify an FLSA collective. The court granted the motion, reasoning that the employer's overtime policy did not create a systemic practice of denying overtime to county employees while performing administrative tasks. The court held that while the employer's policy discouraged overtime and created a potentially cumbersome overtime approval process, it did not give rise to a systemic policy that prevented the reporting of earned overtime. The court noted that the employer's overtime expenditures varied during the class period and that some of the opt-in plaintiffs had actually been paid overtime for performing administrative tasks. Because there was evidence showing there was not a uniform policy to deny employees overtime for performance of administrative tasks, the case could not proceed on a collective basis.

In *Hallman v. Peco Foods, Inc.*,[85] the named plaintiffs alleged they and opt-in plaintiffs were owed wages for time spent donning and doffing personal protective equipment. They claimed their employer required all employees to clock-in fully clothed and ready to work which added three minutes of compensable time to every shift. The employer sought to decertify an FLSA collective consisting of all production-line workers working at one of its facilities. The court decertified the collective consisting of all employees working across different departments at the facility in question because there was no uniform policy involving donning and doffing where different department had different personal protective equipment requirements. The court did, however, hold that one department at the facility was subject to common donning and doffing requirements, and therefore narrowed the scope of the collective to a single department that required its employees to utilize certain protective equipment.

[82] 2021 WL 4255027 (D. Colo. Sept. 16, 2021).

[83] *Id.* at *4.

[84] 2022 WL 2162822 (C.D. Cal. Apr. 7, 2022).

[85] 2022 WL 987931 (E.D. Ark. Mar. 31, 2022).

5. Conditional Certification in Specific Types of Cases

a. Misclassification Cases

(i.) Exemption Cases

In *Rosario v. Valentino U.S.A., Inc.*,[86] former employees sought to certify a FLSA collective action. They alleged the defendant purposefully misclassified employees as exempt and denied them overtime wages. It was undisputed that the defendant had previously re-classified some of its employees from exempt to non-exempt, which the plaintiffs argued was an admission that the employees had, in fact, been misclassified. The district court rejected this argument, reasoning that the prior decision to re-classify employees as non-exempt was insufficient evidence of a common policy or that the employees were similarly situated, and thus denied conditional certification.

In *Babbitt v. Target Corp.*,[87] the plaintiffs sought conditional certification of a nationwide collective action of "executive team leaders." They argued that these employees were misclassified under the executive exemption of the FLSA and various state laws and were consequently denied overtime wages. The district court granted certification, reasoning that the defendant had a common policy that applied to all executive team leaders at the defendant's stores. The written policies and training materials stated that executive team leaders were expected to spend more than half their time on leadership responsibilities rather than "hourly tasks." The plaintiffs had also produced evidence showing the range of time spent on non-exempt hourly tasks was between 80% and 95% of their working time, and the court found that it was clear the defendant wanted executive team leaders to perform hourly tasks. Part of their essential functions included the physical requirements of moving merchandise and placing items on shelves and racks on the sales floor. While executive team leaders had different roles and experiences, these differences did not render a nationwide class unmanageable or require denial of conditional certification.

In *Roggenkamp v. Bold Transp., Inc.*,[88] the plaintiff alleged that his employer misclassified the plaintiff and other "Yard Hostlers" as exempt under the FLSA and improperly withheld overtime compensation. As set forth in the plaintiff's complaint, Yard Hostlers' duties involved operating tractors and moving freight from a staging area to loading docks at the defendant's facility. When the plaintiff moved for conditional certification, however, he expanded the definition of the proposed class so that it was not limited to Yard Hostlers. The district court found that the plaintiff's new class definition was broader and poorly defined. Because the court was unable to ascertain the scope of the new proposed class, the court granted conditional certification based only upon the class definition set forth in the plaintiff's complaint.

In *Modise v. CareOne Health Servs., LLC,*[89] the plaintiffs sought conditional certification on behalf of home health aides and personal care assistants. These

[86] 2021 WL 4267634 (S.D.N.Y. Sept. 20, 2021).

[87] 2022 WL 1715180 (D. Minn. Apr. 5, 2022).

[88] 2021 WL 7209984 (D. Kan. June 16, 2021)

[89] 2021 WL 3421711 (D. Conn. Aug. 5, 2021).

employees lived with the defendants' clients assisting them by cooking and serving meals, helping them bathe and change clothes, and escorting them to medical appointments. During a typical week, the plaintiffs worked thirteen hours a day for seven days a week. For this, they received a flat rate of $140 per day. The plaintiffs contended they were misclassified as exempt employees under the FLSA and were entitled to overtime compensation. They also claimed that their sleep and meal breaks were frequently interrupted, and the defendants did not offer any way for the plaintiffs to account for this additional uncompensated time. In opposition to the motion for conditional certification, the responding defendant primarily contested the merits of the plaintiffs' claims. The district court, however, rejected these arguments. The court reasoned that, at the conditional certification stage, the court's role is not to reach the merits of the plaintiffs' claims. Rather, the court was satisfied that the plaintiffs established the requisite "factual nexus" between their employment experiences and others to support a finding they were similarly situated, and it granted conditional certification for those employees who were paid a flat daily rate.

(ii.) Independent Contractor Cases

In *Badon v. Preferred Caregivers & Sitters, LLC*,[90] the plaintiffs were hired by a home health care provider to provide in-home health care services for the defendants' clients. Plaintiffs alleged that they were misclassified as independent contractors, routinely worked more than 40 hours per week, and were not paid required overtime wages. Plaintiffs, who sought to bring a collective action on behalf of all similarly situated workers, filed a motion to conditionally certify an FLSA collective action. The court, however, denied the motion. It explained that the Fifth Circuit in *Swales* had rejected the common two-step conditional certification process for claims arising under the FLSA. Instead, according to *Swales*, a district court "must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.'"[91] The district court in *Badon*, therefore, denied the plaintiffs' motion for "conditional" certification. It directed the parties to submit a discovery plan for determining which potential opt-in plaintiffs were similarly situated, to be followed by a collective action certification motion.

b. Off-the-Clock Cases

(i.) Pre-Shift and Post-Shift Cases

In *Pippen v. Global Tech. Recruiters Inc.*,[92] an hourly employee at a steel production facility brought overtime claims for time spent donning and doffing protective gear and attending pre-shift meetings. In denying conditional certification to both claims, the district court held that the plaintiff failed to show that employees were subjected to common policies for each alleged violation. For the donning and doffing claim, the plaintiff submitted declarations from employees with different titles at different locations. The record revealed that the amount and type of protective gear worn by each

[90] 2021 WL 3418382 (E.D. La. Aug. 5, 2021).

[91] Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021).

[92] 2021 WL 2430707 (N.D. Ohio June 15, 2021).

employee varied by title and location. Because the declarations failed to describe the employees' job duties, the district court concluded that it could not determine whether the donning and doffing was compensable on a collective-wide basis and thus whether the putative collective members were subject to a common policy of not paying for compensable time. For the pre-shift meeting claim, the declarations contained "conclusory statements" that they were not compensated for mandatory pre-shift meetings.[93] Because the plaintiff did not provide "any handbook or explicit policy that authorizes unpaid, pre-shift meetings, and [the employer] flatly contradicts the existence of any such policy or practice," the declarations did not establish that all hourly employees were subject to a common policy of not paying for pre-shift meetings.[94]

In *Echeverria v. Nevada*,[95] current and former guards and other employees at state prisons brought claims for uncompensated time spent preparing for and wrapping up their work shifts. In denying defendants' motion to decertify, the district court held that the plaintiffs were similarly situated under the FLSA, as they offered deposition testimony and written policies to support that they were required to perform certain preliminary and postliminary activities integral to their job without compensation, and were instructed not to request overtime for such tasks. The court further concluded that any distinctions among the plaintiffs regarding different amounts of time to perform different tasks went to the individualized calculation of damages or the individualized application of defenses, which is not inconsistent with the collective action mechanism, where courts must first resolve the common questions of law and fact that do exist.

(iv.) Tip Credit Cases

In *Williams v. Bob Evans*,[96] "tipped employees" of Bob Evans' restaurants brought a proposed class and collective consolidated action for, among other things, violations of the "Dual Jobs Regulation" for recovery of unpaid wages for spending more than 20% of their workweek performing non-tipped duties. The district court granted conditional certification on the dual jobs claim. The court reasoned that the plaintiffs carried their burden of making a modest factual showing that the employees were similarly situated by offering evidence that the defendant "centrally developed policies and practices to determine the job tasks to be performed by servers and then implemented those policies and practices through a cascading company-wide chain of command."[97]

[93] *Id.* at *7.

[94] *Id.*

[95] 2022 WL 1652450 (D. Nev. May 23, 2022).

[96] 2022 WL 1120048 (W.D. Pa. Apr. 14, 2022).

[97] *Id.* at *8.

6. Other Issues That May Be Considered at or Before Stage I

a. Addressing "Dispositive Issues" Prior to Conditional Certification

In *Alvarez v. NES Global LLC*,[98] plaintiff employee brought a putative collective action against a staffing company for unpaid overtime wages and other damages. Plaintiff alleged she and other "day rate workers" had been paid under a day rate system that included a weekly "retainer" amount for any week in which they performed any work, and a day (or hourly) rate in any workweek that he or she performed more than a certain number of days or hours of work. Plaintiff alleged she and other similarly situated employees were not paid overtime under this system. Plaintiff provided pay information for herself and three other employees—all four employees were paid differently under the day rate system and each employee had differing employment duties. Plaintiff moved for certification under the Swales decision.[99] The defendant employer opposed certification, arguing that its primary defense was the employees were "highly compensated employees," and because the highly compensated employee exemption depends on an employee's salary and job duties, the proposed collective was not similarly situated because the pay practices and job duties differed significantly between members. The district court determined that because the "salary basis" element of the exemption defense could be answered collectively, certification was appropriate even though it was less plausible that the "duties" element of the "highly compensated employee" defense could be answered collectively. It reasoned that since the defendant employer bore the burden of establishing both elements of the defense, the court could reconsider later if the collective members were still "similarly situated" if the salary basis test was satisfied.[100]

b. Lack of Personal Jurisdiction

In *Speight v. Lab. Source, LLC,*[101] the district court granted in part and denied in part defendant employer's partial motion to dismiss for lack of personal jurisdiction. The defendant's motion sought to dismiss claims brought on behalf of any putative member of the collective who was not a resident of North Carolina or did not work for defendant in North Carolina. The court held that it is improper to exercise personal jurisdiction over the defendant as it relates to claims brought on behalf of putative collective members who did not work in North Carolina, were not hired in North Carolina, or whose employment by defendant was not otherwise related to North Carolina. The court denied defendant's motion to the extent it was based upon a category of "nonresident" putative collective members as there is no reason, based on the alleged facts, that a nonresident employee's FLSA claim could not arise from defendant's activities aimed at the state, such as where a nonresident worker comes into North Carolina to work.

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[98] 2021 WL 3571223 (S.D. Tex. Aug. 11, 2021).

[99] 985 F.3d 430 (5th Cir. 2021).

[100] *Id.* at *4–5.

[101] 2022 WL 1164415 (E.D.N.C. Apr. 19, 2022).

In *Ison v. Markwest Energy Partners, LP*,[102] on plaintiffs' motion for conditional certification, defendant argued that plaintiff inspectors failed to demonstrate the district court had jurisdiction over work performed outside of West Virginia under the Supreme Court's holding in *Bristol-Meyers*.[103] The district court rejected defendant's argument, finding it had personal jurisdiction over the named plaintiff. The court explained that the majority of courts have held *Bristol-Meyers* is inapplicable to class actions brought under Rule 23 and that courts in the Fourth Circuit have declined to extend the holding in *Bristol-Meyers* to FLSA collective actions. In doing so, the court recognized that the purpose of collective actions is to prevent piecemeal litigation and allow an efficient way for employees to pursue claims against an employer based on the same alleged unlawful conduct.

In *Jaime v. Parts Auth. LLC*,[104] plaintiff delivery drivers brought an action for unpaid wages against defendants Diligent Delivery Systems ("Diligent"), Parts Authority Arizona LLC, and Parts Authority, Inc., claiming they were wrongly classified as independent contractors. Defendants moved to dismiss the complaint for lack of personal jurisdiction. In determining whether the court had personal jurisdiction, it looked to the three-prong test in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004), explaining that courts in the District of Arizona have applied both the personal availment and purposeful direction tests to unpaid wage claims. The court dismissed the claims against Diligent for lack of personal jurisdiction because it was unclear whether Diligent contracted with the Arizona parties and the court was unaware of any other acts that would avail Diligent of Arizona's jurisdiction. As to defendants Parts Authority Arizona LLC, and Parts Authority Inc., the court found under the three-prong *Schwarzenegger* test, that it could exercise jurisdiction as defendants purposefully availed themselves of conducting business in Arizona—it had stores which used delivery drivers supplied with Arizona Logistics, Inc. and plaintiffs' claims arose from the Parts Authority defendants' agreements with Arizona Logistics, Inc.

(i.) Jurisdiction Over Defendant

In *Olin-Marquez v. Arrow Senior Living Management, LLC*,[105] a former care partner brought overtime claims on behalf of Ohio-based employees against a senior residential facility. The district court denied the defendant's motion to dismiss for lack of personal jurisdiction. The court first found that the plaintiff satisfied the relevant criteria of Ohio's long-arm statute by alleging the defendant, as plaintiff's single or joint employer, operated and managed approximately 15 senior living communities in the state. By virtue of its operative authority, defendant hired the plaintiff and putative class members, controlled their employment and working conditions, supervised and controlled their work schedules, pay rates, and methods of compensation, and sufficiently engaged in commerce. The court further found that application of Ohio's long-arm statute would accord with due process based on the plaintiff's allegations that

[102] 2021 WL 5989084 (S.D.W.V. Dec. 17, 2021).

[103] Bristol-Meyers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017).

[104] 2021 WL 3055041 (D. Ariz. July 20, 2021).

[105] 586 F. Supp. 3d 759 (S.D. Ohio 2022).

the defendant purposely availed itself of the state by singularly or jointly managing the employees of Ohio-based facilities and that her overtime cause of action arose from the defendant controlling her wage rate and employment conditions. The court determined that the defendant's burden to litigate in Ohio did not mitigate the allegations that it purposefully reached into Ohio, did not outweigh the state's interest in ensuring fair and legal business conduct, and did not surpass the plaintiff's interest in pursuing relief in her home state.

In *Butler v. Adient US, LLC*, the plaintiff moved for conditional certification of a nationwide class of workers at defendant's facilities. Defendant opposed certification based on the lack of personal jurisdiction over any claims brought by nonresidents. The court held that it could not exercise general jurisdiction over the defendant because the defendant's home was in Michigan, not Ohio where the lawsuit was filed. As to specific jurisdiction, the court followed holdings outside the Sixth Circuit[106] finding that a court lacks specific jurisdiction on claims of opt-in plaintiffs for work performed outside the forum state and denied conditional certification as to those plaintiffs. The court further held the plaintiff's allegations also fell short as to workers in the forum state who performed different work at another facility.

(ii.) Jurisdiction Over Opt-Ins

In *Vallone v. CJS Sols. Grp.*,[107] consultant employees who were hired on a per-project basis brought a putative collective action against their employer seeking wages for out-of-town travel to and from remote project locations. The district court conditionally certified the action but limited the claims to those arising out of travel to and from Minnesota, the forum state. The district court later granted summary judgment for the employer, and the plaintiffs appealed. The Eight Circuit, in affirming the judgment, concluded that the district court did not err in limiting the scope of the action to claims with a connection to Minnesota based on a lack of personal jurisdiction over the non-Minnesota claims.

In *Parker v. IAS Logistics DFW, LLC,*[108] the court evaluated defendant's motion to dismiss the non-Illinois plaintiff and out-of-state opt-in plaintiffs for lack of personal jurisdiction. Since the parties agreed that general jurisdiction did not exist, the court evaluated whether the plaintiffs' claims arose out of or were related to defendant's Illinois activities. Since the FLSA did not authorize nationwide service of process, the court evaluated whether the Illinois long-arm statute authorized service on defendant for the non-Illinois related claimants. The court concluded that personal jurisdiction must exist as to each opt-in, specifically noting that recent cases had reached the same conclusion.[109] Given the lack of any connection between the defendant's forum

[106] The Sixth Circuit had not ruled on the issue whether *Bristol-Meyers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017), applies to federal courts exercising personal jurisdiction.

[107] 9 F.4th 861 (8th Cir. 2021).

[108] 2021 WL 4125106 (N.D. Ill., Sept. 9, 2021).

[109] *See* Canaday v. Anthem Co., Inc, 2021 WL 3629916, at *4 (6th Cir. Aug. 19, 2021) *and* Valone v. CJS Sols. Grp., LLC, 2021 WL3640232, at *3 (8th Cir. Aug. 18, 2021).

activities and the out-of-state opt-ins, the court dismissed the claims of out-of-state opt-in plaintiffs for lack of personal jurisdiction.[110]

In *Carlson v. United National Foods, Inc.*,[111] Plaintiff, Donald Carlson, worked for defendants, SuperValu, Inc. and United Natural Foods, Inc, as a Warehouse Coordinator, Customer Care Coordinator, Operations Coordinator, and Account Coordinator for over 10 years in Washington state. Plaintiff alleges that defendants had misclassified him as exempt under the FLSA and failed to pay him required overtime. In February 2020, defendants reclassified plaintiff's job as non-exempt under the FLSA, at which point he alleges defendants permitted plaintiff to work off-the-clock to avoid paying overtime. The court found that plaintiff established the requisite modest factual showing that the employees were similarly situated and granted conditional certification as to employees within plaintiff's proposed collective definition who worked in Washington state but denied as to those who worked in Florida for lack of personal jurisdiction.

In *Canaday v. Anthem Cos., Inc.,*[112] Plaintiff filed a collective FLSA action in Tennessee, her home state. Defendant was a resident of Indiana. After several of Anthem's nurses in other jurisdictions opted in, defendant filed a motion to dismiss the out-of-state opt-ins on the ground that the district court lacked specific jurisdiction over them. The District Court agreed, and the Sixth Circuit affirmed, citing the Supreme Court's decision in *Bristol-Myers Squibb*[113] where the Supreme Court held that specific jurisdiction requires the plaintiff's claims to arise from or relate to the defendant's activities in the forum state. Because the FLSA does not contain a nationwide service provision, FRCP 4(k) applies, which places territorial limits on exercising personal jurisdiction to the home state. Therefore, the Sixth Circuit held that the court did not have specific jurisdiction over defendant's out-of-state nurses who had opted into the collective action. The Sixth Circuit noted that a collective action is akin to a mass tort rather than a class action under FRCP 23, and that no federal statute or rule authorizes pendent claim or pendant party personal jurisdiction.

In *Waters v. Day & Zimmermann NPS, Inc.*,[114] an hourly employee in Massachusetts filed suit against his employer on behalf of himself and other similarly situated individuals, alleging failure to pay him and other employees overtime wages. More than 100 current and former employees from across the country filed opt-in notices. The First Circuit heard the defendant's interlocutory appeal from the district court's denial of its motion to dismiss nonresident opt-in claims due to lack of jurisdiction. The court upheld the district court's denial and held as a matter of first impression that the federal rule governing territorial limits of effective service did not limit a district court's personal jurisdiction over nonresidents' opt-in claims when the employer was properly served with process initially and the case was proceeding as a

[110] 2021 WL 4125106, at *2–3.

[111] 2021 WL 3616786 (W.D. Wash. Aug. 14, 2021).

[112] 9 F.4th 392 (6th Cir. 2021), *cert denied* 142 S. Ct. 2777 (Mem) (2022).

[113] Bristol-Myers Squibb v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017).

[114] 23 F.4th 84 (1st Cir. 2022).

collective action. Breaking from other circuit courts, the court relied on the Due Process Clause in the Fifth Amendment, which allows an out-of-state opt-in plaintiff to sue under a federal statute in federal court when the defendant maintains the required minimum contacts with the United States and was properly served an initial summons in accordance with Rule 4.

7. Communication About the Collective Action

a. Contact by the Parties

In *Brewer v. Alliance Coal, LLC,*[115] plaintiffs sued for unpaid overtime pay, obtained conditional certification, and were in a dispute with the defendant regarding the manner of transmittal of notice to the putative class members. The court allowed the parties to send the notice via mail and email, and to utilize electronic signature means with Docusign. The court also ordered the defendant to post the notice in a conspicuous place. The court did not allow plaintiff's counsel to send a reminder notice or to obtain the phone numbers of putative class members for a follow-up communication in the case of returned forms.

In *Goldston v. Ariel Community Care, LLC*,[116] after conditionally certifying a collective of allegedly misclassified peer support specialists, the district court authorized an approved notice to be sent via mail, a separate emailed notice referring to the mailed notice, and a copy of the mailed notice to be posted at the defendant's workplace. The court also allowed a reminder notice, finding that plaintiff's evidence that the peer support specialists are often engaged in support assignments away from their homes was sufficient "special circumstances" to warrant such a reminder notice. However, the court denied plaintiff's request for text notice, finding that unless plaintiff learned that neither the mail notice nor email notice reached the putative plaintiff, no "special need" existed.

In *Curry v. P&G Auditors & Consultants, LLC*,[117] which involved a conditionally certified proposed collective action, the defendant sought to prevent notification to potential opt-in plaintiffs by any means other than mail. Plaintiffs sought to include email and text as other possible means of notification. The district court relying on *Yi Mei Ke*[118] found email and text to be appropriate additional means of disseminating notice of the action to potential, opt-in plaintiffs.

(i.) Contact by Plaintiffs and Their Counsel

In *Bernstein v. Town of Jupiter*, the district court denied plaintiffs' Motion for Certification of Collective Action because plaintiffs failed to proffer sufficient evidence that the 27 opt-in plaintiffs were similarly situated.[119] Consequently, the court denied

[115] 2021 WL 3729297 (E.D. Ky. Aug 23, 2021)

[116] 2022 WL 1289673 (M.D.N.C. Apr. 29, 2022).

[117] 2021 WL 2414968 (S.D.N.Y. June 14, 2021).

[118] 2021 WL 148751, at *14 (S.D.N.Y. Jan. 15, 2021).

[119] 2021 WL 6135185 (S.D. Fla. Oct 13, 2021).

plaintiff's counsel the opportunity to send court-supervised notices to potential class members.

(ii.) Contact by Defendants and Their Counsel

In *Carusillo v. Fansided, Inc.,*[120] plaintiffs filed a collective action alleging FLSA violations on behalf of all persons similarly situated to "site experts" creating content for one of defendant's sport websites. Plaintiffs signed "Expert Services Agreements," which governed the terms of their employment with defendants. The Court denied the defendants' motion to dismiss finding that the plaintiffs made the "modest factual showing" required to justify conditional certification of all persons who are working or have performed work in the United States for defendant as a Site Expert at any time within the past three years and who were classified as independent contractors. On defendants' motion, the court allowed defendants to send another updated Expert Services Agreement to putative collective members that would include an arbitration agreement without a carve-out for this litigation.

b. Court-Facilitated Notice

In *Alfaro v. Gali Serv. Indus., Inc.*,[121] plaintiffs alleged that defendants had failed to pay their janitorial employees for hours they worked in the last month before operations were shut down. The court entered orders of default against three of the five defendants for not responding to the complaint or making an appearance to defend themselves. The other two defendants consented to plaintiffs' motion for conditional certification, notice was issued, and 330 individuals opted in to the collective action. For purposes of their motion for a default judgment, Plaintiffs requested that the court certify that those individuals be deemed to have opted in as to a collective action against the other two defendants. The magistrate judge recognized that collective actions must be certified even in the case of a defendant's default, but concluded there was no need to resend notice because all eligible employees had already received it.[122] The magistrate judge then recommended that the district court grant final certification of the FLSA collective action because plaintiffs had demonstrated that they were similarly situated in their FLSA claims against the defaulting defendants.[123]

In *Johnson v. Serenity Transp., Inc.*,[124] plaintiffs, who are mortuary drivers, brought a suit against their employer under the FLSA and state law. The plaintiffs were granted class certification before a settlement was reached between the parties.[125] The district court, in reviewing plaintiffs motion for preliminary approval of the class settlement, held that the proposed notice met the requirements of Fed. R. Civ. P.

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[120] 2021 WL 4311167 (S.D.N.Y. Sept. 21, 2021), *motion to certify appeal denied,* 2021 WL 5166958 (S.D.N.Y. Nov. 5, 2021).

[121] 2021 WL 4704690 (D. Md. Oct. 8, 2021), *adopted by* 2021 WL 8314951 (D. Md. Oct. 27, 2021).

[122] *Id.* at *2.

[123] *Id.* at *3.

[124] 2021 WL 3081091 (N.D. Cal. Jul. 21, 2021).

[125] *Id.* at *1.

23(b)(3) and supported preliminary approval because it explained in "in plain language: (1) the nature of the action; (2) the definition of the class certified; (3) the claims, issues, and defenses in the case; (4) that a class member may obtain their own attorney if they wish to proceed with litigation upon opting out of the settlement; (5) that the court will exclude them if they request so and that objections must be made within 45 days; (6) how to request exclusion; and (7) the binding effect of class judgment on class members," and further that a settlement administrator was not needed because the modest settlement amount rendered an administrator too costly.[126] Finally, the court held that the plaintiff did not need to propose additional outreach methods, such as by social media, because the class was small and defendants had records of class members' addresses.[127]

In *Pieczynski v. LCA Vision, Inc.*,[128] the Lasik center employee and the employer filed a joint motion regarding the content of the notice that would go to putative collective members giving them notice of the lawsuit. The parties agreed to some content, but also had various disputes. The court noted that it has discretion over the form of the notice provided in an FLSA collective action. The court found that the agreed portions of the notice were sufficient because they were accurate and described: the notice's purpose, the lawsuit, who was eligible to participate, how to opt in, the right to decline participation, the consequences of opting in, protection from retaliation, and the role of class counsel. On the disputed issues, the court ruled in favor of the employer's request to include language warning potential collective members that liability for costs and fees would be possible if they joined the lawsuit. In regard to the employer's request that the notice include a warning that employees who opted-in to the lawsuit could be liable for the employer's attorneys' fees, the court ordered that the language be included only as modified so that it would be clear that opt-in employees would only be liable for the employer's attorneys' fees if there was an ultimate finding that the employees litigated in bad faith.

In *Villamar v. Carrier Compliance Services Corporation*,[129] the Southern District of Florida granted the plaintiff's motion to conditionally certify his lawsuit to collect unpaid overtime wages under the FLSA as a collective action. The plaintiff, a dispatcher for a Florida-based trucking compliance company, sought to certify a class of "all current and former hourly paid dispatchers, customer service representatives, and/or other employees who performed the same or similar job duties who were not paid full and proper overtime wages for all hours worked in excess of forty (40) hours per workweek at any time within the last three (3) years." However, the court narrowed the class certification to similarly situated employees who were employed at the same location as the plaintiff. The court also ordered the Defendants to produce an electronic, importable spreadsheet identifying the putative class members by full names, job titles, dates of employment, mailing addresses, and e-mail addresses. In analyzing

[126] *Id.* at *5–6.

[127] *Id.* at *6.

[128] 2022 WL 1238552 (M.D. Fla. Jan. 14, 2022), *report and recommendation adopted*, 2022 WL 1238574 (M.D. Fla. Feb. 1, 2022).

[129] 2022 WL 1650100 (S.D. Fla. May 24, 2022).

the plaintiff's proposed notice to the putative class members, the court limited the duration of the notice period from 90 days to 45 days based on an agreement between the parties, it declined to include the defendants' counsel's contact information on the notice to avoid the ethical concern of a putative class member contacting the defendants' counsel for legal advice, and it denied the defendants' request to remove the case caption from the notice—rejecting the defendants' argument that including the caption would mislead the class members to believe that the court approves of the collective action and would not be impartial. Finally, the court granted the plaintiff leave to amend the proposed notice to clearly advise the putative class members of their right to obtain independent legal counsel, to advise the putative class members that Defendants may seek to recover their attorneys' fees and costs if they prevail at trial, and to advise the putative class members that they may have to appear in person for trial in Miami.

In *Ricketts v. NV5, LLC*,[130] plaintiff alleged that defendant violated the FLSA "by paying him a day rate disguised as an hourly rate and failing to pay overtime for time he worked in excess of forty hours per week."[131] Plaintiff filed a motion for conditional class certification and court authorized notice. After finding that plaintiff met the standard for conditional class certification, the court addressed the form of the court-facilitated notice. Defendant made several objections to the proposed notice: "(1) the description of the class; (2) the lack of warnings provided to potential plaintiffs; (3) the method of communication by which the notice may be sent; and (4) the frequency with which the notice may be given to the same potential plaintiff." First, the court sustained in part and overruled part defendant's objection regarding the description of the class. The court sustained the objection to the description and location of the class because it agreed with defendant that the description offered by plaintiff was too broad and would encompass inspectors who were not similarly situated. However, the court overruled the defendant's objection to the time frame of the putative class because the defendant did not plead lapsing of the statute of limitations as a defense to the plaintiff's claims and thus the objection was not timely. Second, the court overruled defendant's request to include warnings to the potential plaintiff regarding the defendant's litigation position. The court reasoned that the warnings are "unnecessary and do more to dissuade participation than inform potential plaintiffs."[132] Third, the court overruled defendant's objection to the production and use of email addresses and phone numbers for notice. The court found plaintiff's request for emails and phone numbers reasonable due to the transitory nature of inspectors. Lastly, the court sustained defendant's objection to the second reminder notice that the plaintiff requested be authorized, finding that it was unnecessary and inappropriate.

[130] 2022 WL 949947 (S.D. W. Va., Mar. 29, 2022).

[131] *Id.*

[132] *Id*. at *4.

(i.) Notice Content

In *Aleman-Valdivia v. Top Dog Plumbing & Heating Corp.*,[133] the court conditionally certified a minimum wage and overtime collective action brought by a plumber who alleged that his employer did not track hours worked, paid wages in cash, and never paid overtime wages. Plaintiff requested that notice be sent to non-exempt employees who worked during a six-year period prior to the complaint date because he asserted claims under the FLSA and New York state law, which provided a longer statute of limitations period. The court recognized that New York district courts were divided on issuing notice for the longer period, with some allowing the broader scope because discovery of earlier FLSA claims, even if time-barred, could be helpful in determining whether Rule 23 class certification was appropriate.[134] The court limited the notice period to three years because motions for conditional certification only encompass FLSA violations and a six-year notice period "could confuse potential opt-in plaintiffs who are ineligible to bring claims under the FLSA."[135]

In *Nyarko v. M&A Projects Restoration Inc.*,[136] a group of construction laborers brought suit against their employer alleging violations under the Fair Labor Standards Act and New York Labor Law for failure to properly reimburse the workers for overtime hours worked and fraudulent reporting on the workers' tax forms. Amongst other claims, plaintiffs filed a motion for conditional certification and a proposed notice and claim form seeking to certify a class of hourly construction helpers or laborers who worked for the defendants' construction company within the statutory period. In granting the motion for conditional certification, the court evaluated the notice content to ensure compliance with Second Circuit standards. Notably, the court:: (1) advised that the notice be amended to clearly reflect that the notice concerns an FLSA collective; (2) allowed notice to be translated into the native language of non-English speaking groups of potential plaintiffs; (3) recommended that defense counsel's contact information be included in the notice, but should be accompanied by language that instructs recipients who decide to join the case not to contact defense counsel; (4) corrected the notice to include a reference to only those current named plaintiffs and opt-ins who are a party to the litigation, and not those who are not involved in the litigation; (5) revised "ambiguous" language in the notice to clarify that potential plaintiffs can "submit a claim form", in lieu of language stating that potential plaintiffs can "participate" generally; (6) advised that a 60-day notice period, which is common under the FLSA, is appropriate in lieu of a 90-day notice period when plaintiffs failed to explain why an extended period was warranted and was not agreed-upon by the parties; and (7) recommended that completed consent forms be returned to the clerk of the court, and not to plaintiffs' counsel, aligning with the most common practice in the Second Circuit.

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[133] 2021 WL 4502479 (E.D.N.Y. Sept. 30, 2021).

[134] *Id.* at *6.

[135] *Id.*

[136] 2021 WL 4755602 (E.D.N.Y. Sept. 13, 2021).

In *Martinenko v. 212 Steakhouse Inc.*,[137] plaintiff moved to conditionally certify a collective action under the FLSA and authorize notice to all service employees of the defendant restaurant in a case seeking unpaid overtime, The court granted conditional certification for the suit to proceed as a collective action. Plaintiff also sought permission to disseminate notice by first-class mail, email, and text message. Defendant objected to the form of the proposed notice. Defendant sought: (1) to include the defendant's position and potential defenses; (2) to include the defendant's counsel as a potential contact for the opt-in plaintiffs; (3) to exclude any reference to "class" or to "improperly withheld wages" and to include language about possible depositions or written discovery for opt-in plaintiffs; (4) to limit the opt-in period to 30 days; (5) to limit the collective period to two years; and (6) to require the consents to be sent to the Clerk of the Court rather than plaintiff's counsel. *Id*. The court rejected defendant's objections and explained that "[t]he content of the notice is 'left to the broad discretion of the trial court'" and that courts are "'guided by the goals of the notice: to make as many potential plaintiffs as possible aware of this action and their right to opt in without devolving into a fishing expedition or imposing undue burdens on the defendants.'"[138]

In *Kim v. U.S. Bancorp*,[139] a former employee brought suit against the defendant for violations of the FLSA during his employment as a Branch Assistant Manager at employer's branch in Auburn, Washington. Other branch managers who had joined the case were employed at various locations in Missouri, Tennessee, and Wisconsin. Employees alleged that they were required to work "off the clock" and were not compensated for that time. This time included opening and closing procedures, as well as answering phone calls from other branch managers and working through meal breaks. Plaintiff sought an order granting conditional certification which included, among other things, approval of the content and issuance of various notices to the collective. The notice approved by the court required that it include information about the suit, qualified potential plaintiffs, the choices potential plaintiffs have, consequences to those choices, independent legal representation, and instructions be published.

In *King v. Fedcap Rehabilitation Servs., Inc.*,[140] the plaintiff alleged violations of the FLSA and state law for failure to pay overtime compensation, specifically that defendants, two recruiting and job placement companies, would round down when calculating compensation, including when employees worked beyond the end of their shifts. Further, the plaintiff alleged that defendants automatically deducted an hour for a meal break regardless of whether employees took a break, and that employees were often required to travel to other locations for additional work but were not compensated for travel time. In his motion for conditional certification, the plaintiff sought approval of notice to potential collective members in Spanish and a six-year notice period. Defendants requested a three-year notice period and for the notice to include contact information for defendants' counsel. Citing precedent, the district court approved for the

[137] 2022 WL 1227140 (S.D.N.Y. Apr. 26, 2022).

[138] *Id*. (citing Fasanelli v. Heartland Brewery, Inc., 516 F. Supp. 2d 317, 323 (S.D.N.Y. 2007); Elmajdoub v. MDO Dev. Corp., 2013 WL 6620685, at *4 (S.D.N.Y. Dec. 11, 2013)).

[139] 2021 WL 3665840 (W.D. Wash. Aug. 18, 2021).

[140] 2022 WL 292914 (S.D.N.Y. Feb. 1, 2022).

notice to be translated to Spanish and to include contact information for defense counsel. As the plaintiff had not moved for class certification of his state law claims, the court found a three-year notice period appropriate to avoid the confusion and inefficiency of providing notice to employees whose claims may be time-barred.

In *Amoko v. N&C Claims Serv., Inc.*,[141] a claims adjuster brought claims for unpaid overtime and moved for conditional certification of a collective action. The defendants argued, over the plaintiff's objections, for several edits be made to the plaintiff's proposed notice form. In ruling on these arguments, the district court directed the plaintiff to include contact information defendants' counsel in the notice form.[142] The court also ordered the plaintiff to make clear in the consent form that opt-in plaintiffs may consult with other counsel. The court declined to add language regarding a potential member's discovery and trial obligations, noting that because all potential plaintiffs worked in the same office, they would not be expected to appear for deposition or trial in an unexpected location. The court also found it unnecessary, for the purposes of an accurate and informative notice, to include language regarding the possibility that plaintiffs who join may later be excluded.[143]

In *Barron v. Casa Luis Corp.,*[144] restaurant workers brought claims under the FLSA and New York Labor Law in district court for failure to pay employees minimum wage and overtime premiums, failure to pay spread of hours compensation, unlawfully withholding tips, and failure to provide wage notices and statements. Over the defendants' objections, the magistrate judge recommended for the notice to retain reference to the state law claims but that it must make clear that while state law class claims may be litigated in the future, the opt-in consent form is only for joining the FLSA claims. The court cited prior cases in the Eastern and Southern Districts that found sending notice to all potential plaintiffs at the same time promotes judicial economy, even though some individuals may only have timely state law claims.

In *Robertson v. REP Processing, LLC*,[145] day rate inspectors brought claims under the FLSA alleging that the defendant paid improper and inconsistent overtime when it required inspectors to work in excess of 40 hours per week, yet paid them a day rate. The defendant made multiple objections to the proposed notice, most of which the district court found unpersuasive. Namely, the defendant objected that the notice does not advise recipients of their option to be represented by plaintiff's counsel, to obtain independent representation, or to proceed *pro se*.[146] Finding that the notice already references an option to return the consent form to plaintiff's counsel or to hire an attorney of his or her choice, the court ordered for the notice to also advise of the option to proceed *pro se*.[147] The defendant also argued for the notice to include language that

[141] 2021 WL 6340992 (D.S.C. Dec. 29, 2021).

[142] *Id.* at * 13.

[143] *Id.* at * 5–7.

[144] 2022 WL 2467595 (E.D.N.Y. Jan. 21, 2022).

[145] 2021 WL 4255027 (D. Colo. Sept. 16, 2021).

[146] *Id.* at *5.

[147] *Id.* at *6.

that potential opt-in plaintiffs may be asked to appear for a deposition and/or appear at trial in Denver, Colorado, which the court found to be unnecessary, inaccurate, and aimed at discouraging participation.

(ii.) Scope of Providing Notice

In *Holder v. A&L Home Care & Training Ctr., LLC*,[148] home health care employees sought conditional certification of collective classes alleging a failure to pay for travel time and a failure to properly calculate the regular rate. While the district court granted the motion for conditional certification, it found it inappropriate to issue opt-in notice to employees who signed an arbitration agreement and waived their ability to participate in the collective action. Accordingly, the court narrowed who could receive notice to those individuals for whom the defendants could not produce evidence of signed arbitration agreements, reasoning that it better promotes judicial economy to avoid inviting individuals to opt in to collective litigation when an arbitration agreement prevents them from opting in to collective litigation.[149]

In *Santos v. E&R Servs., Inc.*,[150] construction workers brought minimum wage and overtime claims against a residential and commercial construction company for requiring its employees to work off-the-clock and shaving time off of their timecards. The plaintiffs sought conditional certification of a collective consisting of all hourly-paid construction employees in the commercial division.[151] The district court conditionally certified a three-year period, applying a "lenient pleading requirement for willfulness at the conditional certification stage."[152] The court found that the plaintiffs' allegations met this standard because the plaintiffs sufficiently alleged that defendants had willfully failed to pay all wages due.[153] Further, the court rejected the defendants' request to limit potential plaintiffs to those who worked for defendants before either the date when the last named plaintiff stopped working for defendants, or the date when plaintiffs filed the complaint.[154] Citing precedent, the court held that the conditional certification period extends to the date of the conditional certification order.

In *Iannotti v. Wood Grp. Mustang*,[155] the plaintiff filed suit under the FLSA and state law against his former employer, alleging that he and others similarly situated worked as day rate employees and were paid a flat amount for each day worked, regardless of the number of hours they worked. The district court certified a collective of day rate employees who had some relationship to the forum state, but declined to grant a nationwide collective, citing a considerable circuit split over whether courts could exercise personal jurisdiction over out-of-state opt-in plaintiffs. In light of two pending

[148] 552 F. Supp. 3d 731 (S.D. Ohio 2021).

[149] *Id*. at 745.

[150] 2021 WL 6073039 (D. Md. Dec. 23, 2021).

[151] *Id*. at *1.

[152] *Id.* at *5.

[153] *Id.*

[154] *Id.*

[155] 2022 WL 1605855 (S.D. Ill. May 20, 2022).

Supreme Court petitions for writ of certiorari over the issue, however, the court tolled the claims of all potential opt-in plaintiffs regardless of their connection to the forum state.

(iii.) Method of Providing Notice and Data Provided by the Defendant

In *Lin v. JD Produce Maspeth LLC*,[156] the plaintiff sought conditional certification of a collective of salespersons who occasionally drove the defendant's trucks. The district court granted the motion. However, the court denied the plaintiff's requests to include QR codes or defendant's logo on the notice, to post the notice on plaintiff's counsel's website, and to distribute the notice through defendants' employees pay envelopes, reasoning that they were all unnecessary to the dissemination of court-authorized notice.

In *Aleman-Valdivia v. Top Dog Plumbing & Heating Corp.*,[157] a district court conditionally certified a minimum wage and overtime collective action brought by a plumber who alleged that his employer, a plumbing and heating company, did not track hours worked, paid wages in cash, and never paid overtime wages. The plaintiff requested that the court order defendants to produce a list of names, last known addresses, telephone numbers, email addresses, social media handles, social security numbers, dates of employment, titles, compensation rates, and hours worked per week for all non-exempt employees in the relevant period. The court denied the request for social media handles because the plaintiff failed to demonstrate the need to disseminate notice outside the traditional methods of mail, email, and text message. It also determined that the plaintiff had not demonstrated a valid need for social security numbers for the use of skip traces, given the other approved methods of circulating notices to those who cannot be reached by mail.[158]

In *Castro v. Tierno Care Home Health Agency, Inc.*,[159] a district court certified a conditional class of home health care aides in an action alleging overtime violations under the FLSA and D.C. Minimum Wage Act. The plaintiff sought an order requiring the defendants to disclose the names, last known home addresses, and cellular telephone numbers of members of the putative class. The defendants opposed the disclosure of cell phone numbers and requested that notice be limited to delivery by mail. Noting that many courts have recognized that email is a more ubiquitous and effective method of communication than traditional mail, the court reasoned that email was an appropriate method to facilitate notice. As for cell phone numbers, the court found that the plaintiff had not made a showing of particularized need where she merely stated that that home health aides are "generally Spanish speaking immigrants with little education."[160] Because the Plaintiff not connected this assertion with any need for her to access cell phone numbers, the court declined to order the production of cell phone numbers and denied the plaintiff's request to notify putative plaintiffs via text message.

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[156]2021 WL 5163218 (E.D.N.Y. Nov. 5, 2021).

[157] 2021 WL 4502479 (E.D.N.Y. Sept. 30, 2021).

[158] *Id.* at *11.

[159] 2022 WL 1433650 (D.D.C. Apr. 5, 2022).

[160] *Id.* at *4.

In *King v. Fedcap Rehabilitation Servs., Inc.,*[161] the plaintiff alleged violations of the FLSA and state law for failure to pay overtime compensation, specifically that defendants, two recruiting and job placement companies, would round down when calculating compensation, including when employees worked beyond the end of their shifts. Further, the plaintiff alleged that defendants automatically deducted an hour for a meal break regardless of whether employees took a break, and that employees were often required to travel to other locations for additional work but were not compensated for travel time. In his motion for conditional certification, the plaintiff requested that notice and consent forms be posted in defendants' places of business, but the district court found it duplicative in light of the fact that defendants could provide plaintiffs with last known mailing addresses, email addresses, and all known phone numbers. The defendants were also ordered to provide the names, titles, and dates of employment of covered employees so long as they were able to extract it from their records. The court declined to require the production of social security numbers and compensation rates, finding such information to be overly broad.

In *Chang v. Jenny JN Nails, Inc*.,[162] a worker alleged that her employer, a nail salon, failed to pay minimum wage and overtime in violation of the FLSA and state law. After conditionally certifying a collective encompassing non-exempt nail/waxing workers and massage workers at the defendants' nail salons, the district court approved for notice and consent form to be issued in four different languages: English, Chinese, Korean and Spanish, and for notice to be distributed by mail, email, text message, or social media group and individual chat and posts to all potential members of the proposed collective class. The court also granted the plaintiff's request to post the notice at the defendants' stores and to send reminder notices. The court denied, however, the plaintiff's request to post the notice on the plaintiff's counsel's website because counsel failed to aver that it maintains a stand-alone website for this purpose.

In *Chen v. Dun Huang Corp*.,[163] restaurant waiters filed suit against their former employer alleging that it paid them either a day rate or weekly rate without regard to the number of hours they worked in violation of the minimum wage and overtime provisions of the FLSA and state law. Plaintiffs also alleged that the defendants unlawfully retained all tips from customers. After granting conditional certification, the district court ordered for notice to be disseminated in both English and Chinese by mail, email, text message, and social media chat (addressed specifically to the members of the proposed collective), along with a reminder via mail and email halfway through the opt-in period. The court also permitted the notice to be posted on plaintiffs' counsel's website and ordered for a copy of the notice to be displayed in a conspicuous location convenient to employees at the restaurant. However, the court declined to require the defendants to include the notice in the employees' pay envelopes, reasoning that the plaintiff did not cite any Second Circuit authority for such a requirement, and that courts in the circuit have been wary of permitting this form of dissemination, as it may suggest either that

[161] 2022 WL 292914 (S.D.N.Y. Feb. 1, 2022).

[162] 2021 WL 6339641 (D. Conn. Sept. 28, 2021).

[163] 2021 WL 5234421 (S.D.N.Y. Nov. 8, 2021).

the notice originates with the employer or that filling it out may actually be required or expected by the employer. The court also declined to authorize plaintiffs' counsel to post a short form of the notice on public social media groups or chats, noting that posting on public social media groups (unlike personalized social media messages) would be overbroad and not likely to materially improve the chances of notice to a relatively small group of workers, all of whom were employed at a single restaurant location. Finally, the court found plaintiffs' request to publish the proposed notice on social media and in a newspaper if the defendants fail to furnish a complete contact list or if more than 20% of the notices are returned as undeliverable to be premature.

C. Stage II: The Standard for Deciding Motions to Decertify Collective Actions

2. Disparate Factual and Employment Settings of the Plaintiffs

In *Owens v. City of Malden*,[164] the district court granted the defendant city's motion for decertification of a collective of police officers following a five-day bench trial. The plaintiffs alleged that the city illegally deducted a ten percent administrative fee from their wages for private detail work. The court noted that it was tasked with determining whether the named-plaintiffs and opt-in plaintiffs were similarly situated and would consider at the decertification stage factors such as disparate factual employment settings, the defenses available to defendant which appeared to be individual to each plaintiff and fairness and procedural considerations. In analyzing the first factor—disparate factual employment settings—the court found that proceeding with the suit would require the court to first determine whether each plaintiff had an overtime claim. Furthermore, the court noted that even after the completion of trial, it was not at all certain whether any of the individual plaintiffs, named or not, had a viable claim, which demonstrated the extraordinary efforts required to make a showing of liability. Combined with individualized defenses considered by the court, it found that individual considerations overwhelmingly dominated any common questions of fact of law and, as a result, plaintiffs were not similarly situated.[165]

In *Olukayode v. UnitedHealth Grp.*,[166] clinicians who consulted on the use of electronic medical record software at the defendants' client hospitals alleged that they were improperly classified as independent contractors and denied overtime compensation. The district court granted the defendants' motion to decertify the collective action. The court found that, given the consultants' varying experiences with respect to the factors of the economic realities test, determining liability for misclassification would require cumbersome and unmanageable mini-trials for each plaintiff. In particular, the consultants' different experiences regarding substantive software training, supervision, timekeeping, meeting, and reporting requirements, and work for competitors evidenced that the defendants exerted different levels of control over them; their varying testimony about the ability to negotiate higher pay rates evidenced different opportunities for profit; the permanency of their relationships with

[164] 568 F. Supp. 3d 77 (D. Mass. 2021).

[165] *Id.* at 108–10.

[166] 2021 WL 3293648 (D. Minn. Aug. 2, 2021).

the defendants varied in terms of project length, daily hours, and the ability to simultaneously work for competitors; and some consultants furnished their own equipment while others did not. Moreover, the court found that the record reflected that the defendants engaged in an individualized review of each consultant to determine their classification, weighing in favor of decertification.

In *Blandon v. Waste Pro USA, Inc.*,[167] waste disposal drivers brought unpaid overtime claims in federal court against a waste disposal and recycling services company, alleging they were not paid time and a half for overtime because they were paid an improperly calculated day rate in violation of the FLSA. In recommending that the defendant's motion to decertify the FLSA collective be granted, the magistrate judge applied the Eleventh Circuit's three-factor test in determining whether the plaintiffs were sufficiently similarly situated after the parties completed discovery.[168] In analyzing the first factor—the factual and employment settings of the plaintiffs—the judge reasoned that the conditionally certified collective entailed different types of drivers who were subject to different compensation methods, which supported decertification.[169] Further, the plaintiffs' concession to dismissing two subclasses and creating three additional subclasses based on payment of bonuses, payment of half day rates, and payment under other methods indicated that the opt-in plaintiffs were not similarly situated to each other.

In *O'Reilly v. Daugherty Systems, Inc.*,[170] the plaintiff brought a collective action under the FLSA and Equal Pay Act alleging that the defendant discriminated against female consultants and support staff by providing them with lower pay than similarly situated male consultants and support staff. The court previously certified a class of current and former female employees who worked for the defendant, and the defendant now moved for decertification. In evaluating whether plaintiffs were similarly situated, the court considered (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) other fairness and procedural considerations. In evaluating the whether the disparate factual and employment settings of the individual plaintiffs evinced the existence of a company-wide policy, the court granted defendant's motion for decertification on the grounds that the plaintiffs' employment circumstances were "too individualized" to support a collective action based on different individuals making different compensation decisions, along with varying titles, roles, compensation structures, supervisors, department codes, intra-department lines of service, and company locations worked at by the plaintiffs.

In *Carr v. AutoZoner, LLC*,[171] store managers of an aftermarket automotive parts and accessories retailer asserted that they had been improperly classified as exempt

[167] 2021 WL 7447594 (M.D. Fla. Dec. 21, 2021).

[168] *Id.* at *2 (citing Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008)).

[169] *Id.* at *3 (citing Thomas v. Waste Pro USA, Inc., 2019 WL 4751802, at *1 (M.D. Fla. Sept. 30, 2019)).

[170] 2021 WL 4514293 (E.D. Mo. Sept. 30, 2021).

[171] 2021 WL 4894610 (N.D. Ala. Oct. 20, 2021).

employees under the FLSA. More than 1,500 current and former AutoZone store managers opted into this suit. AutoZone moved to decertify the collective, arguing that the class members were not similarly situated because their duties as store managers and discretion over managerial tasks differed from store to store and district to district. The plaintiffs countered that the evidence showed class members working in similar settings with similar oversight, and their work was governed by the same mandatory corporate policies. Agreeing with the defendant, the district court granted the motion to decertify, finding that the plaintiffs' deposition testimony revealed differences in their daily responsibilities, discretion over managerial tasks, authority to hire, set pay rates, and promote, and that district managers gave the plaintiffs' recommendations on these issues differing amounts of weight.

3. Individualized Defenses

In *Blandon v. Waste Pro USA, Inc.*,[172] waste disposal drivers brought unpaid overtime claims in federal court against a waste disposal and recycling services company, alleging they were not paid time and a half for overtime because they were paid an improperly calculated day rate in violation of the FLSA. In recommending that the defendant's motion to decertify the FLSA collective be granted, the magistrate judge applied the Eleventh Circuit's three-factor test in determining whether the plaintiffs were sufficiently similarly situated after the parties conducted discovery.[173] In analyzing the second factor—the defendant's individualized defenses—the magistrate judge reasoned that two defenses supported decertification: (1) the extent of interstate travel performed by some plaintiffs, which impacted the applicability of the Motor Carrier Exemption and (2) whether the plaintiffs worked any or *de minimis* overtime hours, both of which relate to liability and would require individualized determinations by the jury.

In *Martinez v. First Class Interiors of Naples*,[174] a district court had previously conditionally certified a collective action with two opt-in classes, the overtime class and the last paycheck class.[175] The plaintiff employees performed drywall installation, framing, and finishing, and were alleging minimum wage and overtime violations against their employer under the FLSA. One of the defendants filed a motion to decertify the collective action, arguing that it was not any of the plaintiffs' employer. The court noted three factors it considers when determining whether certification is appropriate: (1) "factual and employment settings of the individual[ ] plaintiffs;" (2) "the different defenses to which the plaintiffs may be subject on an individual basis;" and (3) "the degree of fairness and procedural impact of certifying the action as a collective action."[176] The defendant's motion to decertify relied in part on its argument that the plaintiffs are subject to various individualized defenses.[177] However, the court noted that the defendant "incorrectly frames this factor in terms of different *arguments* that could

[172] 2021 WL 7447594 (M.D. Fla. Dec. 21, 2021).

[173] *Id.* at *2 (citing Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008)).

[174] 2022 WL 1462965 (M.D. Tenn. May 6, 2022).

[175] *Id*. at *1.

[176] *Id*. at *6 (quoting O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009)).

[177] *Id*. at *8.

be asserted by Plaintiffs rather than the different *defenses* to which Plaintiffs may be subject."[178] The defendant raised just a single defense to which all plaintiffs would be subject on an individual basis, and had not pointed to different defenses to which particular (but not all) plaintiffs may be subject. Accordingly, the court denied the motion to decertify, finding the plaintiffs to be similarly situated and that the record supported their allegation of a common, FLSA-violating policy.[179]

4. Fairness and Procedural Considerations

In *Blandon v. Waste Pro USA, Inc.*,[180] waste disposal drivers brought a collective action to recover alleged unpaid overtime premiums from a waste disposal and recycling services company. They claimed the company failed to pay them time-and-a-half for their overtime premiums because it improperly calculated their daily rates. The company brought a motion to decertify. In recommending that the defendant's motion to decertify be granted, the magistrate judge applied the Eleventh Circuit's three-factor test in determining whether the plaintiffs were sufficiently similarly situated after the parties conducted discovery.[181] In analyzing the third factor—fairness and procedural considerations—the magistrate judge reasoned the drivers had failed to specify how many individuals would be in each subclass, meaning the court could not determine whether certification would reduce the burdens of litigation. The factor therefore weighed in favor of decertification.

5. Decertification Motions in Specific Types of Cases

a. Misclassification Cases

(i.) Independent Contractor Cases

In *Olukayode v. UnitedHealth Group*,[182] clinicians who consulted on the use of electronic medical record software at hospitals alleged that they were improperly classified as independent contractors and denied overtime compensation. The district court granted the defendants' motion to decertify the collective action. At issue was whether each consultant was properly classified as an independent contractor, which required the court to engage in a fact-intensive inquiry into the six factors of the economic realities test. The court reasoned that, given the consultants' varying experiences with respect to four of the six factors used to determine whether workers are employees or independent contractors, determining liability for misclassification would require cumbersome and unmanageable mini-trials for each plaintiff.

In *Kloppel v. HomeDeliveryLink, Inc.*,[183] the defendant moved to decertify a Rule 23 class action brought under state law. Class representatives alleged that the defendant had misclassified truck drivers as independent contractors, and thereby took

[178] *Id*. at *15 (emphasis in original).

[179] *Id*. at *16.

[180] 2021 WL 7447594 (M.D. Fla. Dec. 21, 2021).

[181] *Id.* at *2 (citing Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008)).

[182] 2021 WL 3293648 (D. Minn. Aug. 2, 2021).

[183] 2022 WL 1210484 (W.D. N.Y. Apr. 25, 2022).

improper deductions from their wages in violation of the New York Labor Law. The defendant successfully argued that the commonality requirement of Rule 23 was not met because new evidence, including tax returns and testimony obtained in the discovery process, showed that many of the questions relevant to the nature of the relationship between the plaintiffs and defendant could not be answered with common evidence. Critically, the plaintiffs did not share common proof of wages and the evidence showed divergent practices in terms of investment in equipment, supplies and advertising. The district court therefore decertified the class, reasoning that the common question of whether the defendant had misclassified drivers would not yield a common answer. Instead, driver-specific analyses would be required to determine the degree of control that the defendant exerted over each individual driver.

IV. Treatment of Opt-Ins Following Denial of Notice or Grant of Decertification

In *Owens v. City of Malden*,[184] the court decertified a collective action filed by police officers alleging violations of the FLSA and state law. The court reasoned that the claims of opt-in plaintiffs were typically dismissed without prejudice following FLSA decertification. However, the court had also certified a Rule 23 class under state wage and hour law. The court reasoned that dismissing the opt-in FLSA plaintiffs without prejudice while maintaining the state law class claims would force opt-in plaintiffs to re-file any viable individual claims, which would be unnecessarily burdensome and not in the interest of judicial economy. As a result, the Court decertified the collective for the purpose of the FLSA claim but did not to dismiss the opt-in plaintiffs' claims.[185]

A. Intervention

In *Martin v. Tap Rock Res., LLC*,[186] plaintiffs claimed defendant failed to pay overtime wages. During the litigation, a third party filed a motion to intervene and to compel the plaintiffs into arbitration. The third party provided administrative functions for the defendant and had separately entered into both an independent contractor agreement and an arbitration agreement with plaintiffs. The court reasoned that, by seeking to intervene five months after learning of the lawsuit, the third party's intervention was timely. The court also reasoned that the third party's interests in enforcing its arbitration agreement and defending its business model demonstrated adequate interest in the lawsuit that could be adversely impacted by the litigation. Additionally, the court reasoned the third party's interest in enforcing its arbitration agreement was not adequately represented because the defendant had not sought to compel the plaintiffs into arbitration. The court therefore held that the third party could intervene as a matter of right and as a matter of discretion.

[184] 568 F. Supp. 3d 77 (D. Mass. 2021).

[185] *Id.* at 110–11.

[186] 2022 WL 278874 (D.N.M. Jan. 31, 2022).

V. Case Management Issues

A. Scope of Discovery From Opt-In Plaintiffs

In *Johnson v. Int'l Steel and Counterweights LLC*,[187] the plaintiffs alleged that their employer did not properly pay them for work performed before or after that their scheduled shift start and end times. The defendant served interrogatories, requests for production, and notices of deposition on the named plaintiff and all 52 opt-in plaintiffs. The plaintiffs moved for a protective order, arguing that the defendant should be limited to representative discovery from randomly selected plaintiffs. The district court granted the plaintiffs' request that the defendant be limited to representative discovery from the opt-in plaintiffs. It reasoned that responding to 53 sets of written discovery and defending 53 depositions would result in a significant burden and expense because it would generate attorneys' fees exceeding the plaintiffs' damages estimate for the entire opt-in class. The court also reasoned there was no evidence that the clock-in, clock-out, or payroll procedures differed materially among the opt-in plaintiffs, who all worked at the same facility. The district court, however, denied the plaintiffs' request to limit the representative discovery to six plaintiffs, holding that the principles underlying representative discovery weighed in favor of using a statistically significant sample for the discovery process. The district court, in balancing the interests of the parties, ruled that the defendant could serve written discovery upon 34 randomly selected opt-in plaintiffs and the named plaintiff, and could depose no more than 10 plaintiffs.

In *Sutton v. Diversity at Work Grp. Inc.,*[188] the plaintiffs claimed they were paid below minimum wage when considering unreimbursed expenses. The defendant began serving written discovery requests, which led to a dispute over the number of named and opt-in plaintiffs that would be required to respond to discovery and how those named and opt-in plaintiffs would be selected. The parties agreed that representative discovery would be appropriate. Yet the plaintiffs argued that allowing defendants to hand-pick the plaintiffs to serve discovery upon would introduce an unnecessary risk of bias. The court held that the plaintiffs who were the subjects of written discovery should be selected randomly, and that defendants should be allowed to serve discovery upon 17 of the 20 opt-in plaintiffs.

VI. Management of Multiple Collective Actions

A. Multidistrict Transfer Under Section 1407

In *in re Harvest Entities Fair Lab. Standards Act & Wage & Hour Litigation,*[189] the employer filed a motion to centralize four suits alleging violations of state and federal wage and hour laws. The employer moved to centralize the litigation in the District of Maryland or, alternatively, the Western District of Pennsylvania. The plaintiffs in all four actions opposed centralization and, in the alternative, proposed the District of Maryland as proper transferee district. The Judicial Panel on Multidistrict Litigation denied the motion for centralization. The panel reasoned that centralization was not necessary for

[187] 2021 WL 5359198 (N.D. Ohio Nov. 17, 2021).

[188] 2021 WL 2334488 (S.D. Ohio June 8, 2021).

[189] 584 F. Supp. 3d 1380 (U.S. Jud. Pan. Mult. Lit. Feb. 1, 2022).

the convenience of the parties and witnesses. It further reasoned that the record showed informal coordination to be a practicable alternative to centralization because the four actions were not complex and because the plaintiffs in all actions shared the same lead counsel. The plaintiffs' counsel also demonstrated a willingness to work cooperatively with defendants in each of the actions to avoid duplicative discovery. Moreover, none of the four actions involved overlapping putative classes. The differences in the actions' progress and class allegations also indicated that informal coordination was preferable to centralization.

E. The First-to-File Rule

In *Mosley v. Hydrostatic Oil Tools, Inc.*,[190] a former salaried worker brought claims for unpaid overtime and sought conditional certification of a collective action consisting of salaried shop hands, floor hands, and operators. The defendant opposed the motion for conditional certification based on the first to file rule. The defendant pointed to a previously conditionally certified collective action that was already pending before the court involving the same claims. The court reasoned that certifying the plaintiff's proposed collective would risk undermining the goal of avoiding multiple similar suits. It therefore denied the plaintiff's motion for conditional certification.

VII. Pretrial Disposition of Cases

A. Offers of Judgment in Collective and Class Actions

2. *Campbell-Ewald v. Gomez*

In *Johnson v. Chipotle Mexican Grill, Inc.*,[191] a restaurant employee filed suit against his employer for alleged FLSA violations. The employee had worked for the restaurant in the past, and claimed he was asked to return by a general manager. The employee claimed he worked five shifts after returning to the restaurant but was not paid for those shifts because the general manager failed to obtain proper authorization to re-hire him. The plaintiff filed suit against the restaurant, asserting, among other things, failure to pay earned wages, in violation of the FLSA, and sought compensatory and liquidated damages. Shortly after the plaintiff filed suit, the defendant sent the plaintiff two checks which equaled the balance the plaintiff was due for work performed. The plaintiff cashed both checks. The defendant then moved to dismiss the plaintiff's claim for unpaid wages, arguing that the claim was moot because the defendant had tendered, and the plaintiff accepted, two checks in satisfaction of the plaintiff's claim and the corresponding relief sought. The court held in the defendant's favor and dismissed the plaintiff's claim for unpaid wages because the plaintiff's acceptance of the defendant's payment rendered the claim moot.

In *Brown v. 1888 Mills, LLC*,[192] a former employee filed a putative collective action alleging FLSA violations caused by her former employer's use of a timekeeping system that the plaintiff said improperly rounded down employees' hours worked to the

[190] 2021 WL 3134917 (W.D. Ark. July 23, 2021).

[191] 2021 WL 3166394 (N.D. Ohio July 27, 2021).

[192] 339 F.R.D. 692 (N.D. Ga. 2021).

nearest 15-minute interval. The former employee also claimed the timekeeping system automatically adjusted employees' clock-out time, and deprived them of compensation for any time worked beyond their scheduled shift end time. The defendant served an offer of judgment under Rule 68, tendered a check to the plaintiff, and simultaneously moved for summary judgment on the basis that the case was moot and no live controversy existed.[193] The district court denied the motion, reasoning that simply tendering a check, without more, was not sufficient to render a case moot, and that the offer and accompanying check remained unaccepted—meaning the settlement offer was still unaccepted.

VIII. Trial

B. Use of Expert Witnesses

1. Damages

In *Coronado v. Flowers Foods, Inc.*,[194] driver/distributors of baked goods, who claimed they were misclassified as independent contractors, brought a collective action to recover unpaid overtime wages under the FLSA. Plaintiffs offered an expert report on their damages, which included testimony about the employees' regular rate and calculated damages in two parts: incurred costs and expenses, and lost wages. Defendants disputed the reliability and relevance of the expert's methodology and moved to exclude the expert's testimony. In particular, the Defendants argued that "incurred costs and expense" are not allowable under the FLSA. The district court agreed with Defendants and prohibited the drivers from offering business expense evidence as a separate claim under the FLSA because they are not, in and of themselves, a recoverable element of damages under the FLSA. However, the court permitted the unreimbursed business expense evidence to determine the workers regular rate for the overtime pay calculation and to support an inference that defendants' FLSA violation was willful. Defendants also argued that Plaintiffs' expert's use of an estimated market wage cannot be used as a substitute for an employee's actual regular rate. Here, the court again agreed with Defendants and rejected Plaintiffs' expert's calculation because the FLSA requires the regular rate calculation to be based on the rate at which the worker is employed. Finally, because the parties agreed that there was not an accurate record of the hours worked, the court permitted the Plaintiffs to testify as to their best estimate of their hours worked.

IX. Appellate Issues for Collective Actions

In *Holder v. A&L Home Care & Training Ctr.*, LLC,[195] home health care employees sought conditional certification of FLSA collectives alleging a failure to pay for travel time and a failure to properly calculate the regular rate. While the district court granted the motion for conditional certification, the circuit court also certified the case for interlocutory appeal regarding two issues after noting that conditional certification orders are not appealable. The first issue was whether the district court should eschew the

[193] *Id*. at 695.

[194] 2021 WL 4477910 (D.N.M. Sept. 30, 2021).

[195] 552 F. Supp. 3d 731 (S.D. Ohio 2021).

two-step conditional certification process and follow *Swales*.[196] The court granted Defendant's request for interlocutory review of this issue because, while courts in the Sixth Circuit follow the two-step FLSA certification process, there is no authority in the circuit requiring courts to certify FLSA collectives in two stages. The second issue was whether the district court should consider the existence of arbitration agreements when determining whether to certify a collective action.[197] Here, the court noted that recent developments in case law – including intra-circuit district court decisions – have indicated that courts are considering arbitration agreements earlier in order to give effect to employers' agreements without adding burdens on district court resources and sending notice to individuals who ultimately will not be able to participate in the collective action. Because the issue of earlier consideration of arbitration agreements could materially affect the outcome of this and other cases, the court reasoned it involves a controlling issue of law that should be certified for review under Section 1292(b).

In *In re Citizens Bank,*[198] former mortgage loan officers brought a hybrid Rule 23 class action and FLSA collective action against their employer, alleging that loan officers were unlawfully denied overtime pay. The district court granted the loan officers' motion for conditional certification of an FLSA collective action. The district court scheduled a trial on the primary fact issue in the FLSA collective action but left unresolved whether it would certify a Rule 23 class on the state law claims. Defendant raised numerous objections to the district court's planned trial on the FLSA claims, moving to stay it until after a Rule 23 class certification decision had been made, but the district court overruled the employer's objections to this procedural order of business and characterized Defendant's position as a delay tactic. As a result, Defendant petitioned for writ of mandamus to the Third Circuit asking the court (1) to direct the district court to refrain from proceeding with the FLSA collective action trial until the Rule 23 class certification motion is decided; (2) if a Rule 23 class is certified, to direct the district court to refrain from proceeding with trial until after class members have been notified and given an opportunity to opt out; and (3) to reassign the case to a new district Judge. The Defendant also asked the court to stay the case pending the petition for writ of mandamus. The Third Circuit issued the stay pending ruling on the writ, reasoning that the district court refused to meaningfully engage with Defendant's objections to the court's proceeding with a trial on the FLSA opt-in collective action claims without first considering whether to certify a class under Rule 23 on the related state law claims – even though the trial would resolve a fact issue that was central to all the claims, and even though the case was remanded specifically to require the district court to conduct a rigorous analysis on Rule 23 class certification. Notably, the district court filed its own supplemental response to the mandamus petition, joining the Defendant's request that the case be reassigned. Because the district court joined Defendant's request for relief, the Third Circuit dismissed the mandamus petition in part as moot insofar as it requests reassignment. Further, given the impending

[196] Swales v. KLLM Transport Services, L.L.C., 985 F.3d 430, 441 (5th Cir. 2021).

[197] *Id*. at 736–37, 746–49.

[198] 15 F.4th 607 (3d Cir. 2021).

reassignment, the Third Circuit denied the remainder of the petition as unnecessary at the time.

In *Buffington v. Ovintiv USA Inc.*,[199] after the district court granted conditional certification in an FLSA collective overtime action, the defendants sought an order certifying for interlocutory appeal the issue of what standard to apply in deciding whether to conditionally certify an FLSA collective. In denying the motion, the court held that, although the controlling *Thiessen* case of the Tenth Circuit was not an FLSA case but an action filed under the Age Discrimination in Employment Act, "that Act borrows the opt-in mechanism of the FLSA."[200] The court also held that the Tenth Circuit had already approved a two-stage *ad hoc* approach to deciding conditional certification motions and that as that approach "appears to be the majority approach," and the purported "split" between the *Thiessen* decision and the Fifth Circuit's decision in *Swales* was insufficient to support interlocutory appellate review.[201]

X. The Collective Action Mechanism in Arbitration

A. Arbitration Agreements Expressly Prohibiting Class and Collective Arbitration

In *Reeves v. Enter. Prods. Partners, LP*,[202] a welding inspector who worked for the defendant through third-party staffing companies brought a putative collective action to recover unpaid overtime wages under the FLSA. Later, another welding inspector who also worked for the defendant through a third-party staffing company filed a consent to join the suit and was added as a plaintiff. In response, the defendant asserted that both plaintiffs signed employment contracts with their respective staffing companies that compelled arbitration. The district court denied the defendant's motion to compel and stated that the employment agreements were not binding between the plaintiffs and the defendant because the defendant was not a signatory to the agreement. The defendant filed an appeal to the Tenth Circuit and argued that compelling the plaintiffs to arbitration was appropriate because the plaintiffs signed employment contracts with their respective staffing companies and Oklahoma contract law requires applying an expanded equitable estoppel doctrine. On appeal, the Tenth Circuit applied Oklahoma law and reversed the district court's order under the doctrine of equitable estoppel reasoning that the plaintiffs' claims allege "substantially interdependent and concerted misconduct" by the defendant and non-defendant signatories.[203]

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[199] 2021 WL 3726195 (D. Colo. Aug. 23, 2021).

[200] *Id*. at *1 (citing Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)).

[201] *Id*. (discussing Thiessen and Swales v. KLLM Transport Services, L.L.C., 985 F.3d 430 (5th Cir. 2021)).

[202] 17 F.4th 1008 (10th Cir. 2021).

[203] *Id.* at 1011–15.

In *Figueredo-Chavez v. RCI Hosp. Holdings, Inc*,[204] the district court entertained plaintiff's motion to reconsider the denial of her motion for conditional certification regarding employment classification at an adult entertainment club. The court had previously determined the plaintiff's arbitration agreement was not enforceable but applied a severability provision to enforce the collection action waiver in an arbitration clause. Plaintiff claimed this was a violation of Florida law. The court disagreed, reasoning that the text of the contract demonstrated that the parties intended for the collective action waiver to apply regardless of whether arbitration occurred and that such waivers should not be limited to the arbitration context.

In *Vaughn v. Pittsburgh Fondue, LLC*,[205] an employee brought a Rule 23 class and FLSA collective action on behalf of tipped employees working at defendant's restaurant. While the plaintiff had signed a "jury trial waiver" and a "class/collective action waiver," the defendant moved to dismiss the collective action complaint only on the grounds that the plaintiff had waived her right to join or represent other employees in a class or collective action. In response, the plaintiff argued that such a "class/collective action waiver" was unenforceable because an employee cannot waive their right to bring a collective action under the FLSA. The court, in agreeing with the defendant, explained that the plaintiff's argument was inconsistent with Supreme Court precedent, as well as decisional law interpreting the FLSA, finding that class and collective action waivers were valid and enforceable (absent evidence to the contrary). With respect to the "jury waiver," the defendant did not argue for dismissal based on this waiver. Accordingly, the court dismissed plaintiff's class and collective action claims while allowing her individual claim to move forward.

In *Bailey v. Vulcan Materials Co.*,[206] the plaintiff alleged that the defendants, Vulcan Materials Company ("Vulcan") and Southeast Division Logistics ("Southeast") were "joint employers" under the FLSA and that they unlawfully misclassified him and the putative collective members as independent contractors—thereby failing to pay them overtime. The plaintiff and the other putative collective members were required to sign an Independent Contractor Service Agreement. Although each such agreement was executed solely between Southeast and the plaintiff or an individual putative collective member, the plaintiff asserted that he and the members of the putative collective worked for both Southeast and Vulcan, as "joint employers" which operate "as an integrated entity." The defendants contended that the plaintiff waived his procedural right to litigate collectively in accordance with a provision in the Independent Contractor Service Agreement in which contractor workers waive their right to initiate, join, remain in, or otherwise participate in any collective action under the FLSA. The court granted the defendants' motion to dismiss the plaintiff's collective action claims concluding that the enforcement of a collective action waiver is not inconsistent with the FLSA, and the waiver in the Independent Contractor Service Agreement is enforceable as to the plaintiff and the members of the putative collective. The court stated that the policy and

[204] 574 F. Supp. 3d 1175 (S.D. Fla. 2021), *reconsideration denied*, 2022 WL 457848 (S.D. Fla. Jan. 6, 2022).

[205] 2021 WL 2952902 (W.D. Pa. July 14, 2021).

[206] 2021 WL 5860743 (N.D. Ga. Nov. 16, 2021).

purposes of the FLSA do not preclude the contractual waiver in the Agreement. The court also explained that the waiver clause was not unconscionable under Georgia law and noted that arbitration policy is not an absolute requisite for applying equitable estoppel and followed the precedent of the Eleventh Circuit in applying equitable estoppel outside of the arbitration context.

B. Arbitration Agreements Without an Express Class/Collective Waiver

In *Granados v. Harrison Contracting Co.*,[207] employee painters filed a collective action under the FLSA against a former employer, claiming they were denied overtime pay and those that complained about the overtime pay were terminated. Plaintiffs challenged the enforcement of an arbitration agreement they signed as condition of their employment on grounds of procedural and substantive unconscionability. The district court granted employer's motion to compel arbitration, holding the arbitration agreement was neither procedurally nor substantively unconscionable. The district court concluded that the plaintiffs' argument that the agreement was substantively unconscionable based on a provision that parties share the costs of arbitration equally was moot because defendant agreed to waive its entitlement and pay all the fees. The district court also determined that the plaintiffs' argument that they were being denied a statutory right because the agreement contained a provision where they would have to pay all attorneys' fees and costs if they lost was not unconscionable because the district court would be in a position to hear such an argument after arbitration.[208]

C. Determining Whether an Arbitration Agreement Permits Class or Collective Arbitration

In *Johnson v. Ensite USA, Inc.*,[209] the plaintiff, a welding inspector, sued the defendant welding company under the FLSA and New York Labor Law ("NYLL") alleging overtime violations, failure to provide proper wage statements and notices, and failure to timely pay wages. The plaintiff had entered into two identical arbitration agreements with class and collective action waivers in 2019 and 2020. The arbitration agreements stated that they did not prohibit or prevent the plaintiff from opting into or participating in litigation that was already pending against the defendant. In 2019, prior to initiating the New York lawsuit, the plaintiff opted into a substantially similar collective action against the defendant pending in a district court in Texas. In 2021, the plaintiff withdrew his consent in the Texas collective action and brought his own case against the defendant in New York. The defendant moved to compel arbitration in the New York action. The district court granted the defendant's motion and rejected the plaintiff's argument that the defendant had waived its right to arbitrate by litigating the Texas collective action. The court noted that although the same parties had litigated similar issues in the Texas collective action, the plaintiff's two arbitration agreements did not exist when the Texas action was commenced and the Texas litigation, which was already pending when the plaintiff signed the arbitration agreements, was not subject to

[207] 2021 WL 8533029 (N.D. Fla. Sept. 8, 2021).

[208] *Id*. at *1–4.

[209] 2022 WL 463381 (S.D.N.Y. Feb. 15, 2022).

the terms of the arbitration agreements.[210] The court held that because the defendant had no right to arbitrate against the plaintiff in the Texas collective action, the plaintiff could not rely on that earlier litigation to argue that the defendant had waived its right to arbitrate.[211]

In *Fraga v. Premium Retail Servs., Inc.*,[212] the defendant, a retail support services company, moved to compel arbitration or, in the alternative, to dismiss the plaintiff's class and collective action complaint pursuant to F.R.C.P. 12(b)(1). The merchandiser plaintiff alleged that the defendant failed to pay her and other similarly situated employees for all their time worked. The district court denied the defendant's motion to dismiss, finding that the plaintiff was covered by the exemption in the residual clause of section 1 of the Federal Arbitration Act ("FAA"). The court reasoned that because the plaintiff received, sorted, and prepared point-of-purchase display materials that had traveled in interstate commerce and then transported, delivered, and installed them at various retail locations in multiple states, she was "part of the intrastate—and at times interstate—leg of an integrated interstate journey."[213] It rejected the defendant's arguments that the plaintiff was not subject to the residual exemption because she was a retail worker and was not employed by an interstate transportation business. After determining that the FAA did not apply, the court applied Massachusetts law and held that the class action waiver in the defendant's arbitration agreement was invalid as a matter of Massachusetts public policy. The court took no position on the defendant's motion to compel arbitration and noted that the plaintiff would need to provide *prima facie* evidence of the existence of a class under the FAA's section 1 exemption.[214]

In *Easterday v. USPack Logistics LLC*,[215] a delivery driver alleged that he was misclassified as an independent contractor and brought overtime and improper deduction claims on behalf of himself and others similarly situated under the New Jersey Wage Payment Law, the New Jersey Wage and Hour Law, and New Jersey common law. The defendant moved to compel arbitration pursuant to an owner/operator agreement. In a previous decision, the magistrate judge had held that the Federal Arbitration Act ("FAA") did not apply because the plaintiff was a transportation worker. Because the arbitration agreement did not reference any state law, the magistrate judge declined to apply New Jersey law to the agreement and denied the defendant's motion. The district court upheld the magistrate judge's decision that the FAA did not apply, but remanded with instructions to apply New Jersey state law to the arbitration agreement pursuant to *Arafa v. Health Express Corp*.[216] On remand, the magistrate judge applied New Jersey law and once again denied the defendant's motion, finding that the arbitration agreement was not sufficiently clear to put the plaintiff on notice that he was giving up his right to bring his claims in court, such that the plaintiff understood his legal

[210] *Id.* at *5.

[211] *Id.*

[212] 2022 WL 279847 (D. Mass. Jan. 31, 2022).

[213] *Id.* at *8.

[214] *Id.* at *11.

[215] 2021 WL 7629907 (D.N.J. June 30, 2021), *aff'd*, 2022 WL 855583 (D.N.J. Mar. 23, 2022).

[216] 243 N.J. 147, 233 A.3d 495 (N.J. 2020).

rights and mutually assented to the terms of the contract. Specifically, the arbitration agreement did not explain that arbitration was a replacement for judicial relief, did not state that the plaintiff was waiving his right to have a judge or jury decide his claims, and did not make the nature of the claims the plaintiff was agreeing to arbitrate "clear and understandable" to the average person.[217] The magistrate judge also held that the language of the arbitration clause only contemplated arbitration of contractual claims "arising from or relating to [the] agreement or the breach thereof" and did not include statutory claims, and the plaintiff therefore could not be compelled to arbitrate his state law class claims.[218]

In *Levine v. Vitamin Cottage Natural Food Mkts., Inc.*, [219] the plaintiff, an assistant grocery store manager, sued the defendant for failure to pay overtime resulting from alleged misclassification. After conditional certification was granted and 158 opt-in plaintiffs joined the action, the defendant moved to dismiss the claims and compel arbitration for 57 opt-in plaintiffs who had electronically executed arbitration agreements. To determine whether the opt-in plaintiffs had executed valid arbitration agreements, the magistrate judge applied the law of the state where each opt-in plaintiff lived and worked when he or she signed the agreement. The magistrate judge rejected the plaintiff's allegations of fraud and unconscionability as well as the unsupported claims of opt-in plaintiffs who generally denied that they had signed the arbitration agreement and granted the defendant's motion to compel arbitration as to 56 of the opt-in plaintiffs. However, the magistrate judge denied the motion to compel as to one of the opt-in plaintiffs finding that the declaration he submitted, which described his precise, affirmative refusal to sign the agreement and attached a screen shot to support his denial, created a dispute of material fact as to whether he had accepted the agreement.[220] The magistrate judge further rejected the plaintiff's argument that the arbitration agreements should not be enforced because the defendant engaged in an "arbitration scheme" while ostensibly engaging in pre-suit negotiations with the plaintiff, finding that the plaintiff had provided no evidence of the alleged pre-suit discussions and no evidence that the defendant had orchestrated the rollout of the arbitration agreements to specifically interfere with the litigation.[221] The magistrate judge stayed the plaintiff's and opt-in plaintiffs' claims pending resolution of the arbitration proceedings.

In *Carr v. Freedom Care, LLC*,[222] the plaintiff, a home health care attendant, brought a class and collective action against the defendant alleging violations of the FLSA and the New York Labor Law for allegedly failing to pay minimum and overtime wages, failing to preserve records required to properly calculate wages, and failing to pay wages on the regularly scheduled pay day. The defendant moved to compel arbitration and stay the litigation. The district court granted the motion and held that

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[217] *Easterday*, 2021 WL 7629907, at *7.

[218] *Id.* at *9.

[219] 2021 WL 4439800 (D. Colo. Sept. 27, 2021).

[220] *Id.* at *9.

[221] *Id.* at *19–20.

[222] 2021 WL 4262646 (N.D.N.Y. Sept. 20, 2021).

even though the arbitration clause did not specifically reference class arbitration, it did state that the plaintiff would not bring a class action on behalf of others and this language was sufficient to preclude class arbitration.[223]

In *Finch v. Lowe's Home Ctrs., LLC*,[224] an installer sued the defendant under the South Carolina Payment of Wages Act and the FLSA for allegedly misclassifying him and other similarly situated workers as independent contractors. The plaintiff argued that the modification clause in the contract containing the arbitration agreement rendered the agreement illusory. The district court rejected this argument, reasoning that because any modifications the defendant made to the contract would only come into effect after they were accepted by the installers, the clause did not give the defendant unfettered discretion and did not render the promise to arbitrate illusory. The court also rejected the plaintiff's argument that the class action waiver in the arbitration agreement made the agreement unconscionable. Instead, the court concluded that individual arbitration was adequate to assure effective vindication of the installers' rights. Accordingly, the court granted the defendant's motion to compel arbitration and dismissed the case without prejudice.

In *Streety v. Parsley Energy Operations, LLC*,[225] a FLSA misclassification case filed against a defendant oil-and-gas operator, the magistrate judge recommended that the district court deny the defendant-intervenor staffing company's motion to compel arbitration of the plaintiff's and certain opt-in plaintiffs' claims. The magistrate judge rejected the staffing company's three arguments in support of compelling arbitration: (1) that the arbitrability of the claims was a question for the arbitrator; (2) that the plaintiffs' claims against the defendant oil and gas company were within the scope of the arbitration agreement between the plaintiffs and intervenor staffing company; and (3) the claims should be compelled to arbitration because of intertwined claims estoppel. The magistrate judge rejected the first argument because while the arbitration agreement between the plaintiffs and the defendant-intervenor staffing company contained a clause delegating disputes about the interpretation, applicability, or enforceability of the arbitration agreement to the arbitrator and included a clause incorporating AAA's rules, binding Fifth Circuit precedent held that "when a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between the parties."[226] With respect to the second argument, the magistrate judge reasoned that the relevant determination was not whether the claims were included within the scope of the arbitration agreements, but instead whether the plaintiffs had violated the arbitration agreements by filing suit only against the non-signatory defendant oil-and-gas company. The magistrate judge held that because the plaintiffs did not violate the agreement with the defendant-intervenor by bringing claims against the defendant oil-and-gas operator, the defendant-intervenor was not an "aggrieved party" under the FAA with a cause of action to petition the court to compel arbitration. With respect to the third argument, the magistrate judge reasoned that the defendant

[223] *Id.* at *8.

[224] 2021 WL 2982863 (D.S.C. Jul. 15, 2021).

[225] 2022 WL 2786737 (W.D. Tex. May 3, 2022).

[226] *Id.* at *3 (quoting Newman v. Plains All Am. Pipeline, L.P., 23 F. 4th 393, 398 (5th Cir. 2022)).

and the defendant-intervenor did not have a "close relationship" to support intertwined claims estoppel.

In *Barrows v. Brinker Rest. Corp.,*[227] restaurant workers appealed a district court's order dismissing their FLSA and New York Labor Law claims and compelling arbitration. The Second Circuit vacated and remanded, holding that the district court erred when it disregarded a plaintiff's sworn declaration in which she adamantly and categorically denied having electronically signed an arbitration agreement. In support of its motion to compel arbitration, the defendant had presented the plaintiff's purported electronic signature on an electronic arbitration agreement, along with several management declarations regarding the company's use of an electronic platform for onboarding documents and evidence that the arbitration agreement was executed from a computer at the defendant's restaurant on a day when the plaintiff was working. In response, the plaintiff presented a sworn declaration in which she categorically denied ever completing any electronic paperwork for the defendant; using any of the defendant's computers at her workplace; receiving or signing any documents showing receipt of the defendant's arbitration policies; using the defendant's electronic platform; hearing about or having any knowledge of the defendant's electronic platform; or even living in a home with a computer during her employment with the defendant. The court of appeals drew a distinction between the plaintiff's declaration, which it held was sufficient to create a triable issue of fact, and a declaration where a party merely states that she cannot recall signing an agreement or that relies on speculative or conclusory assertions.

In *Bell v. Arise Virtual Sols., Inc.,*[228] the district court addressed the question: when a motion for conditional certification and a motion to compel arbitration of the sole named plaintiff are simultaneously pending, should one necessarily be decided before the other? Observing that the Eighth Circuit has not squarely addressed the issue, the court relied on the reasoning employed by the Fifth Circuit in *Reyna v. Int'l Bank of Commerce*[229] and other district court cases and found that the threshold issue of arbitration should be decided first. In doing so, the court distinguished the "different" question answered in a line of cases considering whether to rely on the existence of an arbitration agreement in deciding a motion for conditional certification (e.g. when deciding whether collective members should receive notice). The court stayed the plaintiff's claims pending arbitration and denied the plaintiff's motion for conditional certification as moot.

In *Garcia-Alvarez v. Fogo De Chao Churrascaria (Pittsburgh), LLC*, [230] the plaintiff, on behalf of himself and other similarly situated restaurant carvers, filed suit against Fogo De Chao steakhouses alleging minimum wage violations under the FLSA, the Pennsylvania Minimum Wage Act, and the Florida Constitution. The plaintiff pursued his FLSA claim as a putative collective action. After seven individuals had submitted

[227] 36 F.4th 45 (2d Cir. 2022).

[228] 2022 WL 567841 (W.D. Mo. Feb. 24, 2022).

[229] 839 F.3d 373 (5th Cir. 2016).

[230] 2021 WL 5804289 (E.D. Tex. Dec. 7, 2021).

opt-in notices, but before the plaintiff moved to certify a collective action, the defendants rolled out an arbitration agreement to all currently employees that required all claims (including the claims involved in the plaintiff's lawsuit) to be adjudicated through arbitration. The agreement additionally provided that for current employees, continued employment constituted acceptance of the agreement and its terms. The plaintiff filed a motion asking the district court to declare the agreement unenforceable and permit corrective notice, arguing that the timing of the agreement and the language of agreement itself rendered it an improper, coercive, and misleading communication. In support of the motion, the plaintiff relied only on the agreement itself. In denying the plaintiff's motion, the court found that the plaintiff had not put forth sufficient evidence to justify restricting the defendants' communications. Specifically, the court found that the plaintiff had not established evidence of coercion or efforts by the defendants to undermine the potential collective action. The court also concluded that the plaintiff had not met his burden to show the defendants engaged in misleading communications with the putative class, as there was no record evidence that any putative class member had been misled by the agreement. Ultimately, because the plaintiff and existing opt-in plaintiffs were not employed by defendants when the arbitration agreement took effect and were therefore not subject to it, the court determined that it was premature to invalidate the agreement between the defendants and third parties who were not before the court. It denied the plaintiff's motion without prejudice.

In *Kennedy v. Pioneer Nat. Res. Co.*,[231] the construction manager plaintiff filed suit against his oil company employer for misclassification and overtime pay violations under the FLSA. Three opt-in plaintiffs subsequently joined the case. The defendant moved to compel arbitration, and its motion was denied. Two inspection companies moved to intervene and sought enforcement of their arbitration agreements with the plaintiffs. The intervenors argued that the issue of arbitrability should be decided by the arbitrator and the plaintiffs' claims against the defendant were within the scope of their arbitration agreements with the plaintiffs. The magistrate judge reasoned that while the plaintiffs and the intervenors executed arbitration agreements that incorporated the AAA Rules and delegated the question of arbitrability to the arbitrator, the defendant was not a party to those agreements and therefore the delegation clause did not apply. The magistrate judge also found that the intervenors' attempt to enforce their arbitration agreements with the plaintiffs constituted a collateral attack on the court's previous ruling that the defendant could not enforce the arbitration agreements between the plaintiffs and the intervenors. In denying the intervenors' motion to compel arbitration, the magistrate judge ruled that the intervenors were not aggrieved parties and that the dispute did not fall within the scope of the arbitration provisions in the intervenors' agreements.

In *Hamrick v. Partsfleet, LLC*,[232] the issue before the Eleventh Circuit was whether final-mile delivery drivers were exempt transportation workers under section one of the Federal Arbitration Act ("FAA"). The district court had denied the defendants' motion to compel and held that the plaintiffs were exempt under section one of the FAA

[231] 2021 WL 8443801 (W.D. Tex. Oct. 29, 2021).

[232] 1 F.4th 1337 (11th Cir. 2021).

because they transported items that had previously crossed state lines. The Eleventh Circuit reversed and found that the district court erred by focusing on the goods instead of what the class of workers were engaged in doing. Citing *Paladino v. Avnet Computer Tech., Inc.*[233] and *Hill v. Rent-A-Center, Inc.*[234], the Eleventh Circuit held that the transportation worker exemption applies only "if the employee is part of a class of workers: (1) employed in the transportation industry; and (2) that, in the main, actually engages in foreign or interstate commerce."[235] The Eleventh Circuit remanded the case and instructed the district court to determine whether the plaintiffs belonged to a class of workers in the transportation industry and whether they actually engaged in foreign or interstate commerce.

In *Singh v. Uber Techs., Inc.*[236], the driver plaintiffs brought class and collective action claims against the rideshare defendant claiming that it misclassified them as independent contractors under the FLSA and New Jersey and New York wage laws. The defendant moved to compel arbitration under the Federal Arbitration Act ("FAA") pursuant to the drivers' contracts. The plaintiffs argued that they were exempt from the FAA under the residual clause in section one. In a prior ruling, the district court considered this question and granted the defendant's motion, finding that the FAA only exempted transportation workers engaged in moving goods across state lines, not people. Th Third Circuit vacated the district court's decision and remanded on the grounds that the FAA transportation worker exemption is not limited to those engaged in movement of interstate goods, but also encompasses those who move interstate passengers.[237] The Third Circuit also directed the parties to engage in limited discovery to determine whether the plaintiffs work was "so closely related to interstate commerce as to be in practical effect part of it."[238] On remand, the district court noted that the majority of district courts, as well as two circuit courts (the Ninth and First Circuits), have ruled that ride share drivers are not subject to the transportation worker exemption to the FAA.[239] The district court then applied the factors identified by the Third Circuit in *Singh,* including "the contents of the parties' agreement, information regarding the industry in which the class of workers is engaged, information regarding the work performed by those workers, and various texts—i.e., other laws, dictionaries, and documents—that discuss the parties and the work."[240] The court noted that the centrality of the interstate work was at the center of the analysis and rejected the plaintiffs' argument that the number of trips drivers took across state lines was dispositive, reasoning that the interstate trips did not constitute a central part of what Uber does. The district court also rejected the plaintiffs' argument that the drivers were involved in interstate commerce because they delivered passengers to and from the

[233] 134 F.3d 1054 (11th Cir. 1998).

[234] 398 F.3d 1286 (11th Cir. 2005).

[235] *Hamrick*, 1 F.4th at 1351.

[236] 571 F. Supp. 3d 345 (D.N.J. 2021).

[237] Singh v. Uber Techs., Inc., 939 F.3d 210, 214 (3d Cir. 2019).

[238] *Id.* at 219.

[239] *Singh,* 571 F. Supp. 3d at 356 (citing Capriole v. Uber Techs., Inc. 7 F.4th 854 (9th Cir. 2021); Cunningham v. Lyft, Inc., 17 F.4th 244, 249 (1st Cir. 2021)).

[240] *Id.* at 357 (quoting *Singh*, 939 F.3d at 219).

airport. The court held that at most, the drivers were only tangentially or incidentally related to interstate movement. The court granted the defendant's motion to compel arbitration under the FAA.

In *Zambrano v. Strategic Delivery Sols., LLC*,[241] the plaintiff delivery drivers alleged violations of the FLSA and New York Labor Law. Before the plaintiffs moved for conditional certification, twenty-three plaintiffs opted into the case. Thereafter, the district court granted the defendants' motion to compel arbitration for the named plaintiffs and granted a related motion to stay the case. Four years after the court granted the defendants' motion, two opt-in plaintiffs moved to lift the stay and amend the complaint. The defendants argued that the opt-in plaintiffs were bound by the court's prior order compelling arbitration and, for the first time, introduced arbitration agreements for the opt-in plaintiffs. The district court ruled that the previous order did not apply to the opt-in plaintiffs because they were not named in that order and the court had not certified a collective action. The court further ruled that the issue of whether the opt-in plaintiffs were bound by defendants' arbitration agreements was not ripe because the defendant had not yet moved to compel the opt-in plaintiffs to arbitration and the opt-in plaintiffs had not had a chance to challenge the agreements.

In *De Jesus v. Gregorys Coffee Mgmt., LLC*,[242] the plaintiff, who worked as a cook and baker at the defendants' coffee shop, brought class and collective action claims for unpaid overtime wages under the FLSA and the New York Labor Law. After the plaintiff moved for conditional certification, the defendants filed a motion to dismiss and to compel the plaintiff to arbitration, on the grounds that he had signed two arbitration agreements. The plaintiff argued that the arbitration agreements were not enforceable because they were unconscionable. The plaintiff asserted that his primary language was Spanish and he could not read English, the arbitration agreements were only written in English, and the defendants had misrepresented the contents of the documents. The district court ordered an evidentiary hearing to determine whether the arbitration agreements were unconscionable as to the plaintiff.[243] Because the defendants only sought to compel the plaintiff to arbitrate, the district court did not consider whether the arbitration agreements were unconscionable as to the putative class members.

E. Conditional Certification When Putative Class Members May Be Subject to Arbitration Agreements

In *Droesch v. Wells Fargo Bank, N.A.*,[244] the plaintiffs filed an FLSA collective action against the defendant bank. The court granted the plaintiffs' motion for conditional certification, and it also granted the defendant's motion to compel certain plaintiffs' claims to arbitration. The defendant subsequently filed a motion for reconsideration, requesting that the court reconsider its decision to defer ruling on the

[241] 2021 WL 4460632 (S.D.N.Y. Sept. 28, 2021).

[242] 2021 WL 5591026 (E.D.N.Y. Nov. 29, 2021).

[243] *Id*. at *6–7.

[244] 2021 WL 2805604 (N.D. Cal. July 6, 2021).

enforceability of arbitration agreements between the defendant and other members of the putative collective action until step two of the FLSA certification process. The court granted the defendant's motion for reconsideration, holding that because it already ruled on the enforceability of the at-issue arbitration agreement with respect to some plaintiffs, it did not make sense to issue notice to 27,000 individuals who the defendant claimed signed the same arbitration agreement. The court opted to follow the approach used by the Fifth and Seventh Circuits, both of which declined to send notice to persons whose claims were subject to arbitration. The court concluded by allowing the defendant the opportunity to present evidence in support of its argument that 27,000 members of the putative collective signed arbitration agreements, permitted the plaintiffs to issue limited discovery concerning the arbitration agreements, and directed the parties to confer over the issue of notice to individuals who did not sign an arbitration agreement.

In *Pogue v. Chisholm Energy Operating, LLC,*[245] the plaintiff brought class and collective action claims under the FLSA and the New Mexico Minimum Wage Act alleging the defendant oil and gas company misclassified him and other completions and drilling consultants as independent contractors. In response to the plaintiff's motion for conditional certification, the defendant invoked arbitration agreements to try to preclude certain potential opt-in plaintiffs from receiving notice of the collective action. The plaintiff alleged that the defendant improperly communicated with potential class members and obtained the arbitration agreements during the pendency of the suit. The district court granted the plaintiff's motion for conditional certification, noting that while the Tenth Circuit had not decided whether district courts should consider the existence of arbitration agreements at the conditional certification stage, the weight of law in the circuit held that a collective may be conditionally certified, and notice given, notwithstanding that some of the prospective opt-in plaintiffs may have signed arbitration agreements. While the court found the timing that the arbitration agreements were obtained to be "atypical," it found the plaintiff had not submitted sufficient evidence for the court to conclude that the defendant or defense counsel had engaged in improper communications with potential opt-in plaintiffs.[246]

In *McLean v. Cornucopia Logistics, LLC*,[247] the plaintiff, a delivery driver, moved for conditional certification of his FLSA collective action overtime and unpaid wage claims against the defendant. The plaintiff and the putative opt-in plaintiffs had all executed arbitration agreements with the defendant. The plaintiff and the defendant had previously stipulated to stay the litigation and proceed in arbitration, but the defendant had failed to pay the requisite arbitration fees. As a result, AAA administratively closed the arbitration matter and banned the defendant from using its services. The defendant subsequently repaired its relationship with AAA, which agreed to arbitrate the plaintiff's and the putative opt-in plaintiffs' claims. However, the plaintiff elected to proceed before the magistrate judge. In opposition to the plaintiff's motion for conditional certification, the defendant argued that the plaintiff was not similarly situated to the putative opt-in plaintiffs because they had all signed arbitration agreements. Noting that the Second

[245] 2021 WL 5861184 (D.N.M. Dec.10, 2021).

[246] *Id.* at 7.

[247] 2021 WL 3709260 (E.D.N.Y. Aug 20, 2021).

Circuit had not addressed whether notice of an FLSA collective action should be issued to putative opt-in plaintiffs who had signed binding arbitration agreements, the magistrate judge denied the plaintiff's motion for conditional certification. The magistrate judge reasoned that the plaintiff and the putative opt-in plaintiffs were not similarly situated because the plaintiff could proceed in federal court due to the defendant's failure to pay the requisite arbitration fees, while the opt-in plaintiffs were undoubtedly subject to arbitration. The court held that where it is undisputed that the arbitration agreements executed by the putative opt-in plaintiffs are valid and binding, it would waste everyone's time to conditionally certify a collective that the court was virtually certain to decertify at the next phase of the proceedings.[248] The court ordered the plaintiff's claims to proceed as a single-plaintiff action, only.

In *Pittmon v. CACI Int'l, Inc.*,[249] background investigators brought overtime claims under the FLSA against the defendant employers, which provided background check services in the United States and abroad. The district court granted the plaintiff's motion for conditional certification and rejected the employer's request to exclude from the collective putative opt-in plaintiffs who might be subject to arbitration agreements. The court reasoned that the enforceability of arbitration agreements is a merits-based decision and thus inappropriate to decide at conditional certification. It noted that the overwhelming majority of courts that have considered the issue have held that the possibility of mandatory arbitration should not prevent conditional certification of a collective action.[250]

In *Holandez v. Ent., LLC*,[251] exotic dancer plaintiffs and opt-in plaintiffs brought minimum and overtime wage claims against the defendants under the FLSA and the California Labor Code. In granting in part the defendants' motion to compel arbitration, the district court compelled to arbitration the claims of the plaintiffs and opt-in plaintiffs whose arbitration agreements the defendants had filed with the court. The district court denied the motion to compel as to those opt-ins plaintiffs for whom the defendants did not file arbitration agreements.[252]

In *In re A&D Interests, Inc.*[253] the plaintiff, an exotic dancer, sought conditional certification of her misclassification claims against the defendants. The district court granted the motion and ordered that notice be sent to putative opt-in plaintiffs, including those who had signed arbitration agreements with class waivers. The district court reasoned that while the defendants' arbitration agreement prohibited class action litigation and arbitrations, it did not prohibit collective actions. The district court also noted that the defendants had not sought to compel arbitration, and since parties may waive their right to insist on arbitration, the court could send notice until the defendants moved to compel arbitration. The defendants filed a mandamus petition with the Fifth

[248] *Id.* at *5–6.

[249] 2021 WL 4642022 (C.D. Cal. Aug. 27, 2021).

[250] *Id.* at 4.

[251] 2022 WL 2965780 (C.D. Cal. Jan. 18, 2022).

[252] *Id*. at *10.

[253] 33 F.4th 254 (5th Cir. 2022).

Circuit and the Fifth granted the petition. Citing its decision in *In re JPMorgan Chase & Co.,*[254] the Fifth Circuit held that the district court had erred in granting the motion for conditional certification. It reasoned that the language in the arbitration agreement requiring that disputes be resolved by an arbitrator and providing that the only parties to an arbitration would be the defendants and an individual dancer precluded the plaintiff's collective action claims. The Fifth Circuit also held that it did not matter that the defendants had not moved to compel arbitration, because pursuant to its decision in *Swales v. KLLM Transp. Servs., L.L.C.,*[255] the district court's focus should have been on whether the notice recipients would ultimately be able to participate in the collective action.

In *Agerkop v. Sisyphian LLC*,[256] the exotic dancer plaintiffs brought misclassification claims under the FLSA and California state law against the defendants, their employers. The plaintiffs moved for conditional certification under the FLSA. In opposition, the defendants argued that putative opt-in plaintiffs had signed arbitration agreements with defendants and that conditional certification should therefore be denied, or, alternatively, notice should only be issued to those putative opt-in plaintiffs who had not signed arbitration agreements. The court rejected these arguments, holding the fact that potential opt-in plaintiffs may be bound by an arbitration agreement was irrelevant at the conditional certification stage and instead could be raised by the defendants later at decertification. The court also denied the defendants' interlocutory appeal, noting that while the Ninth Circuit had not addressed the issue, other district courts in the Ninth Circuit had held that the existence of an arbitration agreement did not impact conditional certification and there was therefore no substantial ground for difference of opinion on the matter.

XI. Hybrid FLSA/State Law Class Actions

B. Why Hybrid Actions?

In *Almaznai v. S-L Distrib. Co., LLC*,[257] plaintiffs who delivered and stocked products at retail grocery store outlets alleged the wholesale distributors misclassified them as independent contractors. Plaintiffs brought an FLSA minimum wage and overtime collective action, and a state law class action based on numerous alleged violations of the California Labor Code. Defendants sought to dismiss the claims of one named plaintiff under the "claim-splitting doctrine" because he had opted into an earlier filed FLSA misclassification case in a North Carolina federal court prior to bringing the hybrid action. The court found all three elements of the claim-splitting doctrine were satisfied. First, the same parties were involved in the earlier litigation because, by opting in, plaintiff had "party status." Second, the earlier action involved the same claim or cause of action as the second suit, both as to the FLSA claim (which was identical) and the California state law claims because the two lawsuits were "premised on conduct arising from an alleged employee-employer relationship." Third, the court was permitted

[254] 916 F.3d 494, 499 (5th Cir. 2019).

[255] 985 F.3d 430, 436 (5th Cir. 2021).

[256] 2021 WL 4348733 (C.D. Cal. Aug. 4, 2021).

[257] 2021 WL 4457025 (N.D. Cal. June 21, 2021).

to assume the first suit was finally decided on the merits.[258] Accordingly, the named plaintiff's FLSA and state law claims were dismissed without prejudice.

C. Legal Challenge to Hybrid Actions

In *Adams v. Aztar Indiana Gaming Co.*,[259] plaintiff worked as a "Table Games Dealer," an hourly, tipped, and nonexempt position. Plaintiff brought a Fair Labor Standards Act collective action and class action under the Indiana Wage Payment Statute (IWPS) for alleged unpaid minimum wages. The court denied defendant's partial motion to dismiss the IWPS claim under Federal Rule of Civil Procedure 12(b)(6). Defendant argued that plaintiff could not prove liability under the IWPS solely from a FLSA violation. The court disagreed, finding that the IWPS requirement to pay "the amount due the employee"[260] can be based on the defendant's alleged failure to comply with the FLSA.

D. Federal Jurisdiction Over State Law Claims in Hybrid Actions
2. Supplemental Jurisdiction Under 28 U.S.C. §1367

In *Davis v. 2192 Niagara St., LLC*,[261] a group of servers at the defendants' restaurant brought a claim for unpaid wages under the Fair Labor Standards Act and the New York Labor Law. Plaintiffs asserted that the service charges the customers paid to the defendants were really gratuities. The defendants moved to dismiss the claim arguing that there was no subject matter jurisdiction in federal court and if there was jurisdiction, the district court should decline to exercise supplemental jurisdiction over the state claim. The defendant argued the state claim predominated over the federal claim because the federal claim had little monetary value. The district court held that there was subject matter jurisdiction and the type of claim, not the monetary value of the claim, determines predominance. Monetary value is not a valid basis to decline to exercise supplemental jurisdiction.[262]

c. Whether the Court Should Decline to Exercise Supplemental Jurisdiction
(iii.) Dismissal of the FLSA Claims

In *Alfonso v. Mougis Logistics Corp.*,[263] plaintiff brought a collective action for FLSA minimum wage violations, and a state law class action based on various violations of New York state law. The court dismissed the FLSA claim because plaintiff failed to allege that the wages he received fell below the federal minimum wage.[264] After dismissing the FLSA claim, the court weighed the "values of judicial economy,

[258] *Id*. at *6.

[259] 2021 WL 4316906 (S.D. Ind. Sept. 22, 2021).

[260] *See* Ind. Code § 22–2–5–1(a).

[261] 2021 WL 8322485 (W.D.N.Y. June 9, 2021).

[262] *Id*. at *7–8.

[263] 2021 WL 5771769 (S.D.N.Y. Dec. 6, 2021).

[264] *Id.* at *3-4.

convenience, fairness, and comity" and declined to exercise supplemental jurisdiction over the pendant state law claims. In particular, the court concluded, "[a]t this early stage of litigation, when the parties have not spent significant time or resources litigating the dispute in this forum, the balance of factors weigh towards declining to exercise jurisdiction."[265]

E. Standing to Prosecute the State Law Claims in Hybrid Actions

In *Sullivan-Blake v. FedEx Ground Package Sys.*,[266] plaintiffs were delivery drivers who alleged that they were not paid overtime compensation. FedEx Ground Package Sys. used intermediaries to employ drivers for the purpose of delivering FedEx packages across the country. Plaintiffs sought leave to amend the complaint to add additional named plaintiffs and Rule 23 state class action claims on behalf of all similarly situated drivers. The court found that plaintiffs' motion to amend was prior to the deadline set in the scheduling order for amendments. Thus, the court found it was required to use the more lenient standard in reviewing the matter as provided in Fed R. Civ. P. 15. The court said it must first determine if plaintiffs were acting in good faith and that they were because they exercised due diligence. In addition, considering the FLSA's broad remedial nature and given the choice between litigating each claim separately or in the aggregate, the court favored the latter. The defendant's argument the amendment would make the case more difficult and harder to manage was not sufficient to overcome judicial economy. The court granted the motion to amend the complaint.

F. Rule 23 Class Certification in Hybrid Actions

In *Fritz v. Corizon Health, Inc.*,[267] the district court certified plaintiffs' Rule 23 class action which alleged that defendant enforced a uniform, company-wide policy and practice of requiring Correctional Nurses to perform various uncompensated pre- and post-shift activities upon entering and leaving correctional facilities. The court previously conditionally certified the plaintiffs' FLSA claim and plaintiffs were seeking to certify their claim for unjust enrichment under Missouri law. The court stated the four requirements of Rule 23 were to be analyzed in determining class certification. The court found the potential plaintiff size of two hundred to one thousand plaintiffs satisfied the numerosity requirement. Plaintiffs satisfied the commonality requirement because the plaintiffs all performed pre- or post-shift duties and were not paid for doing so. The claims of the representative parties must be typical of the class. The claims need not be identical. The court also found the named plaintiffs could adequately represent the class members. The court continued stating, the two actions were not incompatible, and courts routinely certify state law class actions and FLSA collective actions in the same case.

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[265] *Id.* at *4.

[266] 2021 WL 3563389 (W.D. Pa. Aug. 12, 2021).

[267] 2021 WL 3883643 (W.D. Mo. Aug. 30, 2021).

In *Kuchar v. Saber Healthcare Holdings LLC*,[268] nurses sought to certify a class action under Rule 23 of the Federal Rules of Civil Procedure. They alleged that the defendant automatically subtracted pay during a half-hour lunch break as per the employer's Meal Break Policy, despite the job demands being so high that they were almost always prevented from being able to take a lunch break, contrary to Ohio's wage-and-hour laws. In granting the motion for certification of the class of hourly nurses, the district court noted that the four prerequisites of Rule 23(a) and the predominance and superiority tests of 23(b)(3) were met. Although the matter involved Ohio law claims, the district court followed Sixth Circuit precedent by looking to FLSA standards in its analysis. There was no dispute that the numerosity requirement under Rule 23(a) was met. The criterion of commonality was too because the litigation involved two common questions that are capable of common resolution under Sixth Circuit law. In this regard, the district court noted that "an automatic meal break deduction system becomes unlawful if (1) the employer had no reasonable process to report worked lunch periods, or (2) the employer had actual or constructive knowledge of the uncompensated worktime."[269] On the first of these issues, the plaintiff presented evidence of the defendants' forms, scheduling policy and training policy and the court found that these allowed for a generalized rather than individualized determination of the issues. As for the issue of constructive knowledge, the plaintiff's declaration evidence did not rely on employees' unique experiences and the court concluded that notice to the defendants that nurses were not reporting working through lunches was in the nature of general evidence. Further, the court noted that the plaintiffs challenged a single policy at a single facility that applied to all hourly employees there, such that class-wide resolution could determine the lawfulness of the impugned policy. For reasons similar to those canvassed on the commonality issue, the court found that the requirements of typicality and adequacy were met, as well as the requirements of predominance, superiority and ascertainability under Rule 23(b).

In *Jahagirdar v. Computer Haus NC. Inc.*,[270] plaintiffs brought wage and hour claims under the FLSA and related state laws and sought to certify five different state law classes where defendants had operations. The court certified the five classes under Fed. R. Civ. P. 23, noting that common questions predominated, and all class members had a common claim based on defendants' failure to accurately record time, pay commissions, bonuses, and overtime and to timely pay final paychecks as well as its arbitrary deductions of breaks and requirement to do off-the-clock work.

In *Stewart v. Hudson Hall LLC*,[271] the magistrate judge recommended that the district court deny class certification to the plaintiff, a former line cook at defendant's restaurants, who raised claims for unpaid overtime and off-the-clock work under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") and alleged that defendant failed to provide him with a wage notice and proper wage statements as required by the NYLL. The plaintiff failed to meet any of Rule 23(a)'s requirements

[268] 340 F. Supp 2d 115 (N.D. Ohio 2021).

[269] *Id.* at 120.

[270] 2021 WL 5163307 (W.D.N.C. Nov. 5, 2021).

[271] 2021 WL 6285227 (S.D.N.Y. Nov. 29, 2021).

largely because he relied solely on his own sworn declaration, which was identical to the declaration he provided in support of his failed 216(b) motion, and evidence from defendants, but did not develop any evidence from other members of the class despite having access to a class list contact information and class-wide pay records. On numerosity, the plaintiff's testimony that the defendant employed 75 individuals per shift was insufficient because it did not establish how many of those individuals would be class members, and because plaintiff conceded that as many as half might be excluded from the class if they had participated in the settlement of another case that asserted claims on behalf of tipped workers. On adequacy, the named plaintiff was an inadequate class representation because of testimony that suggested that he was singled out for mistreatment in the form of having his hours adjusted because of his race, and because of evidence in the form of a plea allocution in an unrelated criminal case, which showed that he had engaged in dishonest conduct. On typicality and commonality (which the magistrate judge addressed after concluding that the plaintiff could not meet his burden, having failed to satisfy numerosity and adequacy), the magistrate judge reasoned that the plaintiff had failed to provide sufficient evidence to show that defendants maintained a common policy of failing to pay overtime hours worked because he had failed to point to evidence showing that defendants failed to pay any other employees overtime pay. Similarly, the plaintiff failed to meet his burden to show that defendants maintained a policy of failing to compensate time worked off-the-clock, where the assertions in plaintiff's declaration were vague and he failed to submit declarations from any of the other line cooks. Similarly, the plaintiff failed to submit any evidence to suggesting that defendants maintained a policy of encouraging line cooks to work through their 30-minute automatically deducted meal breaks, so establishing liability would require inquiry into each class member's individual circumstances. On the wage statement and wage notice violations, evidence in the record showed that the plaintiff had actually received a complaint wage notice, and the magistrate judge reasoned that because there was insufficient proof that defendants maintained a uniform policy of failing to pay overtime, proving wage statement violations would involve an inquiry into each individual's circumstances.

Chapter 18

SETTLEMENT OF FLSA LITIGATION

II. General Principles Relating to the Settlement of Private FLSA Claims

A. Validity of Waivers and Releases

In *Klich v Klimczak,*[1] the plaintiff sued the defendants, who are current and former employees, for breach of a confidentiality provision in a settlement agreement by telling other employees about the terms of the settlement. The district court noted that not all confidentiality agreements, releases or other provisions must be approved by a court ahead of time, because a court could, when the employer sought to enforce an overbroad provision, decline to do so. The court considered Supreme Court cases in which employees had entered into a settlement agreement with their employers, and then sued for damages or wages which the settlements had not included, despite a release waiving the employees' rights. In the cases considered, the Supreme Court allowed those actions to go forward, ruling that, "when a pre-litigation settlement occurs, and a release is given for what the parties agree is the payment in full of unpaid wages, the release cannot be raised as a defense to preclude a later suit for liquidated damages."[2] Ultimately, the district court decided that the confidentiality clause in dispute was contrary to the policy objectives of the FLSA, and unenforceable because it sought to reduce the employer's FLSA liability by preventing other employees from learning of their rights.

B. Validity of Settlements Without Court Approval

In *Bogart v. Biggs*,[3] the plaintiffs brought unpaid overtime claims against an individual defendant alleging that the defendant misclassified them as independent contractors. The parties jointly moved for settlement approval and for dismissal of the action. The district court denied the motion with leave to refile. In doing so, the court noted that the issue of whether all FLSA settlements require judicial approval remained unsettled within the Eighth Circuit. The court reaffirmed its holding in a prior decision that parties to an FLSA action may file a stipulation of dismissal, with or without prejudice, under Federal Rule 41(a)(1)(A)(ii). A plaintiff who finds that the settlement is unfair or unreasonable may move under Rule 60(b) to set aside the judgment. In the instant case, the court explained that the parties' briefing did not show whether the underlying dispute related to the legal question of FLSA coverage, which would require settlement approval from the court, or whether fact questions existed, which would not require settlement approval and would require the parties to file a stipulation of dismissal under Federal Rule 41(a)(1)(A)(ii).

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[1] 571 F. Supp. 3d 8 (E.D. N.Y. 2021).

[2] *Id*. at 4.

[3] 2021 WL 6101900 (W.D. Ark. Oct. 21, 2021).

In *Moore v. Universal Protection Services, LP*,[4] a collective action of security guards reached a settlement of their overtime claims through arbitration and sought judicial confirmation of the arbitration award. The district court denied without prejudice the parties' motion to confirm the award because it included a settlement of FLSA claims but the parties had not submitted the settlement agreement or any evidence to allow the district court to review the award. The district court stated that it may not rubber stamp an arbitration order but must confirm the fairness and reasonableness of the resolution of the FLSA claims.

Martinez v. Back Bone Bullies Ltd,[5] arises out of an issue with the performance of a settlement agreement effectuated by the parties after the plaintiff attempted to resolve a dispute over unpaid wages at the Colorado Department of Labor and Employment. The defendant filed a motion for summary judgement. The settlement agreement stated that once the settlement was fully performed, "it will permanently settle and terminate any claim under any law—state, federal, or local—that either party owes the other any wages, penalties, or reimbursements through the date of the settlement."[6] In this action, the plaintiff brought claims of violations of the FLSA and for conversion/theft of services. Defendants asked the court to enforce the settlement agreement and dismiss the claims. Plaintiff argued that the release of claims is unenforceable as to the FLSA claim since it was not reviewed by the court to determine if it was a "fair and reasonable" agreement.[7] While acknowledging that there is significant confusion of this issue between the circuits, the court rejects the plaintiff's argument and holds that "parties to a bona fide FLSA claim may resolve their dispute via a private settlement agreement, with such agreement being legally effective regardless of submission to or approval by the trial court."[8] The court reasoned that requiring court approval of a settlement agreement of an FLSA claim: (1) reads into the FLSA a requirement that is not found in the text; (2) impliedly gives the impression that FLSA rights are more important than those found in other federal statutes; (3) unduly burdens everyone involved in the litigation process; and (4) interferes with the strong general presumption of allowing parties to resolve disputes through private contractual agreements.[9] The court continued by stating there was not a bona fide FLSA claim because the plaintiff did not have an attorney. Before a plaintiff may resolve the dispute, the weight of authority has found the plaintiffs must be represented by an attorney for there to be a bona fide claim and for a private settlement of that claim to be enforceable.[10]

In *Barbier v. Skanska USA Civil Southeast, Inc.*,[11] the plaintiff was a quality control supervisor/administrative assistant for defendant. The parties resolved their case

[4] 2022 WL 494380 (C.D. Cal. Jan. 21, 2022).

[5] 2022 WL 782782 (D. Colo. Mar. 15, 2022).

[6] *Id*. at *3.

[7] *Id*. at *7.

[8] *Id*. at *12.

[9] *Id*. at *11-12.

[10] *Id.* at *13.

[11] 2021 WL 6882963 (M.D. Fla. Dec. 29, 2021).

and sought approval of an FLSA settlement for only approximately 12% of the plaintiff's claimed damages without explanation of the shortfall. The settlement also incorporated a confidential non-FLSA agreement into its merger clause. The court applied *Lynn's Food Stores, Inc. v. United States Department of Labor* [12] and other caselaw in the Tenth Circuit which generally disfavors "pervasive, overly broad general releases," to find that it could not determine whether to approve the settlement because there was no reasoning for the compromise. The court could not determine whether the settlement amount was fair, and it could not know whether the FLSA settlement was fair without reviewing the integrated non-FLSA agreement. The court also found a provision regarding modification which read "may be modified only in a writing executed in the same manner as the original FLSA Settlement Agreement" unenforceable because it appeared to attempt to negate the necessity of court approval of the agreement in violation of *Lynn's Food* since the parties could alter the agreement after court approval without requesting court approval of the modified settlement.

In *Davis v. Harper Hill & Assocs., Inc.*,[13] the plaintiff brought a claim for retaliation under the Fair Labor Standards Act. The plaintiff did not bring a claim for unpaid wages. After a settlement was reached with the defendant, the plaintiff filed a motion for approval of the settlement. The district court denied the motion as moot and held that unless the claim under the Fair Labor Standards Act involves unpaid wages, the district court need not approve the settlement.[14]

III. Stipulated Dismissals of FLSA Claims

In *Almaraz v. Hometown Ventures LLC*,[15] the parties filed a stipulation of dismissal with prejudice in a Fair Labor Standards Act. The court determined that no further action was required by it because the parties had complied with Rule 41(a)(1)(A)(ii) by filing a stipulation of dismissal signed by all parties who had appeared. The court stated that "the text of the FLSA does not provide, and no Eleventh Circuit decision has ever held, that FLSA claims are exempt from Rule 41," and in fact had found the Federal Rules of Civil Procedure apply to FLSA actions.[16]

In *Samake v. Thunder Lube, Inc.*,[17] the Second Circuit held that when an employee voluntarily dismisses a suit containing FLSA claims against an employer, the district court retains limited jurisdiction to conduct a review as to the existence of any FLSA settlement.[18] The court relied on its decision in *Cheeks v. Freeport Pancake House, Inc.*,[19] where it held that any FLSA settlement must be reviewed by the district court before the parties can dismiss a case with prejudice by submitting a joint

[12] 679 F.2d 1350, 1352–53 (11th Cir. 1982).

[13] 2021 WL 8200220 (M.D. Fla. Aug. 17, 2021).

[14] *Id.* at *1.

[15] 2022 WL 622729 (M.D. Fla. Mar. 3, 2022).

[16] *Id.* at *1.

[17] 24 F.4th 804 (2d Cir. 2022).

[18] *Id.* at 810–11.

[19] 796 F.3d 199 (2d Cir. 2015).

stipulation.[20] In *Cheeks*, the court had found although stipulated dismissals are generally automatically effective under Fed. R. Civ. P. 41(a)(1)(A)(ii), the FLSA falls under the "federal statute exception" to the rule.[21] In *Samake*, the Second Circuit held that the same exception applies to unilateral dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i).[22] The court reasoned that judicial oversight is needed to ensure that parties do not evade review of FLSA settlement agreements by having the plaintiff unilaterally dismiss the action.[23]

IV. Factors in Court Approval of FLSA Settlements

In *Flores v. Urciuoli*,[24] the parties had a dispute over the terms of a settlement reached at mediation. Specifically, defendant included a confession of judgment to be executed for an amount that was purportedly less than what was agreed to during the mediation—and failed to include defendants' request that plaintiff represent he had no knowledge of any similar suits to be filed—including by his brother. The court approved the original settlement because (1) the parties intended to be bound by the Mediation Agreement and (2) the MA unambiguously contained all material terms.

In *Gomez v. Terri Vegetarian LLC*,[25] after defendants failed to make settlement payments pursuant to a payment plan, plaintiffs filed a motion to enforce a court-approved settlement agreement and for entry of judgment against all named defendants. The court, however, held that "when the agreement became enforceable, [the dismissed defendants] were no longer parties to the Settlement Agreement" and it therefore lacked jurisdiction over them to enforce the settlement agreement.

A. Is the Settlement the Product of a Bona Fide Dispute?

In *Wonderly v. Youngblood*, the district court addressed the standard to use for approval of an FLSA settlement. The court noted that the Ninth Circuit "has not established criteria for district courts to consider in determining whether a FLSA settlement should be approved."[26] The court went on to state, "[h]owever, district courts in this circuit have applied the widely used standard adopted by the Eleventh Circuit, which looks to whether the settlement is a fair and reasonable resolution of a *bona fide* dispute."[27] The court found the settlement met the criteria.

In *Cook v. Papa John's Paducah, LLC*,[28] pizza delivery drivers alleged unreimbursed business expenses for use of their personal vehicles brought their pay

[20] *Samake*, 24 F 4th at 810 (citing *Cheeks*, 769 F.3d at 206–07).

[21] *Id.* at 810–11.

[22] *Id.* at 810.

[23] *Id.* at 810–11.

[24] 2022 WL 987353 (E.D.N.Y. Jan. 10, 2022).

[25] 2021 WL 2349509 (S.D.N.Y. June 9, 2021).

[26] 2022 WL 378262, at *3.

[27] *Id.*

[28] 2022 WL 301796 (W.D. Ky. Feb. 1, 2022).

below the FLSA minimum wage. In approving the settlement, the district court found that a *bona fide* dispute existed about the amount of the expense reimbursement. Specifically, the drivers claimed that the defendants should have used the reasonably approximate costs of the business use of their vehicles. And the defendants used an unreasonably low rate beneath any reasonable approximation of the expenses that the drivers incurred. Defendants denied the allegations and claimed that the drivers were due no damages.

In *Lopez v. Americold Logistics, LLC*,[29] a warehouse worker who had opted-in to a collective action brought a separate suit in which he sought to be the named plaintiff in a similar collective action. After the original collective action settled, the worker agreed to settle the second suit individually, forgoing any class claims on behalf of others. Approving the settlement, the district court applied the *Lynn's Food* settlement factors, finding the settlement fair and reasonable because the agreement resolved a *bona fide* dispute, provided a reasonable recovery to the plaintiff after a good-faith—albeit informal—arm's-length exchange of relevant discovery, and provided for attorney's fees that were less than plaintiff's counsel's actual lodestar.

B. Is the Settlement Fair and Reasonable?

In *Smith v. Simmons Prepared Foods, Inc.*,[30] a factory worker filed an individual claim and putative collective action under the FLSA for the processing factory's failure to accurately calculate overtime wages. A curious joint motion to approve the settlement agreement and dismiss the lawsuit and brief in support was filed. The court denied the motion, finding the settlement agreement was not reasonable and was the product of collusion, rather than an arms' length negotiation between the parties based on the merits of the case. Prior to signing the settlement agreement, plaintiff fired his attorneys, and the attorneys continued to negotiate the settlement agreement on his behalf. Plaintiff was pressured into accepting and signing the agreement and was not afforded an opportunity to discuss the terms of the agreement with new counsel, despite the settlement agreement explicitly representing that plaintiff had the opportunity to negotiate the agreement and consult with an attorney before signing it.

In *Colon v. Morgan Grp. LLC*,[31] the district court considered a total settlement amount equal to 24.4% of plaintiff's "best case" recovery to be fair and in line with approvals in other cases. Of the total, fees and costs were also fair as being less than 1/3 of the total and, if based on a lodestar, below that normally approved.

In *Medina v. NYC Harlem Foods, Inc.*,[32] an employee of a fast food company brought FLSA claims for her employer's failure to pay overtime, keep proper records, and engage in illegal deductions, and other violations. The parties quickly proposed a

[29] 2021 WL 4553873, *1 (E.D. Cal. Oct. 5, 2021).

[30] 2021 WL 6012286 (W.D. Ark. Aug. 24, 2021).

[31] 2022 WL 2163787 (S.D.N.Y. May 24, 2022).

[32] 2022 WL 1184260 (S.D.N.Y. Apr. 21, 2022).

settlement and sought approval of the district court. The court, however, found that the attorneys would be enriched at the expense of the workers and rejected the proposed settlement.

In *Bellan v. Capital Blue Cross,*[33] the district court withheld approval of a FLSA settlement because the settlement agreement contained language deeming anyone who cashed the settlement as having given written consent to become an opt-in plaintiff, even though no such written consent had been filed with the court – and because the settlement agreement was silent as to the status of the named plaintiff's individual state law wage and hour claims.

In *Schlieser v. Sunrise Senior Living Mgmt. Inc.*,[34] non-exempt employees of an operator of senior living communities in California brought overtime claims under the FLSA alleging that the employer had failed to include non-discretionary bonuses in their overtime rates. The parties reached a class-wide settlement, which the district court preliminarily approved as fair and reasonable, considering the factors set forth in Fed. R. Civ. P. 23(e) and *Hanlon v. Chrysler Corp*.[35] The court held that: (1) the plaintiffs had sufficiently represented the interests of the class by extensively litigating the case; (2) the settlement was negotiated at arms' length; (3) the value of the settlement – 2.78% of the total potential recovery – was reasonable given the litigation risks, including the contention that a prior court had determined the bonuses at issue need not be included in the overtime rate; (4) the notification and payment process were adequate; (5) the attorneys' fees requested would amount to up to one-third of the fund; and (6) an extra award for a subset of the class was reasonable given that those individuals experienced an additional, separate harm.

In *Tapia v. Lira*,[36] plaintiffs and one of several defendants filed a letter to the court for judicial approval of the settling parties proposed settlement.[37] The court reviewed the proposed settlement agreement to determine if it was fair and reasonable under the totality of the circumstances. The court denied approval of the proposed settlement agreement for several deficiencies, including the failure to provide a distribution of the settlement funds to each plaintiff and a provision that allowed plaintiffs' counsel to recover fees, regardless of whether the court approved the proposed settlement or not.

In *Cook v. Papa John's Paducah, LLC*,[38] pizza delivery drivers brought claims for FLSA minimum wage violations due to unreimbursed business expenses for use of their personal vehicles. In approving the settlement, the district court followed the Sixth Circuit's seven factor test for class action settlements to determine that the FLSA

[33] 2022 WL 736441 (M.D. Pa. Mar. 10, 2022).

[34] 2021 WL 6752320 (C.D. Cal. July 6, 2021).

[35] 150 F.3d 1011, 1019 (9th Cir. 1998).

[36] 2021 WL 5086300 (S.D.N.Y. Nov. 2, 2021).

[37] *Id*. The court references this process as a Cheeks application, as described in *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015)

[38] 2022 WL 301796 (W.D. Ky. Feb. 1, 2022).

collective action settlement was fair and reasonable. The court found that the factors favored a settlement: 1) there was no fraud or collusion because the plaintiff filed the case a year earlier and the parties engaged in informal discovery; 2) litigation, including discovery, would be quite expensive and increase the litigation length; 3) although discovery was limited, the parties' informal discovery was sufficient; 4) the likelihood of success on the merits favored the settlement because both parties recognized the inherent risks of going to trial, which included plaintiffs' need to prove that the defendants' policies violated the FLSA and plaintiffs had to present evidence of each plaintiff's specific damages; 5) counsel and the parties supported the settlement, as represented in the settlement agreement; 6) no opt-ins objected to the settlement agreement; and 7) the public interest in the settlement was satisfied given the parties' bona fide dispute, the litigation risks, and litigation costs.

In *Cortazar-Garcia v. Wrist Aficionado Miami, LLC*,[39] a luxury watch store employee brought claims for retaliation under the FLSA, unpaid FLSA minimum and overtime wages, and other claims for harassment, retaliation, and failure to pay wages and commissions. The district court approved the settlement because: the settlement amount was fair and reasonable due to a bona fide dispute; the attorneys' fees and costs were reasonable because the parties agreed upon the amounts separately and without regard to the amount to the employee. Further, the employee's release of claims was reasonable because: the scope was limited to FLSA claims; was a significant factor in the negotiations; and contributed to the settlement amount. The court also found sufficient consideration for a no re-employment provision because it permitted a quicker resolution, and the employee had no interest in re-employment. Similarly, the confidentiality term was reasonable because of the history between the parties, the small size of the local luxury watch network, and employee's continued work in the industry.

In *Welch v. Jenn Energy Servs. LLC*,[40] plaintiff employee brought suit on behalf of himself and other similarly situated employees against his former employer under the FLSA, alleging failure to properly pay overtime wages. The district court held that the parties' proposed settlement was fair and reasonable, as there was no evidence of fraud or collusion, the parties were sufficiently adversarial, and the complexity, expense, and likely duration of litigation favored settlement. However, the court struck the part of the settlement that waived and released non-FLSA claims, as releasing all claims would have been contrary to the purpose of the FLSA.

In *Cole v. Bellar Construction Management, Inc.*,[41] a general laborer sued his former employer under the FLSA for failing to pay him overtime wages. The district court approved the parties' proposed settlement of $5,000 for unpaid wages to the plaintiff and $10,000 for attorneys' fees and costs. The court found that the payment compensated the employee for more than 80 percent of his best estimated recovery,

[39] 2022 WL 2048467 (S.D. Fla. May 27, 2022).

[40] 2022 WL 3006402 (S.D. Tex. May 20, 2022), *report and recommendation adopted*, 2022 WL 2992876 (S.D. Tex. July 28, 2022).

[41] 2021 WL 2571236 (N.D. Ind. 2021).

and thus concluded the settlement was a fair and reasonable resolution of a *bona fide* dispute between the parties.

V. Settlement Provisions Common in FLSA Settlements

In *Olker v. Edward Zengel & Son Express, Inc.*,[42] the magistrate judge recommended that the district court grant the parties' joint motion to approve their settlement of the plaintiff's claims for failure to pay overtime wages, minimum wages, and retaliation. However, the judge also recommended that the district court strike from the agreement a "potentially problematic contractual provision sometimes found in proposed FLSA settlement agreements" that purported to allow the parties to modify the agreement without court approval.

In *Sanchez v. La Cantina Cocina Mexicana, Inc.*,[43] a group of servers and bartenders brought FLSA overtime and minimum wage claims against the restaurant where they worked.[44] The district court approved the settlement of the plaintiffs' FLSA claims as well as a separately executed separation agreements for each plaintiff. The separation agreements were executed in consideration for an additional $2,500 per plaintiff and contained mutual general releases, as well as non-disparagement, no-rehire, and confidentiality provisions. The district court found that those provisions in the separation agreement did not preclude approval of the settlement agreement. The confidentiality provision did not preclude approval because both agreements had already been filed on the public docket. Nor did the non-disparagement provision because it was mutually beneficial to both parties. The district court found that the no-rehire provision did not preclude approval of the settlement because the parties informed the court that they had an "antagonistic" relationship "both before and during [the] case," and that this provision was "of particular importance to [the parties] for reasons unrelated to the FLSA claims." Finally, although there was no additional consideration for the no-rehire provision, the court found that it was "sufficiently related to the general release of claims."

A. Confidentiality

In *Klich v. Klimczak*,[45] the employers sued employees who currently or previously worked for the plaintiffs for breach of a confidentiality provision in a settlement agreement under the FLSA. The alleged breach occurred when the defendants told other employees about the terms of an FLSA settlement. The plaintiffs maintained that, because the parties entered into a settlement prior to the Second Circuit's decision in *Cheeks v. Freeport Pancake House Inc.*[46], court approval of the settlement agreement was not necessary and the confidentiality clause was enforceable. In refusing to maintain the action, the district court noted that, prior to *Cheeks*, "district courts were

[42] 2021 WL 8201495 (M.D. Fla. July 27, 2021).

[43] 2021 WL 7501177 (M.D. Fla. Sept. 3, 2021).

[44] *Id.* at *1.

[45] 571 F. Supp. 3d 8 (E.D.N.Y. 2021).

[46] 796 F. 3d 199 (2d Cir. 2015).

divided on whether court approval was required before dismissal of an action under Federal Rule of Civil Procedure 41(a)," and most refused to allow settlement agreements containing confidentiality clauses for public policy reasons. The district court reviewed Supreme Court cases preceding *Cheeks* and concluded that, "in the absence of court approval of an FLSA settlement, courts will not enforce objectionable components of the settlement in post-settlement litigation."[47] The court concluded by stating that, while in some special circumstances confidentiality clauses are acceptable, the confidentiality clause in dispute was designed to reduce the plaintiff's exposure to FLSA liability by preventing other employees from learning of their rights, which is contrary to the public policy objectives of the FLSA. For those reasons, the court dismissed the action.

In *Smith v. SAC Wireless, LLC*,[48] a field technician filed a putative collective action alleging a wireless company failed to comply with the FLSA's overtime requirements. The plaintiff and defendant settled the dispute and moved for final approval of their settlement agreement. The proposed settlement agreement and notice contained a confidentiality provision requiring every plaintiff keep their individual settlement payment confidential. The district court granted final approval of the proposed settlement despite the inclusion of the confidentially provision because "publishing the agreement on the docket and redacting only the specific settlement amounts strikes a balance between the defendant's interest and the desire to inform future workers of their rights under the FLSA and the potential for recovery when those rights are violated."[49]

In *Martinez v. Avalanche Constr. Grp. Inc.*,[50] the parties in a wage and hour class action submitted a joint "fairness letter-motion" and two settlement agreements for approval. The settlement agreements include an "Agreement Not to Publicize" in which the plaintiffs specifically agreed "'that they will not publicly publicize the terms [or existence] of this Agreement in the print media or on social media.'"[51] The court found that the restrictive step to communicate with "print media" was permissible because of the following reasons: (1) it does not prevent the plaintiff from discussing the settlement with friends/colleagues in a similar situation; (2) it limits the plaintiffs' ability to contact the media only about the settlement; and (3) it does not prevent the plaintiffs from responding to media inquiries about their litigation experience. The court found the restriction on the use of social media impermissible because "'individuals regularly use the internet to communicate with friends, colleagues, and family, [and by] restricting Plaintiffs' ability to use it 'places a substantial burden on their ability to openly discuss their experience litigating the lawsuit and entering into the [Proposed Settlement],'" which is incompatible with the FLSA's statutory purpose of ensuring that workers know their rights.[52]

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[47] 571 F. Supp. 3d at 4–5.

[48] 2022 WL 1744785 (E.D. Mich. May 31, 2022).

[49] *Id.* at *4.

[50] 2021 WL 5001415 (S.D.N.Y. Oct. 28, 2021).

[51] *Id*. at *1.

[52] *Id*. at *2 (quoting Zorn-Hill v. A2B Taxi LLC, 2020 WL 5578357, at *7 (S.D.N.Y. Sept. 17, 2020)).

In *Fassa v. P&E Express Inc.*,[53] the plaintiff filed a collective action against the defendant-employer alleging violations of the FLSA and state laws. The parties settled the matter and sought approval from the district court of the settlement. In approving the parties' motion for approval of the settlement, the district court reiterated the relevant factors necessary for it to approve such a settlement, including the public's interest in settlement. The district found all relevant factors were met in this matter.

In *Bates v. Discovery Aviation, Inc.,*[54] the magistrate judge recommended striking confidentiality and other terms from the plaintiff's motion to approve settlement. The court held that employer's insistence upon a confidentiality provision as part of an FLSA settlement contravenes the policies underlying the FLSA. More broadly, the court concluded that confidentiality, non-disparagement and general release provisions would render the settlement of the FLSA claims unfair and unreasonable to plaintiff—absent further explanation by the parties.

In *Whitehead v. Garda CL Cent., Inc.*,[55] plaintiff brought a suit against his former employer for failure to pay overtime wages under both federal and state law. The parties brought a joint motion asking the district court to approve their settlement under the FLSA, file the settlement under seal, and dismiss the case with prejudice. The court denied the motion to file under seal, as the parties did not meet the heavy burden necessary to defeat the strong presumption in favor of openness for court records in FLSA cases. The court found a strong public interest in FLSA cases and held that confidentiality provisions in settlement agreements were not enough, without more, to defeat this interest. The court denied the arguments that the confidentiality provision was a material term to the agreement, that public disclosure would make it less likely for the parties to enter into the settlement, that the public would not be interested in the details of the settlement, and that in the absence of an order to seal, there was no other alternative means to present the settlement to the court. The court ordered for the parties to file supplemental briefs addressing the need to file under seal, and delayed approval of settlement until that time.

In *Lopez v. Silfex, Inc.*, [56] the named plaintiff filed suit on behalf of herself and other employees whose shift differentials and bonus payments had not been included in their regular rates for overtime purposes. At mediation, the parties agreed to create a settlement fund and stipulated to conditional certification and notice of the settlement, then moved for approval of their agreement and the dismissal of the case. The district court denied the motion because, though the settlement was otherwise fair and reasonable, it included confidentiality provisions that could not be honored because the settlement documents were to be filed publicly.[57] Accordingly, the district court ordered

[53] 2022 WL 1158596 (S.D. Ohio Mar. 28, 2022).

[54] 2021 WL 8155567 (M.D. Fla. Aug. 20, 2021).

[55] 2021 WL 4270121 (W.D. Ky. Sept. 20, 2021).

[56] 2021 WL 5795280, at *1 (S.D. Ohio Dec. 3, 2021).

[57] *Id.* at *9–10.

the parties to revise their proposed settlement documents or otherwise explain their proposal to the court.

In *Miller v. Fresh Start Behav. Health, Inc.*,[58] the parties' filed a joint for *in camera* review of their confidential settlement agreement. The court denied the motion explaining that it could not "at this time, approve the confidential settlement agreement."[59] FLSA claims cannot be settled without the supervision of the Secretary of Labor or a district court. Thus, the parties need to present the court with their proposed settlement to obtain court approval. Here, the parties failed to file a copy of the agreement on the docket with their motion. The court explained that an "agreement settling an FLSA claim that is submitted for court approval is indisputably . . . a 'judicial document' subject to the presumption of access."[60] Confidentiality is "an insufficient interest to overcome the presumption that an approved FLSA settlement agreement is a judicial record, open to the public."[61] The court explained that parties seeking approval of a confidential FLSA settlement must "articulate a real and substantial interest that justifies depriving the public of access to the records that inform [the court's] decision-making process."[62] Here, the court denied the motion for review *in camera* because the parties did not articulate a reason for confidentiality.

B. Scope of Release

In *Lowe v. NewQuest, LLC*,[63] the settlement agreement contained a general release of claims, including "any past or present claims, known and unknown, asserted or unasserted against Defendants." The magistrate judge court found the release to be impermissibly broad and did "not include any tether to Plaintiff's employment, any temporal limitation, or any other connection to Plaintiff's FLSA claims." In addition, the parties conceded that the overbroad provisions of he release were not supported by separate consideration. The court recommended striking the general release provision from the settlement agreement and otherwise approving the proposed settlement agreement.

In *Macas v. Alex's Auto Body 1 Inc*.,[64] the court rejected the plaintiff's motion for final approval of the parties' settlement of plaintiff's FLSA claims. The proposed settlement agreement included a general release provision, which the district court found to be "a sufficient basis to reject the motion." Specifically, the court noted that the release was overbroad because it would prevent any possible claim against defendants,

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[58] 2022 WL 1618293 (S.D. Ohio Feb. 20, 2022).

[59] *Id.*

[60] *Id.* (quoting Thompson v. Deviney Const. Co., Inc., 2017 WL 10662030, at *2 (W.D. Tenn. Dec. 15, 2017).

[61] *Id.*

[62] *Id.* (quoting Chime v. Fam Life Counseling & Psychiatric Servs., 2020 WL 6746511, at *4 (N.D. Ohio Nov. 17, 2020)).

[63] 2022 WL 1721195 (M.D. Fla. May 11, 2022), *report and recommendation adopted*, 2022 WL 1720833 (M.D. Fla. May 27, 2022).

[64] 2021 WL 6881295 (E.D.N.Y. Dec. 20, 2021).

including unknown claims that have no relationship to the wage and hour issues being litigated.

In *King v. Rockline Indus., Inc.*,[65] employees filed suit against their employer alleging violations of the FLSA and the Arkansas Minimum Wage Act (AMWA). Plaintiffs alleged that the defendant would provide a bonus to them for each weekend worked and for each quarter their first aid certificate was active, but then would not include that additional compensation in the overtime calculations. Upon a grant of conditional certification, the parties submitted a joint motion to approve a settlement agreement and dismiss the plaintiffs' claims with prejudice.[66] The court determined that, without involvement of the Secretary of Labor, they must first scrutinize the settlement for fairness, which allowed the court to consider the stage of litigation, the amount of discovery exchanged, the experience of counsel, the probability of success, any overreaching by the employer during negotiations, and whether the settlement was the product of an arm's length negotiation. The district court determined that, due to the presence of a release of non-wage related claims, the settlement violated the legislative purpose of the FLSA and could be allowing the employer to use FLSA claims to leverage a release of liability unconnected to the FLSA. The court held that the settlement could not be approved due to the inclusion of the general release of claims.

In *Swain v. Jodlowski*,[67] the parties were seeking court approval of their settlement and submitted a proposed settlement agreement that contained a mutual general release. The court held that for a general release to be actually mutual, the plaintiffs must receive general releases from all the persons and entities to whom they are providing a general release. The court rejected the parties mutual release language, because the defendant's definition of releasees and the plaintiffs' definition of releasees were not parallel to each other. Therefore, plaintiffs were releasing persons and entities, but not receiving a release from those same persons and entities. Further, the court discussed that that the claims and potential claims being released also must be parallel.

In *Devries v. Teen Challenge of Florida*,[68] the court reviewed the parties amended joint motion for approval of their FLSA settlement. Plaintiff initially filed a complaint alleging two FLSA violations. Then the plaintiff amended the complaint to assert a collective action alleging only one FLSA violation. In response, the defendant filed a motion to compel arbitration, which the court granted. After arbitration, the parties filed a joint motion for approval of the agreement. The joint motion was denied because it found the release provision problematic. In the amended motion, the parties modified and clarified the release provision. Specifically, the parties removed the problematic language which extended the release to non-parties to the agreement. Additionally, the parties clarified the scope, explaining that even though the plaintiff initially filed two FLSA claims, the amended complaint containing the single claim was the plaintiff's only FLSA claim against the company, therefore release from all FLSA claims was no longer

[65] 2021 WL 5991895 (W.D. Ark. Apr. 7 2021).

[66].2021 WL 3612281 (W.D. Ark. Aug. 13, 2021).

[67] 2021 WL 6101017 *2 (S.D.N.Y., 2021).

[68] 2021 WL 5496059 (M.D. Fla. Nov. 3, 2021).

included. The court found the release permissible and granted the amended motion to approve because the parties had removed the language extending the release to non-parties and clarified that the plaintiffs had no remaining FLSA claims.

In *Diaz Bravo v. Broadway Fines Deli Corp.*,[69] the parties sought court approval of their revised settlement agreement. After reviewing the revised settlement, the court again denied approval. The revised agreement contained several inappropriate terms for an FLSA settlement. The two particularly problematic provisions were a reemployment ban and an overbroad collective and class action waiver. The court explained that a reemployment ban is contrary to the aims of the FLSA, specifically conflicting with the remedial purpose of the FLSA. In this case, the court also found a reemployment ban particularly inappropriate because there was "not a shred of explanation—and no cases—to justify the inclusion of such a provision."[70] The court also found the class and collective action waiver impermissible because it was not limited to participation in proceedings arising under the FLSA. Rather, it included any action. The parties did not attempt to demonstrate why such a waiver is appropriate under the circumstances.

In *Zamora v. Senior Care Residences Sapphire Lakes at Naples, LLC*,[71] the plaintiff brought an action under the FLSA for unpaid overtime. The parties settled the claim and filed joint motion for settlement approval. Holding that there was no consideration for several of the non-cash provisions of the settlement, the district court denied the parties' motion. Specifically, the court found that the defendants gave up nothing in exchange for the plaintiff's general release of claims, agreement to vacate a discrimination charge, and the no re-employment, non-disparagement, and neutral work reference provisions in the agreement. The court also found that the settlement agreement improperly allowed the parties to change the terms after court approval and included indemnification, a non-standard FLSA settlement term.

In *Zhu v. Meo Japanese Grill & Sushi, Inc.*,[72] the plaintiffs alleged violations of the FLSA, New York Labor Law, and New York General Business Law for improperly withholding tips, failing to record hours and provide paystubs, failing to pay overtime, and filing fraudulent information with respect to payments to plaintiffs. The parties settled the case and filed two successive motions for settlement approval which the district court denied, holding that the broad general release and non-disparagement clause were improper. The parties revised these provisions and filed a third motion for settlement approval which the district court granted. The district court ruled that the parties' addition of a mutual general release was appropriate and rendered the plaintiffs' general releases proper because the settlement was the result of a fair and balanced negotiation and because the plaintiffs were no longer employed by the defendant.

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[69] 2021 WL 4263047 (S.D.N.Y. Aug. 4, 2021).

[70] *Id.* at *2 (quoting Zekanovic v. Augies Prime Cut of Westchester, Inc., 2020 WL 5894603, at *5 (S.D.N.Y. Oct. 5, 2020)).

[71] 2021 WL 3174205 (M.D. Fla. July 9, 2021), *report and recommendation rejected*, 2021 WL 3172121 (M.D. Fla. July 27, 2021).

[72] 2021 WL 4592530 (E.D.N.Y. Oct. 6, 2021).

Additionally, the court approved the settlement with the revised non-disparagement clause which carved out statements by the plaintiffs regarding the underlying facts in the litigation.

In *Garza v. St. Surin*,[73] legal assistant plaintiffs and defendants filed a joint motion to dismiss with prejudice in light of the parties' settlement. Specifically, in January 2020, plaintiffs filed suit alleging, among other things, that defendants failed to pay plaintiffs overtime in violation of the FLSA. Subsequently, defendants filed their Answer denying plaintiffs' allegations, and thereafter, on October 23, 2020, the parties filed a joint stipulation for dismissal asserting that plaintiffs received all amounts owed, without compromise, on their FLSA claims rendering judicial approval of the settlement unnecessary. But, because the presiding district court judge had previously ruled that dismissal could not be used to avoid judicial approval of the settlement, the court instructed the parties to file a motion for approval of their FLSA settlement that provided both the agreement and additional information for the court to assess "the bona fides of the parties' dispute and the precise contours of their resolution." After ignoring the court's order for several months, the parties filed another joint motion requesting dismissal of the action arguing again that the court need not review the agreement because the plaintiffs were receiving full compensation, without compromise, on their FLSA claims. This time, however, the parties did attach a fully executed copy of their settlement agreement with the motion. Thus, in evaluating whether to approve the settlement, and despite ultimately not approving the settlement on other grounds, the court concluded that because the release of claims agreed to by the parties was limited to claims arising under the FLSA, there were no concerns that the limited waiver was too broad to preclude approval of the settlement.

In *Texas v. New World Van Lines of Fla., Inc.*,[74] plaintiff brought suit seeking unpaid overtime. The parties reached a settlement subject to court review and approval. Although plaintiff had claimed in discovery that he was entitled to over $33,000 the parties demonstrated that records documenting plaintiff's work showed substantially less damages than what plaintiff had claimed, thus supporting the parties' compromise on the settlement amount. The parties had also entered into a general release agreement supported by separate consideration. While the court noted that general releases are viewed with disfavor as affecting the fairness and reasonableness of FLSA settlements, the court nonetheless approved the FLSA settlement because the execution of the general release did not contaminate the FLSA settlement.

D. Severability Clause

In *Ogden v. Topbuild Corp.*,[75] the plaintiff filed an amended motion seeking approval of the settlement agreement entered into with the defendant pursuant to the Fair Labor Standards Act. Upon granting plaintiff's motion, the court first struck the

[73] 2021 WL 7451889 (M.D. Fla. Sept. 15, 2021).

[74] 2021 WL 2458409 (M.D. Fla. June 10, 2021), report and recommendation adopted, 2021 WL 2435794 (M.D. Fla. June 15, 2021).

[75] 2022 WL 2317506 (M.D. Fla. Jan. 27, 2022).

modification provision present in the amended settlement agreement. In support of striking the modification provision, the district court found that the modification provision within the settlement agreement was unenforceable because it included language that would allow the parties to modify the settlement agreement without obtaining approval from the court, which is required under the FLSA. However, given the presence of a severability clause within the settlement agreement, the modification provision could be stricken without impacting the enforceability of the remainder of the settlement agreement.

VI. Collective Action Settlements

In *Fernandez v. HR Parking Inc.*,[76] the plaintiffs filed an FLSA action against the defendants alleging a failure to pay overtime wages. The plaintiffs' counsel filed a letter with the district court indicating that the parties had reached a settlement in principle and would seek approval of that settlement. Subsequently, the defendants filed a motion to enforce the settlement where two plaintiffs refused to sign the settlement agreement. Using a four-factor analysis under New York law to determine whether the parties intended to be bound by the agreement in principle, the district court found that they did not. In reaching this decision the district court held that (i) that the agreement was "in principle," indicated that it was not a final agreement; (ii) that the phrase "is hereby agreed" in the settlement agreement shows that only the terms in the agreement would be legally binding upon signing; (iii) none of the terms of the agreement had been performed; and (iv) there was no evidence of agreement to the release of claims provision, especially where the plaintiffs did not sign the agreement to be bound by this non-monetary term. The court held that all four factors weighed against enforcing the settlement agreement and therefore denied defendants' motion.

A. Settlement of Class Actions Versus Collective Actions

1. FLSA Collective Actions

In *Lopez v. Silfex, Inc.*,[77] the named plaintiff filed suit on behalf of herself and other employees whose shift differentials and bonus payments had not been included in their regular rates for overtime purposes. At mediation, the parties agreed to create a settlement fund and stipulated to conditional certification and notice of the settlement, then moved for approval of their agreement and the dismissal of the case. The district court denied the motion because, though the settlement was otherwise fair and reasonable, their proposal requested that the court dismiss the action before any other class members had the opportunity to file their consents with the court and participate in the settlement process.[78] Accordingly, the district court ordered the parties to revise their proposed settlement documents to clarify the method and timing for class member participation.

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[76] 577 F. Supp. 3d 254 (S.D.N.Y. 2021).

[77] 2021 WL 5795280, at *1 (S.D. Ohio Dec. 3, 2021).

[78] *Id.* at *11.

2. Combined FLSA Collective Actions and Rule 23 Class Actions

In *Green v. Platinum Restaurants Mid-Am. LLC*,[79] former and current servers, bartenders, and other tipped non-management staff brought a hybrid collective action and putative class action against the defendant-restaurants under the FLSA. The defendant and plaintiffs reached a comprehensive settlement and sought preliminary approval of the agreement which covers individuals who are either part of the Rule 23 class action or individuals that opted-into the FLSA collective action. The district court considered both Rule 23(e) factors and factors set forth by the Sixth Circuit to evaluate if the preliminary settlement is "fair, reasonable, and adequate." The district court granted preliminary approval and ordered notice of the settlement to all individual in the class and collective action along with opt-out statements to members of the Rule 23 settlement class. The district court scheduled a fairness hearing regarding the proposed settlement where any Rule 23 class member would have an opportunity to object to the agreement.[80]

In *Borelli v. Black Diamond Aggregates, Inc.*,[81] the plaintiffs and defendant reached a settlement of a combined FLSA collective and Rule 23 California state law claim. The court examined the fairness of the agreement with regard to the class members. The court had some concerns regarding the 33% percentage of attorney's fees sought by plaintiffs' counsel and the relatively low recovery compared to the total potential recovery. However, the court ultimately approved the higher than usual attorneys' fees percentage due to the case's long pending nature, counsel's contingent representation, the contested nature of the claims, and the many evidentiary and legal obstacles of continued litigation.

In *Smith v. Kaiser Found. Hospitals,*[82] the district court granted final approval of a settlement of FLSA and California Rule 23 off-the-clock claims brought by the plaintiffs, telemedicine specialists and other related positions at the defendant's hospitals. In evaluating the settlement pursuant to the FLSA and Rule 23(e) the court noted "there are important distinctions between the policy objectives of –and the right protected by – Rule 23 and the FLSA," but that there is "considerable overlap between the factors considered for settlement approval."[83] Therefore, the court found that because the proposed settlement warranted approval under Rule 23, it also warranted approval under the FLSA.

In *Connell v. Heartland Express, Inc.*,[84] the district court considered a settlement agreement of a Rule 23 class action and a FLSA collective action; after initially granting provisional certification of both, the court vacated certification due to the parties' failure to notify the court of three other cases involving similar claims against the defendant. In

[79] 2022 WL 1240432 (W.D. Ky. Apr. 27, 2022).

[80] *Id*. at *1–7.

[81] 2021 WL 5139610 (E.D. Cal. Nov. 4, 2021).

[82] 2021 WL 2433955 (S.D. Cal. June 15, 2021).

[83] *Id.* at *6.

[84] 2021 WL 4296207 (C.D. Cal. June 10, 2021).

addition, after filing the initial motion seeking approval of settlement, plaintiffs added additional claims to their complaint. Considering only the Rule 23 factors for fairness of the settlement, the court found that plaintiffs failed to establish fairness of the settlement as it appeared through their actions that "the settlement agreement reached by [plaintiff] and [defendant] in this case was built around settling putative class claims alleged by other plaintiffs in other cases, not merely the claims that Plaintiffs actually intended to litigate in the present case."[85]

In *Luz Bautista-Perez v. Juul Labs, Inc.*,[86] the plaintiffs provided canvassing, phone banking, and related campaign services to the defendant-campaign operator, who helped manage defendant electronic cigarette manufacturer's campaign to overturn an ordinance suspending the sale of its products. The plaintiffs filed an unopposed motion for preliminary approval of a settlement under Rule 23 class and FLSA collective action and the court granted the motion. Under the terms of the settlement, the settlement administrator would send a notice to members of the class, followed by a slightly modified notice to class members who also had claims under the FLSA, allowing them to join the collective action portion of this case and participate in the settlement of the FLSA portion of the settlement. In addition, class members who also had a claim under the FLSA received a separate version of the class action notice inviting them to opt into the settlement of the FLSA overtime claim.

In *Ortega v. Aho Enters., Inc.*,[87] a group of technicians, technician helpers, detailers, painters, and painter helpers from an automobile body repay business sued for unpaid overtime under the FLSA and California law, and several other California wage-and-hour violations. The parties reached a class-wide settlement following a mediation session and a settlement conference.[88] The plaintiffs then moved for preliminary approval of the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. In deciding the motion, the district court considered the fairness factors set forth in *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004), Rule 23(e)(2), and the Northern District of California's Procedural Guidance for Class Action Settlements.[89] The district court granted preliminary approval, having given serious consideration to the risks facing the plaintiffs, including defendants' financial constraints and the potential for bankruptcy.[90]

In *Anderson v. Team Prior, Inc.*,[91] the plaintiffs, pizza delivery drivers, and their defendant employers entered into a class wide settlement to resolve all minimum wage claims under the FLSA and the wage and hour laws of Maine and Connecticut. The parties jointly moved to certify a proposed class action and for preliminary approval of their settlement. The parties had previously stipulated to conditional certification of a

[85] *Id*. at *3.

[86] 2022 WL 307942 (N.D. Cal. Feb. 2, 2022).

[87] 2021 WL 5584761 (N.D. Cal. Nov. 30, 2021).

[88] *Id*. at *2.

[89] *Id*. at *5.

[90] *Id*. at *6-7, 8.

[91] 2021 WL 3852720 (D. Me. Aug. 27, 2021).

FLSA collective action. The court noted that because of the competing opt-in and opt-out provisions of hybrid actions, settlement agreements that inextricably intertwine Rule 23 class and FLSA collective claims can prevent approval of the collective settlement. Thus, to be found fair, the parties' proposal must clearly draw a line between the FLSA collective's settlement terms and the settlement terms of the Rule 23 class.[92] This information should be further broken down by (1) the range of potential recovery for individual class members, (2) the range of expected payments to individual class members within the different funds under the settlement agreement, (3) the average expected settlement recovery for individual class members, and (4) how the parties arrived at these figures. The district court denied the parties' motion because the settlement agreement provided insufficient information regarding the putative plaintiff's claims and the parties' settlement.[93]

In *Askar v. Health Providers Choice, Inc.*,[94] the plaintiff, an hourly health care worker, and the defendant-employer sought final approval of a class action settlement resolving claims under the FLSA and California wage and hour laws. The agreement was reached prior to conditional certification and the parties sought such certification and opt-in status through settlement by means of the class members receiving and cashing a separate check labeled "FLSA Settlement Payment."[95] Under the agreement, each member of the class was to receive two checks. One to release the Rule 23class claims and one to release the FLSA claims. Cashing the FLSA check was to constitute the class member's opt-in form. Individuals who did not cash the FLSA check would not opt-in to the FLSA collective. With regard to the FLSA claims, the district court reviewed the parties' motion as a motion to conditionally certify a collective and approved the parties' settlement.[96]

In *Chen v. XpresSpa at Terminal 4 JFK LLC*,[97] the plaintiffs commenced a class and collective action for unpaid wages and unpaid overtime compensation against the defendant, who operated airport-based spa services. The district court granted the motion for preliminary approval of the proposed settlement. In so doing, the district court found that the settlement was fair, reasonable, and adequate as required under Rule 23 and then separately evaluated the totality of the circumstances standard for collective class settlement set forth in *Wolinsky v Scholastic, Inc*., including : (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.[98]

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[92] *Id.* at * 9.

[93] *Id.* at * 10.

[94] 2021 WL 4846955 (N.D. Cal. Oct. 18, 2021).

[95] *Id.* at * 1.

[96] *Id.* at * 5.

[97] 2021 WL 4487835 (E.D.N.Y. Oct. 1, 2021).

[98] 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012).

In *Then v. Great Arrow Builders, LLC,*[99] the plaintiff brought a FLSA collective action and Rule 23 class action claiming that the defendant failed to include a "site allowance" in the regular rate of pay when computing overtime compensation. After stipulating to conditional certification, the parties settled at mediation and then sought court approval of the FLSA settlement and a Rule 23 class. The court determined that the FLSA settlement was a fair and reasonable resolution of a bona fide FLSA dispute and preliminarily approved the settlement.

In *Curtis v. Genesis Eng'g Sols., Inc.*,[100] an employee working on a federally funded service contract brought a class action under the Maryland Wage and Hour Law and a collective action under the Fair Labor Standards Act seeking overtime wages because his employer paid him and other workers an hourly rate without overtime pay. After the lawsuit was filed, the plaintiff and the defendant reached a settlement on both a class action and collective action basis. The employee submitted a motion for preliminary approval of the settlement, which the district court denied without prejudice. The district court denied the motion for preliminary approval because the settlement was structured solely as an opt-out settlement that released claims under both Maryland law and the Fair Labor Standards Act. The district court held that under the Fair Labor Standards Act, employees must affirmatively opt-in to participate in the settlement and to release their claims and the settlement cannot be structured as an opt-out settlement for the Fair Labor Standards Act claims.[101]

B. Settlement Terms for Consideration That Are Unique to Class and Collective Actions

In *Spagnuoli v. Louie's Seafood Rest., LLC*,[102] a former employee of the defendant-restaurant filed a motion to opt out of a class action settlement more than sixteen months after the opt-out deadline and more than seven months after the district court granted final approval to the settlement. Defendants filed a motion seeking to permanently enjoin the former employee from pursuing claims for unpaid wages that defendants claimed were resolved, waived, and released pursuant to the settlement agreement and the district court's final approval order. The district court held that the former employee had failed to establish excusable neglect in delaying to timely opt-out because his claim that he did not receive notice of the class action was not credible. The district court reasoned that the defendant had established a rebuttable presumption that the notice had been delivered via mail, and the former employee failed to rebut that assumption because he did not include affidavits from any of the other three adults in his household who handled mail denying receipt of the notice, and because it was not credible that he had not heard of the lawsuit because he was employed at the restaurant while notice was posted conspicuously and the settlement approval process was ongoing. The district court also reasoned that the former employee's counsel could

[99] 2022 WL 562807 (W.D. Pa. Feb. 23, 2022).

[100] 2021 WL 5882341 (D. Md. Dec. 10, 2021).

[101] *Id*. at *5.

[102] 2022 WL 657411 (E.D.N.Y. Mar. 4, 2022).

have discovered the existence of the settlement when they screened his case, and did not act diligently in filing the motion to opt-out.

In *Cook v. Papa John's Paducah, LLC*,[103] the plaintiffs, pizza delivery drivers, brought claims for FLSA minimum wage violations due to unreimbursed business expenses for use of their personal vehicles. In approving the settlement, the district court approved the settlement allocation based on a formula that included: 1) each driver's total deliveries; 2) each driver's wage rate; and 3) the reimbursement rate paid to each driver. In addition, each driver received a minimum payment of $100. The court also approved an incentive award to the named plaintiff for their contribution to the case.

In *Logan v. United Am. Sec., LLC*,[104] the plaintiff, a security guard, brought a putative collective action alleging unpaid overtime hours due to the defendant-employer's failure to pay for "pass duties" performed during shift changes. After the parties stipulated to stage one conditional certification and notice, they reached a settlement before issuing notice to the potential class members. The parties then jointly moved for settlement approval and notice of the approved settlement to issue to potential class members. The district court denied their motion without prejudice because the notice did not inform potential class members of their right to retain their own counsel and their right not to be bound by the settlement negotiated by the named plaintiff.[105]

In *Negrete v. ConAgra Foods, Inc.*,[106] the plaintiffs, who worked at seven of defendants' food processing facilities, asserted claims under the FLSA and California Labor Code based upon their allegations that the defendants failed to give them legally sufficient meal and rest breaks and did not pay them the wages they were due. The plaintiffs brought their claims as a FLSA collective action and Rule 23 class action. After engaging in fact and expert discovery and participating in three mediations, the parties reached a settlement and filed a motion for preliminary approval of the proposed Rule 23 and FLSA settlement classes. At the preliminary approval stage, the district court granted preliminary approval of a settlement and directed notice to the class because the settlement: (1) appeared to be the product of serious, informed, non-collusive negotiations; (2) had no obvious deficiencies; (3) did not improperly grant preferential treatment to class representatives or segments of the class; and (4) fell within the range of possible approval. In particular, the district court noted that the case was heavily litigated for over three years, which weighed against a finding of collusion. Second, the $18 million recovery was significant and the release was limited to claims that were pleaded or could have been pleaded based upon the factual allegations in the complaint. Third, the incentive awards for the class representatives were between $5,000 and $10,000, which was reasonable in light of the total settlement amount. Finally, the district court found that the notice procedure was reasonable because the

[103] 2022 WL 301796 (W.D. Ky. Feb. 1, 2022).

[104] 2021 WL 4990305, *1 (D. Colo. Oct. 26, 2021).

[105] *Id.* at *4.

[106] 2021 WL 4202519 (C.D. Cal. June 21, 2021).

proposed notice: (1) described the nature of the action and the claims alleges; (2) provided the definition of the class and explains the terms of the settlement, including the settlement amount, the distribution of that amount, and the release; (3) includes an explanation that lays out the class members' options under the settlement: they may remain in the class, object to the settlement but still remain in the class, or exclude themselves from the settlement and pursue their claims separately against defendants; and (4) explains the procedures for objecting to the settlement and provides information about the final fairness hearing.[107]

1. Incentive Awards or Service Payments

In *Smith v. Loc. Cantina, LLC*,[108] a restaurant worker filed a putative class and collective action on behalf of approximately 800 restaurant workers from 17 restaurants. Plaintiff alleged violations of the FLSA, the Ohio Minimum Wage Amendment, the Ohio Minimum Fair Wage Standards Act and Ohio's Prompt Pay Act, arising from the defendants retaining employee tips and only paying one-and-a-half times the plaintiffs' tipped wage rate. In plaintiff's unopposed motion for final settlement approval, plaintiff requested a $10,000 service award for advancing the class's interests. The court found the $10,000 incentive award was in line with amounts awarded in similar cases and granted approval of the motion.

In *Poblano v. Russell Cellular Inc.*,[109] salaried store managers brought overtime claims for time worked while classified as exempt. The district court denied the parties' motion for settlement approval without prejudice because the agreement included incentive awards to the named plaintiffs. The district court reasoned that circuit precedent precluded it from granting incentive awards to named plaintiffs in a collective action settlement. Nor could the district court sever the incentive awards from the settlement agreement because the agreement did not include a severability clause and the parties filed a single motion for approval, as opposed to separate motions for approval of the settlement and approval of the incentive awards.

In *Emeterio v. A&P Rest. Corp.*,[110] plaintiffs alleged that defendant violated the FLSA by failing to pay overtime wages due to time-shaving, spread of hours premium, improperly deducting meal credit and failing to meet the NYLL's requirements on wage statements and notices. In approving the parties' settlement agreement, the court evaluated the terms of the settlement agreement, including service awards to the lead plaintiff and to each opt-in plaintiff. The court highlighted the appropriateness of recognition payments, particularly in employment context, where the plaintiffs are former or current employees of the defendant have undertaken the risk of adverse actions by the employer or coworkers. The court found the service awards appropriate where the service award recipients actively contributed to the prosecution and fair resolution of the

[107] *Id*. at *4–9.

[108] 2022 WL 1183325 (S.D. Ohio Apr. 19, 2022).

[109] 543 F. Supp. 3d 1293 (M.D. Fla. 2021).

[110] 2022 WL 274007 (S.D.N.Y. Jan. 26, 2022).

action on behalf of the class members, as well as noting the importance of no objections to the proposed service award by the defendant.

In *Denham v. Global Distribution Services*, *Inc.,*[111] the plaintiffs filed an unopposed motion for approval of the FLSA settlement. The court concluded that the settlement was fair, but the amount plaintiffs sought for service awards was unreasonable. The agreement permitted three plaintiffs to apply for awards up to $10,000 for one of the plaintiffs and $5,000 for the other two; all three sought the maximum amount. The plaintiffs did not explain why the awards were justified and the court found the service award amounts unreasonable. Enhanced awards for litigation are warranted only when the plaintiff was essential to the litigation, not just helpful. The two plaintiffs seeking the $5,000 awards each provided a single, eight-paragraph declaration as evidence of their efforts. Based on the declaration, the court concluded that plaintiffs were helpful at best, but not essential. The plaintiff seeking the $10,000 award was in a different position because he was the named plaintiff and was essential to the litigation. Still, the court requested evidence of the efforts to justify an award of $10,000. The plaintiff argued that he took a reputational risk in bringing the suit but only provided a declaration as evidence. The court found the declaration was not sufficient to justify a $10,000 award. For the named plaintiff, the court found $5,000 a reasonable award because he was essential to the litigation and awarded nothing to the plaintiffs seeking $5,000 because they were helpful, at best, not essential.

In *Hernandez v. Dutton Ranch Corp.,*[112] plaintiff's, former employees of Dutton Ranch Corp., brought a collective action against defendant for failure to pay federal minimum wage for each hour worked. The parties negotiated and resolved the FLSA claims. In this case, the court considered plaintiff's motion for final approval of its Fair labor Standards Act settlement. For approval, settlements must constitute a fair and reasonable resolution of a bona fide dispute over FLSA provisions. Here, the court found that a bona fide dispute existed based on the parties' disagreement over whether or not tools and transportation to and from employer-provided housing were provided to the workers. The court also found that the settlement was fair and reasonable because it represented a significant portion of the estimated value of the claim and allowed the opt-ins to recover 100% of the estimated maximum value of the claim. Additionally, the scope of the release was not overbroad because it only released FLSA claims in the complaint and related claims based on the same or similar allegations. The court found plaintiff's attorneys fee request of 33% reasonable, even though the Ninth Circuit uses a 25% of the fund as presumptively reasonable, the court noted that based on the total amount, the fee requested was comparable and fell within the range of other court-approved fees. The court also reimbursed plaintiff's counsel for the costs incurred litigating the case on a contingent fee basis finding that the categories of costs sought were necessary and reasonable which including deposition expenses, mediation fees, and travel expenses. Lastly, the court found the service awards of $7,000 were reasonable based on the amount of time the two named plaintiff's devoted (63.8 hours and 45.9 hours) assisting with preparation, prosecution, getting deposed, and two full

[111] 2021 WL 3886203 (S.D. Cal. Aug. 31, 2021).

[112] 2021 WL 5053476 (N.D. Cal. Sept. 10, 2021).

day mediations. For those reasons, the court granted final approval of the party's settlement.

2. Whether Negotiating a Check Is Sufficient Consent Under Section 216(b)

In *Askar v. Health Providers Choice, Inc.*,[113] an hourly health care worker and their employer sought final approval of their class action settlement resolving claims under the FLSA and California wage and hour laws. The agreement was reached prior to conditional certification and the parties sought such certification and opt-in status through settlement by means of the class member cashing a separate check labeled "FLSA Settlement Payment."[114] Under the agreement, each member of the class was to receive two checks. One to release of the class claims and one to release the FLSA claims. Cashing the FLSA check was to constitute the class member's opt-in form. Individuals that did not cash the FLSA check would not opt-in to the FLSA collective. The court granted the parties' motion after the parties stipulated to a supplemental notice to FLSA class members identifying their rights under the FLSA and clarifying that cashing the FLSA check would constitute their "opt-in" and release of FLSA claims.[115]

3. Reversion of Settlement Funds

In *Albelo v. Epic Landscape Prods.*, L.C.,[116] plaintiff sought preliminary court approval of a proposed settlement of FLSA collective and Rule 23 state law class claims. In denying the motion for approval without prejudice to further negotiation and resubmission, the court found most concerning that the agreement was a "claims-made" settlement with a reversion provision, combined with what appeared to be a "clear-sailing" provision on attorneys' fees.[117] The court explained that the reversion provision results in a significant reduction in a defendant's total payout if the claim rate is low while the plaintiffs' attorneys still receive their full fees based on the maximum settlement amount.[118] The court identified two "red flags" in the agreement: (1) the agreement on attorneys' fees, "thereby ensuring there will be no adversarial briefing to alert the court to potential issues;" and (2) a claims procedure requiring "each class member to submit a formal claim to receive a settlement check, even though doing so serves no useful purpose and appears designed to lower participation rates" and "departs from recognized best practices."[119]

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[113] 2021 WL 4846955 (N.D. Cal. Oct. 18, 2021).

[114] *Id.* at *1.

[115] *Id.* at *1–5.

[116] 2021 WL 2659082 (W.D. Mo. June 28, 2021).

[117] *Id.* at *1.

[118] *Id.*

[119] *Id.* at *2.

VII. Settlement of Attorneys' Fees and Costs

A. General

In *Cook v. Papa John's Paducah, LLC*,[120] pizza delivery drivers brought claims for FLSA minimum wage violations due to unreimbursed business expenses for use of their personal vehicles. In approving the settlement, the district court approved the driver's request for attorneys' fees and costs, as outlined in the settlement agreement. The court conducted a simple lodestar analysis, noted counsel's experience representing drivers in similar situations, and that counsel's rate was within the range of hourly rates.

In *Del Toro v. Magnum Construction Services, Inc.,*[121] plaintiff brought a claim for unpaid overtime wages against defendant, his former employer, and filed a motion for attorney's fees, costs, and prejudgment interest. The district court entered final judgment for the plaintiff, awarding $12,131.16. Subsequently, the plaintiff filed a motion to amend the final judgment requesting an award of supplemental fees to include costs incurred after filing the initial motion for fees, specifically an additional $8,470 for the 22 hours billed litigating attorney's fees and costs. The court denied the plaintiff's motions for supplemental fees, providing three reasons for its decision. First, the court recognizes that a reasonable attorney's fee award was awarded, which included all fees related to their initial motion. Second, the district court previously rejected the plaintiff's argument for fees relating to the time spent drafting objections to the initial report and recommendation; thus, recovering fees for that failed effort would be inappropriate. Lastly, the court's goal is to "do rough justice, not to achieve auditing perfection."[122] Concluding that justice had been achieved through the first award and additional fees would be inappropriate, the court denied the plaintiff's motion for supplemental fees.

In *Rorie v. WSP2, LLC.*, [123] the plaintiffs filed a Motion for Costs and Attorneys' Fees totaling $31,019.00.[124] Defendant objected and argued that the requested fees were unreasonable. The United States District Court for the Western District of Arkansas examined the reasonableness of plaintiffs' attorneys' hourly rates and numbers of hours worked and found several occurrences of unreasonable billing practices. Before addressing hourly rates, the court first critiqued plaintiffs "inefficient, duplicative, and unnecessary billing practices." The court then adopted the analysis in *Vines,*[125] where the attorneys' hourly rates were also reduced, and determined that reasonable hourly rates for FLSA actions performed in this case were $250 for senior

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[120] 2022 WL 301796 (W.D. Ky. Feb. 1, 2022).

[121] 2021 WL 5084226 (S.D. Fla. Aug. 3, 2021).

[122] *Id.* at *4 (quoting Fox v. Vice, 563 U.S. 826, 838 (2011)).

[123] 2021 WL 4900992 (W.D. Ark. Oct. 20, 2021).

[124] Plaintiffs voluntarily reduced their attorneys' fees to $23,768.00.

[125] In *Vines*, the U.S. District Court for the Eastern District of Arkansas found that the reasonable hourly rate for the firm was $250 for senior attorneys, $175 for senior associates, $150 for junior associates. Vines v. Welspun Pipes, Inc., 2020 WL 3062384, at *4 (E.D. Ark. June 9, 2020). However, the Eighth Circuit vacated the award of attorneys' fees because the district court did not calculate the lodestar. Vines v. Welspun Pipes Inc., 9 F.4th 849, 857-58 (8th Cir. 2021).

attorneys, $175 for senior associates, $150 for junior associates, $125 for a named employee, $100 for paralegals and $25 for law clerks.[126] Next, the court (1) reduced plaintiffs redacted billing records in its entirety because the court was unable to "discern (or divine)" whether the redacted activities were meaningful or related to the litigation, (2) deducted six hours of duplicative time entries that were the result of overstaffing and micromanagement, (3) reduced plaintiffs time to prepare a standard motion and respond to defendant's motion by two hours and one hour respectively, and (4) excluded all staff work and any additional work that was "clerical in nature" from billing.[127]

In *Vines v. Welspun Pipes Inc.*,[128] the Eighth Circuit vacated a $1 attorney's fee award in a collective FLSA action for unpaid overtime and for minimum wages under the Arkansas Minimum Wage Act. During the district court proceedings, the court declined to grant the plaintiffs' requested attorney fees in the amount of $96,000 due to the firm's billing practices—while also explaining that they would grant $25,000 in attorneys' fees if the award was vacated on appeal. In vacating the award, the Eighth Circuit reasoned that the district court failed to apply the "lodestar" calculation to support their claim for attorneys' fees, which would have required the court to (1) determine the prevailing hourly rate for attorneys in the region and (2) multiply that fee by the reasonable number of hours worked. The Eighth Circuit also affirmed the district court's denial of the plaintiffs' motion for approval of settlement because the plaintiffs failed to prove that the wage claim and the attorneys' fees were negotiated separately as required under the FLSA.

B. Court Approval of Fees

In *Skender v. Eden Isle Corp.*[129] the district court found plaintiff's counsel entitled to a nominal fee award of $1.00 where plaintiff accepted an outstanding offer of judgment of $4,000 immediately after the court granted summary judgment in defendant's favor. In rejecting plaintiff's request for approximately $30,000 in attorney's fees, the court reasoned that "but for [the] technicality" of the outstanding offer the plaintiff would have received nothing.[130] Given this lack of success in litigating the case the court found the nominal award of $1.00 in fees reasonable.

In *Smith v. Kaiser Found. Hospitals*,[131] the court granted approval of plaintiff's requested attorneys' fees in the amount of 30% of the gross settlement amount. The court found the request reasonable given the settlement class's recovery was substantial, the risk of nonpayment was not trivial, and no settlement class members

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[126] The firm's original rates ranged from $383 for senior attorneys to $175 for junior associates, and $100, $75, and $60 for paralegals, law clerks and staff, respectively.

[127] *Rorie*, 2021 WL 4900992, at *5 (W.D. Ark. Oct. 20, 2021) ("Staff work is clerical rather than legal work, and is therefore not compensable.").

[128] 9 F.4th 849 (8th Cir. 2021).

[129] 2021 WL 2964991 (E.D. Ark. July 14, 2021), *aff'd*, 33 F.4th 515 (8th Cir. 2022).

[130] *Id*. at *8.

[131] 2021 WL 2433955 (S.D. Cal. June 15, 2021).

objected to the fee request. The court further reasoned that a lodestar cross-check supported a 30% fee award where it reflected a multiplier of 1.5, which fell within a frequently approved range.

In *Adkinson v. Tiger Eye Pizza, LLC*,[132] the court granted the parties' joint motion for approval of settlement of a Fair Labor Standards Act collective action and Arkansas Minimum Wage Act class action. The court explained that district courts have authority to review settlements to ensure that attorney fees were negotiated separately and without regard to the plaintiff's FLSA claim, and that there was no conflict of interest between the attorney and his or her client. If the attorneys' fees were not negotiated separately and apart from the merits settlement, the court may review the fees for reasonableness. Here, plaintiff's counsel sought fees amounting to only 42% of counsel's total incurred fees and costs in the matter. Although the court had some concerns with the amount of fees and hourly rates charged, the court found the requested reward of $33,500 in attorneys' fees and costs to be reasonable.

In *Swickheimer v. Best Courier, Inc.*,[133] plaintiffs were delivery drivers who alleged that they were misclassified as independent contractors by defendant, which resulted in plaintiffs not receiving minimum wage and overtime wages under both federal and state law. The parties then filed a joint motion for approval of settlement. The court held that the prevailing plaintiffs are entitled to recover reasonable attorneys' fees and costs of the action. The court further held that determining reasonable attorney fees is a matter that is the sound discretion of a trial judge and the starting point is the lodestar calculation.

In *Baust v. City of Virginia Beach*,[134] plaintiff EMS captains sought judicial approval of settlement of overtime claims based on misclassification as exempt employees. The court approved attorneys' fees of 40% of the gross settlement observing they were higher than the typical contingency fee arrangement, but justified as they were only a fraction of the amount yielded by lodestar analysis. The court found fees were reasonable especially in light of the reclassification of plaintiffs and similarly situated workers to non-exempt under the terms of the settlement. The plaintiff counsels practice of block billing resulted in a 5% reduction of hours expended under the lodestar analysis. Still, the court held its role is "not to labor to dissect every individual entry to hypothesize if the different tasks in the same entry could reasonably result in the requested time."[135]

In *Autrey v. Harrigan Lumber Co.*,[136] plaintiff asserted that the defendants paid the non-exempt plaintiff and other similarly situated employees non-discretionary "gain share" bonuses when the sawmill stayed under budget and produced a certain amount of lumber but failed to include the value of such bonuses in determining the employees'

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[132] 2022 WL 1050913 (W.D. Ark. Apr. 7, 2022).

[133] 2021 WL 6033682 (S.D. Ohio Dec. 21, 2021).

[134] 574 F. Supp. 3d 358 (E.D. Va. 2021).

[135] *Id.* (*quoting Project Vote/Voting for Am. Inc. v. Long*, 887 F. Supp. 2d 704 (E.D. Va. 2012)).

[136] 2021 WL 6335337 (S.D. Ala. Dec. 20, 2021).

regular rate of pay in calculating the overtime rate(s), resulting in an underpayment of overtime compensation. The court certified the following class: All hourly-paid employees who earned a gainshare bonus in connection with work performed for Harrigan Lumber Co., Inc. in any week in which they worked more than forty hours between November 25, 2018, and November 25, 2020. The parties presented to the court an agreed upon total settlement of $73,000, with forty percent of this fund allocated to attorney's fees, an additional $1,405 allocated to incurred costs, two percent of the fund, or $1,460 allocated to a service award to the plaintiff and the remaining $40,935 was allocated to payment of claims of the plaintiff and the universe of potential opt-in plaintiffs. The court refused to approve the proposed settlement stating that the parties did not provide the court with sufficient information to gauge the reasonableness of a 40% attorney's fee when the common fund fees fall between 20% and 30%. The court questioned why the plaintiff's firm was planning to "plump up" its fees by completing the administrative activities of a settlement administrator. Finally, the court declined to preliminarily approve the proposed settlement as is because without explanation it aimed to release FLSA claims that fall outside the inclusive dates of the collective action.

C. Standards for Evaluating Reasonableness of a Fee Settlement

In *Kirkland v. QLS Enterprise, LLC*,[137] the parties brought a second joint motion to approve a settlement agreement under the FLSA, which requires the court to analyze the proposed agreement for fairness before approving it and entering a judgment. The court denied the parties' original motion due to the inclusion of a release which covered non-FLSA claims, a non-disparagement provision, and a lack of information about the reasonableness of the proposed attorneys' fees and costs. In considering the second motion for settlement approval, the district court noted that the amended release provision only released the defendants from alleged FLSA claims and the parties removed the non-disparagement provision. With respect to the reasonableness of the attorneys' fees, the court noted that the parties negotiated an amount lower than plaintiff's counsel's actual lodestar fees and costs, which the court deemed reasonable after reviewing the applicable hourly rates in the relevant legal market, the hours worked, and the 12 factors identified in *Johnson v Georgia Highway Express, Inc*.[138] The court granted the motion to approve the proposed settlement agreement and dismissed the case with prejudice.

In *Skaggs v. Mobile Climate Control Corp.*,[139] the court rejected plaintiff's request for a fee award totaling 40% of the settlement amount in an individual FLSA case. In rejecting the requested fee, the court reasoned that a 40% fee award, which fell within the high end of the customary range, was unwarranted given the early stage of the ligation and minimal motion practice. The court distinguished prior courts' 40% fee awards, finding they were collective actions with numerous plaintiffs, extensive

[137] 2022 WL 988003 (S.D. Ga. Mar. 31, 2022).

[138] 488 F.2d 714 (5th Cir. 1974).

[139] 2021 WL 2434125 (E.D. Mich. June 15, 2021).

discovery, and prolonged merits litigation.[140] The court found an award of one-third of the total recovery reasonable given the "modest efforts" exercised by plaintiff's counsel.[141]

In *Smiley v. Little Rock Donuts, LLC,*[142] the court found plaintiff's counsel's requested fees and hours expended unreasonable. First, in determining that plaintiff's counsel's requested rate of $383 was unreasonable, the court noted that plaintiff's counsel failed to provide evidence of what it charges an actual fee paying client and that the same counsel had requested lower rates in recent litigation.[143] The court thus rejected the requested rate and awarded an hourly rate of $250 based on "knowledge of the local prevailing rate."[144] Second, the court reduced the hours expended by 20% for overstaffing, for hours expended on redacted entries, and for excessive hours spent on a boilerplate fee petition.

In *Love v. Gannett Co. Inc.*,[145] a call center employee brought an FLSA collective action. The parties sought approval of a settlement and requested the court follow the percentage-of-the-settlement-fund method, rather than the lodestar method, for determining attorneys' fees. The district court noted that the two methods generated roughly commensurate amounts, and that the parties adopted the more conservative of the two, thus, confirming the reasonableness of the request. The court further applied the *Ramey* factors to determine the reasonableness of fees calculated by the percentage-of-the-fund method, finding that the majority of the factors supported the reasonableness of the attorneys' fees request.

In *Swickheimer v. Best Courier, Inc.*,[146] delivery drivers alleged they were misclassified as independent contractors by defendant, which resulted in plaintiffs not receiving minimum wage and overtime wages under both federal and state law. The parties filed a joint motion for settlement approval. The court used the lodestar method and determined that the requested attorneys' fees were not reasonable. Specifically, the court found that plaintiff's counsel's requested hourly rates were too high, as they were higher than the prevailing market rate based on comparable skill and experience within a geographical area where plaintiff's counsel maintained an office.

In *Smyers v. Ohio Mulch Supply Inc.*,[147] plaintiffs appealed the district court's reduction of their negotiated attorney's fees. The district court had reduced plaintiff's counsel's fees from $57,114.25 (reflecting lodestar and expenses) to one-third of the $95,000 global settlement. The Sixth Circuit vacated and remanded the fee reduction and ordered the district court to "consider[] whether the plaintiffs' attorneys' estimate of

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[140] Id. at *2.

[141] Id. at *4.

[142] 2021 WL 4302219 (E.D. Ark. Sept. 21, 2021).

[143] *Id.* at *2

[144] *Id.* at *3

[145] 2021 WL 4352800 (W.D. Ky. Sept. 24, 2021).

[146] 2021 WL 6033682 (S.D. Ohio Dec. 21, 2021).

[147] 2021 WL 2774665 (6th Cir. July 1, 2021).

their fees under the lodestar method was an accurate reflection of their reasonable hourly rates and the number of hours . . . reasonably expended on the case, and, if so, to approve the fee award."[148] The Sixth Circuit reasoned that the district court "provided no explanation as to why the lodestar method was inappropriate or why its award of one-third of the total settlement fund more adequately achieved the goals of the FLSA," and instead only pointed to "its negative view of the inherent nature of FLSA settlements, which tend to provide significant compensation to counsel rather than to the injured."[149] This explanation was inadequate because it "was not based on any facts particular to this case or counsels' representation," and contravened the Sixth Circuit's recent holding that "'a district court abuses its discretion if it limits the fees awardable under the FLSA to a percentage of the plaintiff's recovery.'"[150]

In *Hernandez v. Compass One, LLC*,[151] the parties filed a motion for approval of an FLSA settlement. The court found the settlement consideration fair and reasonable but wrote separately to address the proper inquiry regarding the allocation of settlement consideration for attorneys' fees in FLSA cases. Initially, plaintiff relied entirely on his retainer agreement with counsel, stating that it was controlling, and did not submit time records. The court invited plaintiff's counsel to submit time records to support the fee request. Counsel declined to do so, stating that they did not intend to waive their previous arguments that the retainer agreement was controlling. Relying on *Venegas v. Mitchell*,[152] plaintiff argued that they did not need to submit records because the contractually agreed contingency fee between the plaintiff and his lawyer controlled, and the court had no authority to review the allocation of the settlement consideration. The court disagreed, explaining that *Venegas* did not hold that "in a case where a court has a statutory responsibility to assure that the allocation of settlement proceeds is reasonable and fair to the plaintiff, the Court must defer to a lawyer's retainer agreement with his or her client."[153] Further, other cases have held that courts are "required to conduct precisely the review for reasonableness that counsel here seeks to avoid."[154] The court clarified that a reasonableness assessment is still necessary even when there is a retainer agreement. After reviewing the attorney fee request based on the retainer agreement between plaintiff and counsel, the court found the request was reasonable and approved the settlement.

1. Percentage of the Recovery Method

In *Estes v. Willis & Brock Foods, Inc.*,[155] a delivery driver brought unpaid minimum wage claims arising out of a franchise's reimbursement rates for drivers' expenses related to gas, insurance, repairs, and more for the use of their personal

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[148] *Id.* at *2.

[149] *Id.* (internal quotations omitted).

[150] *Id.* (quoting Rembert v. A Plus Home Health Agency LLS, 986 F. 3d 613, 617 (6th Cir. 2021)).

[151] 2021 WL 4925561 (S.D.N.Y. Oct. 21, 2021).

[152] 495 U.S. 82 (1990).

[153] *Id.* (quoting Gurung v. White Way Threading LLC, 226 F. Supp. 3d 226, 231 (S.D.N.Y. 2016)).

[154] *Id.* (quoting Fisher v. SD Protection Inc., 948 F.3d 593 (2d Cir. 2020)).

[155] 2022 WL 697976 (E.D. Ky. Mar. 8, 2022).

vehicles for deliveries. In approving the parties' settlement agreement, the court reviewed the proposed attorneys' fees for reasonableness using a multi-factor test where the parties agreed to use the percentage-of-value approach to attorneys' fees. The court found the proposed fee reasonable, as all factors weighed in favor of approving the fees, including the value of the benefit rendered to the class, the value of the services on an hourly basis, the fact the services were undertaken on a contingent fee basis, society's stake in rewarding to maintain an incentive to others, the complexity of the litigation, and the professional skill and standing of counsel involved on both sides. Additionally, the court highlighted that the percentage-of-value approach awarded the attorneys less than the lodestar method, which further indicated the reasonableness of the fee award.

In *Tapia v. Lira*,[156] the parties submitted a letter to the court seeking judicial approval of their proposed settlement.[157] Upon review, the court pointed out that the plaintiffs were receiving such a low percentage of recovery in relation to the value of their alleged unpaid wages. Further, the plaintiffs were not being allocated their pro rata share, but instead were all receiving the same amount, which ranged from 1.5% to 36% of their alleged unpaid wages. The court noted that these percentages were far lower than the normal recovery in the district, which was around 39%. The court ordered the parties to submit a more detailed discussion on why the plaintiffs were receiving such a low percentage of recovery in relation to the value of their alleged unpaid wages.

In *Briggs v. DPV Transp., Inc.*,[158] the plaintiffs submitted a revised proposed settlement that addressed concerns that the court previously raised in denying the original proposed settlement. Pursuant to the revised settlement agreement, plaintiffs' counsel requested an "award of $9,116, which amount[ed] to approximately one-third of the settlement plus $536 in costs." Based on the billing records submitted by plaintiffs' counsel to substantiate their time, the requested award resulted in a lodestar multiplier of 1.42.[159] The district court found the requested multiplier reasonable and held that the proposed attorneys' fees were reasonable as a fair percentage of the settlement.[160]

In *Dixon v. Cushman & Wakefield W., Inc.*,[161] the court approved an FLSA collective action settlement which included related state law and private attorney general acts claims. However, the Court limited the settlement in two respects. First, it declined to award the requested one-third of the available common fund because not all of the fund was required to actually be paid out unless certain conditions were met. Second, the court found that the plaintiffs' request for incentive awards for the six FLSA opt-in declarants were based on limited efforts, affirming its view that "paying individuals

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[156] 2021 WL 5086300 (S.D.N.Y. Nov. 2, 2021).

[157] *Id*. The court references this process as a *Cheeks* application, as described in *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015).

[158] 2022 WL 562935 (S.D.N.Y. Feb. 23, 2022).

[159] *Id*. at *3.

[160] *Id*. at *3–4.

[161] 2022 WL 1189883 (N.D. Cal. Apr. 21, 2022).

for providing declarations in support of a FLSA certification motion creates inappropriate incentives."[162]

In *Denham v. Global Distribution Services, Inc.*,[163] the plaintiffs filed an unopposed motion for approval of an FLSA settlement. The court concluded that the settlement was fair, but the amounts plaintiffs sought for service awards, attorneys' fees, and costs were unreasonable. The court applied common-fund fee principles to determine a reasonable amount of attorneys' fees and costs. Plaintiffs' counsel sought a fee award of 34% of the settlement amount, which also included fees and costs incurred by a second firm in a separate state court action. The court declined to include the fees and costs incurred for the state court litigation because that litigation provided no benefit to the plaintiffs in this collective action. But even after removing those fees, the court found that the amount was still unreasonable because it held that proportionality to the common fund is the measure of reasonableness. According to the court, the benchmark for reasonableness typically amounts to 25% of the common fund, and departure from the benchmark is only justified under special circumstances. The court found the special circumstances identified by counsel unconvincing. First, counsel argued that the quality of the result warranted a departure, but the court found that the plaintiffs' recovery was not truly exceptional to the point that would warrant divergence. Second, counsel argued its 40% contingency fee warranted a departure from the benchmark, but that did not justify a departure from the benchmark 25% either because a fee agreement cannot control an attorney's share of a common fund settlement. The court applied the 25% benchmark rate to the common fund as the reasonable fee amount because no special circumstances were present.

In *Lupardus v. ELK Energy Servs., LLC*,[164] the parties agreed to settle an FLSA action for unpaid overtime wages of $100,000. Plaintiff's counsel requested $40,650 in attorney's fees, which the court found represented a reasonable percentage of the total award. The court reasoned that (1) the time and labor expended by counsel on the case; (2) the fact that FLSA collective actions are "complex and difficult . . . requiring an understanding of a specialized area of the law"; and (3) the plaintiff's counsel's expertise in this area of the law all justified the attorney's fees award.

[162] *See* In re Tableware Antitrust Litig., 484 F. Supp.2 d 1078, 1079 (N.D. Cal. 2007) (noting that the court must ensure that the settlement "does not improperly grant preferential treatment to class representatives or segments of the class").

[163] 2021 WL 3886203 (S.D. Cal. 2021).

[164] 2021 WL 2815977, at *1 (S.D. W. Va. July 6, 2021).