FLSA Collective Action Conditional Certification and Decertification Strategies
Evaluating Pursuit or Opposition of Certification or Decertification Motions, Navigating Challenges in Hybrid Cases

WEDNESDAY, JUNE 20, 2018
1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

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What We Will Cover

01 FLSA Collective Actions—Recent Trends and Case Law Developments

02 Certification of FLSA Collective Actions—Best Practices for Plaintiffs’ and Employers’ Counsel

03 Decertification of FLSA Collective Actions—Best Practices for Plaintiffs’ and Employers’ Counsel

04 Certification Considerations and Best Practices for Hybrid Cases/State Law Claims
FLSA Collective Actions – Recent Trends and Case Law Developments
Background On Collective Action Procedures

- **29 U.S.C. § 216(b)** governs collective action lawsuits under the FLSA and EPA.

- The certification requirements for collective actions are not as rigorous as those applicable to class actions.
  - § 216(b) only requires that collective action members be “similarly situated.”

- Various courts have adopted a two-tiered analysis in determining collective action certification.
  - Step 1: Lenient, pre-discovery analysis to determine whether plaintiffs can make a modest showing that they are “similarly situated.”
  - Step 2: Rigorous, post-discovery determination of whether plaintiffs are in fact “similarly situated” and the matter should proceed to trial on a collective basis.
Background on Rule 23 Class Actions

• Class action lawsuits are governed by Rule 23 of the Federal Rules of Civil Procedure.

• Rule 23(a) Requirements
  
  – **Numerosity** – The individuals who would comprise the class must be so numerous that joinder of them all to the lawsuit would be impracticable.
  
  – **Commonality** – There must be questions of law and fact common to the proposed class.
  
  – **Typicality** – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.
  
  – **Adequacy Of Representation** – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.
Collective Action Procedures vs. Rule 23 Class Actions

• § 216(b) requires members of the collective action to affirmatively opt-in by filing an individual consent to join.
  – This tends to lead to lower worker participation in collective actions than in class actions.

• Rule 23 class action members are “in” unless they affirmatively “opt out.”
  – Whereas collective actions include only those employees who affirmatively opt-in, Rule 23 class actions bind the entire employee class, with the exception of those who affirmatively opt-out.
  – Tolling differences
Collective Action Trends In 2017-2018

• Pace Of Wage & Hour Filings Decreased For The Second Time In A Decade, And For The Second Year In A Row

• Location, Location And Location Is All Important For Ruling Outcomes

• The Second & Ninth Circuits Remain “Ground Zero” For Plaintiff-Friendly Rulings

• On-Going Migration Of Skilled Plaintiffs’ Class Action Lawyers Into The Wage & Hour Litigation Space
Recent FLSA Trends

FLSA FILINGS IN FEDERAL COURTS

Year | Filings
--- | ---
2011 | 6,779
2012 | 7,672
2013 | 7,882
2014 | 8,066
2015 | 8,954
2016 | 8,308
2017 | 7,575
Recent FLSA Trends

VALUE OF TOP 10 WAGE & HOUR CLASS ACTION SETTLEMENTS

- 2010: $221.1 M
- 2011: $336.5 M
- 2012: $248.45 M
- 2013: $292 M
- 2014: $463.6 M
- 2015: $215.3 M
- 2016: $525 M
- 2017: $695.5 M
Recent FLSA Trends

SETTLEMENT AMOUNTS BY CLASS ACTION TYPE

- **Employment Discrimination**: $293.5M
- **Wage & Hour**: $525M
- **ERISA**: $927.8M
- **Statutory**: $487.28M
- **Governmental Enforcement**: $485.25M
Significant Certification Decisions
In 2017 – Wage & Hour

• Monroe v. FTS USA, LLC, 860 F.3d 389 (6th Cir. 2017), cert. denied, 138 S. Ct. 980, 200 L. Ed. 2d 248 (2018)


Certification of FLSA Collective Actions—Best Practices for Plaintiffs’ and Employers’ Counsel
About Conditional Certification

• Plaintiffs’ motion for conditional certification and Defendant’s opposition are critical in a collective action

• From the defense side, positioning a putative collective action to maximize the chance of defeating or limiting conditional certification is critical to everything that follows

• Discovery is also extremely important in FLSA collective actions
  – Discovery may be conducted both before a decision on conditional certification and after a collective action has been conditionally certified
  – Plaintiffs will request tolling if there is any delay in conditional certification
About Conditional Certification

• Courts apply a more lenient standard for conditional certification because, at the notice stage, discovery is absent or incomplete.
• Where discovery has occurred, some courts apply a more rigorous standard.
Why Employers Usually Oppose Conditional Certification

• Denial of conditional certification may be the death knell of the litigation

• Even if not completely successful, a vigorous opposition may result in a narrower/more limited conditional certification decision

• A strong opposition may condition the court for a more favorable ruling at a later stage

• A strong opposition can be leveraged into a favorable settlement
Why Employers Usually Oppose Conditional Certification

• “You can’t put the toothpaste back in the tube”
  – The court might “only” conditionally certify and provide indication as to dissimilarities to which it might apply heightened scrutiny at the second stage
  – Insights from the court can be used to shape discovery and de-certification strategy
Why an Employer May Choose Not to Oppose Conditional Certification

• Most conditional certifications motions are granted, often even in the face of a compelling opposition
  – Know the jurisdiction
  – Know the judge’s prior rulings
  – Know what other courts have done in similar cases

• Dissimilarities may seem insignificant, especially at the conditional certification stage
  – Nature of the claim
  – Results of internal investigation

• An employer might not want to preview ultimate de-certification arguments at the conditional certification stage, especially where the employer intends to obtain admissions in discovery
Why an Employer May Choose Not to Oppose Conditional Certification

• Opposing a motion for conditional certification is costly; legal fees can be substantial, especially where a wide-ranging declaration campaign is contemplated
• It could be advantageous to “trade” opposition for a favorable collective action definition, form/content of notice, and/or notice distribution method
• If a low opt-in rate is anticipated, conditional certification may not be significantly detrimental, and might help defeat Rule 23 certification
• Post-opt-in settlement might be the most-advantageous exit strategy
Discovery at the Notice Stage

• Plaintiffs often submit declarations from collective action members.
• Plaintiffs purpose is to ensure certification, but declarations can be used by employers:
  – Identify potential targets for deposition (de-certification/merits)
  – Provide significant information that Defendant can use to oppose conditional certification
  – Identify likely witnesses for merits discovery
Methods to Obtain & Use Evidence to Defeat/Limit Conditional Certification

• Timing of conditional certification motion can dictate the standard used by the court, and the quantum of evidence available to oppose conditional certification
  – Employers can attempt to schedule or continue the motion to permit discovery
    ▪ Employers can argue that, the more discovery conducted, the higher the standard should be for conditional certification
    ▪ Employers can use admissions obtained from Plaintiffs to oppose the motion and demonstrate lack of knowledge or similarity
  – Employers can use admissions obtained from Plaintiffs to move for summary judgment and avoid conditional certification
  – Tolling agreements
Methods to Obtain & Use Evidence to Defeat/Limit Conditional Certification

• Declaration campaign
  – Help identify strengths and weaknesses of case early on
  – Lock in good evidence from potential collective action members
  – Decide target of declaration campaign – managers, supervisors, potential collective action members
  ▪ **Note**: Declarants might be deposed, so choose witnesses carefully

• Depositions of named plaintiffs/opt-ins
  – Often the most persuasive evidence

• Use of experts
Decertification of FLSA Collective Actions—Best Practices for Plaintiffs’ and Employers’ Counsel
Recent Certification & Decertification Trends

2014 - 2017 FLSA CONDITIONAL CERTIFICATION MOTIONS AND DECERTIFICATION MOTIONS

% Conditional Certification Motions Granted / % Conditional Certification Motions Denied

- 2014: 70% Granted / 30% Denied
- 2015: 75% Granted / 25% Denied
- 2016: 76% Granted / 24% Denied
- 2017: 73% Granted / 27% Denied

% Decertification Motions Granted / % Decertification Motions Denied

- 2014: 48% Granted / 52% Denied
- 2015: 52% Granted / 48% Denied
- 2016: 45% Granted / 55% Denied
- 2017: 37% Granted / 63% Denied

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Recent Certification & Decertification Trends

2017 FLSA CONDITIONAL CERTIFICATION MOTIONS AND DECERTIFICATION MOTIONS
Discovery After Conditional Certification

• At this stage, Defendant should maintain the following goals:
  – Collect evidence to show that Plaintiffs are not similarly-situated such that they cannot move forward as a collective
  – Collect evidence related to the merits of Plaintiffs’ claims (in support of a motion for summary judgment)
  – Identify potential trial witnesses
Discovery After Conditional Certification

• Before developing a post-conditional certification discovery strategy, Defendants must consider the size of the collective
  – Courts may be willing to limit discovery to a “representative sample” of opt-in Plaintiffs (e.g., Smith v. Lowe’s Home
    Centers, Inc.)

• Defense counsel should keep in mind the “similarly-situated” inquiry and ensure discovery of a reasonable scope
  – Courts may curtail excessive discovery if viewed as a defense strategy
Using an Expert to Highlight Dissimilarities

- To analyze data to highlight differences among class/collective action members
- To critique a Plaintiffs’ survey tool
- To pick apart the Plaintiffs’ theory of collective liability
- To demonstrate that the results of a sample cannot be extrapolated to the class or collective with a sufficient degree of statistical certainty
Limiting the Collective

• Courts are often skeptical of nationwide classes encompassing multiple positions, locations, supervisors, practices

• Argue that potential collective should be limited to individuals who share named plaintiff’s position, location, supervisor

• Court may narrow proposed collective action definition or may deny without prejudice and permit plaintiff to re-file motion to conditionally certify a narrower collective action
The Mixed Blessing of Decertification

• Decertification is usually a good thing, but Defendants should be careful what they wish for
• Defendants could end up with multiple individual actions, in separate jurisdictions
  – Unlikely that all opt-ins will pursue individual actions but many may, especially if Plaintiffs’ counsel believe that they could recover their fees
  – May be more expensive to litigate than a collective action and cause greater inconvenience to company witnesses
  – May be harder to resolve all cases at once either by dispositive motion or settlement
• Decertification may provide leverage to settle opt-in claims at a significant discount
Certification Considerations and Best Practices for Hybrid Cases
Concerns About Hybrid Actions

• Some courts have refused to allow an FLSA collective action and a Rule 23 state law class action to proceed in the same case
  – Allowing FLSA collective action and Rule 23 class action together would undermine Congress’s intent to limit FLSA claims to opt-in actions
  – Having opt-in and opt-out claims in same case would be confusing for potential plaintiffs
  – Risk of large number of plaintiffs in the state law Rule 23 class(es) but few who have chosen to prosecute their federal claims, raising concern about whether courts should retain supplemental jurisdiction over Rule 23 state law claims predominating over FLSA collective action

Are Hybrid Cases Obtaining Judicial Approval?

• An employer’s exposure usually is higher under Rule 23 state law claims
  – Opt-out vs. Opt-in
  – Tolling
• Appellate cases have rejected some anti-hybrid arguments
  – *Fisher v. Rite-Aid* (3d Cir. 2012)
  – *Ervin v. OS Restaurants* (7th Cir. 2011)
  – *Lindsay v. GEICO* (D.C. Cir. 2006)
• Holdings:
  – Rule 23 opt-out certification of a state law overtime or minimum wage claim is not “inherently incompatible” with an FLSA opt-in collective action
  – FLSA collective action does not preclude the exercise of supplemental jurisdiction over a Rule 23 state law wage-hour class action
  – The Rules Enabling Act does not preclude a Rule 23 state law wage-hour class action
State Wage & Hour Claims

• Each state has its own respective wage & hour laws. Employers should be familiar with the laws of every state in which it maintains employees.

• The map to the right illustrates state court class certification decisions by state in 2017.
State Wage & Hour Claims

- The states highlighted below have laws regulating a minimum wage higher than the federal standard ($7.25)

- 29 States (& DC): AK, AR, AZ, CA, CO, CT, DC, DE, FL, HI, IL, MA, MD, ME, MI, MN, MO, MT, NE, NJ, NM, NV, NY, OH, OR, RI, SD, VT, WA, WV

Source: dol.gov
Best Practices for Hybrid Cases

• Cut off attempts to create hybrid actions by amendment
  – Undue prejudice or delay
  – Futility
  – Supplemental Jurisdiction

• Use opt-in discovery to defeat Rule 23 certification

• Use Rule 23 discovery to support decertification

• Use manageability problems to fracture both class & collective
Supreme Court’s *Epic Systems* Ruling

**Epic Systems Corp. v. Lewis, 584 U.S. ____ (May 21, 2018)**

- Majority opinion authored by Gorsuch, joined by Roberts, Kennedy, Thomas, and Alito
- FAA mandates that courts enforce arbitration agreements
  - The FAA’s Savings Clause applies only to “generally” applicable contract defenses – fraud, duress, unconscionability
- NLRA does not create a right to bring class or collective action
  - Section 7 is focused on the right to organize unions and bargain collectively
  - Section 7’s catch-all provision only protects activities similar to those explicitly listed, and thus reaches only to “things employees do for themselves in the course of exercising their right to free association in the workplace” (emphasis added)
  - Section 7 thus does not create a right to pursue a class or collective action in court or arbitral forum
Supreme Court’s Epic Systems Ruling

Epic Systems Corp. v. Lewis, 584 U.S. ____ (May 21, 2018)

• Some other observations by the majority:
  – Class and collective action procedures were “hardly known” in 1935 when the NLRA was passed
  – The NLRA imposes a strict regulatory regime in certain areas, but provides no rules on class or collective action
  – Collective action procedures under the FLSA are just like the collective action procedures under the ADEA, which the Supreme Court previously held does not prohibit mandatory individual arbitration
  – The Court has rejected every prior effort to find a conflict between the FAA and other federal statutes
  – No Chevron deference can be afforded, since the NLRB is interpreting a statute (the FAA) outside its charge and only recently came to its D.R. Horton position; also, the Executive branch contradicts itself

• Key takeaways:
  – Broader than expected victory for employers
  – Another full-throated statement favoring the FAA’s commands that arbitration agreements be enforced according to their terms
  – There may be no Section 7 right to pursue a class or collective action in the first place
Why Have an Arbitration Agreement/Class Waiver?

• Rise of the collective action under the FLSA
  – 4.5x increase since 2000
  – In 2017, FLSA collective actions were filed more frequently than all other types of workplace class actions – 20x more wage-hour class/collective actions than civil rights class actions in 2017
  – Compare class complaints: 1% for civil rights v. 33% for FLSA
• State-law Rule-23 style class actions asserting wage-hour claims
  – California especially
• Certification standards in several jurisdictions are lenient
  – FLSA: “lenient standard,” “modest showing,” “low burden”
  – Rule 23: more rigorous, but applied in lax manner in several jurisdictions
• Even non-meritorious class and collective actions exert “hydraulic pressure to settle”
• The preemptive effect of the Federal Arbitration Act is the surest way to block class and collective actions.
## Arbitration/Class Waiver Pros & Cons

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<th>Pros</th>
<th>Cons</th>
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<tbody>
<tr>
<td>– Class and collective action waivers</td>
<td>– No waiver of EEOC/DOL lawsuits/PAGA</td>
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<td>– Additional leverage to slow class actions</td>
<td>– No waiver of administrative charges</td>
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<td>– Possible leverage if introduced during pending class actions?</td>
<td>– Likely not effective or desired for ERISA class actions</td>
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<tr>
<td>– No jury trials</td>
<td>– Harder to FOIA EEOC charge files</td>
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<td>– Improved (but not total) confidentiality of proceedings</td>
<td>– Arbitrators often less predictable than judges</td>
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<td>– Possible limitations on scope of discovery</td>
<td>– Easier to initiate arbitration than lawsuit</td>
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<td>– Higher arbitration and admin fees</td>
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<td>– Additional fees incurred to compel arbitration</td>
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### Arbitration/Class Waiver Pros & Cons

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<th>Pros</th>
<th>Cons</th>
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<tr>
<td>– When paired with robust ADR makes successful union organizing less likely</td>
<td>– Possible mass-individual-arbitration filings</td>
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<td>– Lower average awards (verdicts)</td>
<td>– Program implementation costs</td>
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<td>– Shorter cycle time</td>
<td>– Possible employee perception of takeaway</td>
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<td>– Additional legislative pull-back unlikely (except regarding harassment claims)</td>
<td>– Summary judgment less likely</td>
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<tr>
<td>– Lower average settlements (no trial leverage)</td>
<td>– Higher total fees + costs through summary judgment</td>
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<tr>
<td>– Lower total fees through hearing versus through trial</td>
<td>– Not available to transportation workers</td>
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<td>– Possible legislative action and uncertainty, especially regarding harassment claims</td>
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Considerations for an Arbitration Program Design

• Consider experience with class and collective actions
  – Is your workplace particularly vulnerable? Are most of your workers in high-risk jurisdictions?
• Does your organization embrace voluntary dispute resolutions?
  – Consider adopting voluntary multi-step dispute resolution process that precedes formal arbitration
  – Consider robust resolution program to avoid feeling of a “take-away”
• Should you limit the types of Covered Claims?
  – Consider “wage-hour-only” arbitration agreements
  – Consider adding pay equity claims? Certain high-value ERISA claims?
  – Consider value/preference of litigating certain claims in court
  – Consider pushback against mandatory arbitration of harassment claims
• Can you make the litigation process more efficient?
  – Consider limiting e-discovery and some streamlined discovery
• Should the agreement cover all employees?
  – Consider arbitration for rank-and-file only – the real class risk
  – Consider arbitration and class waiver program for applicants?
  – Should executives be subject to arbitration?
Best Practices for Employers

Identifying Compensable Working Time (For Hourly Employees)

• Time spent in primary work activities;
• Time spent by an employee outside normal hours “required, suffered or permitted to work.”
• All such work time must be recorded!
• For time not spent in primary work activities, query whether the time is “integral and indispensable” to a primary duty under the Portal-to-Portal Act. See *Integrity Staffing Solutions, Inc. v. Busk*, 574 U. S. ___, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014).
• On call time, travel time, remote work, and other potential traps.

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Best Practices for Employers

Documents Relating to Wage Policy and Compliance:
• Personnel files (including files showing leaves of absence)
• Resumes, interview notes
• Employee complaints
• Exit interview notes
• Employee surveys or job studies
• Payroll files/records
• Handbooks
• Training manuals
• Orientation materials
• Training manuals
• Operational manuals
• Communications between employees
• Job descriptions
• Emails (yes, emails!)