FLSA Collective Action Discovery Challenges
Effective Approaches Before and After Conditional Certification of the Opt-In Class

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FLSA Collective Action Discovery Challenges

September 3, 2013

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Program Outline

I. Brief FLSA Foundational Overview
II. Discovery Limitations & Strategies for FLSA Actions
   A. A Starting Place – Have *Dukes* and *Comcast* Affected FLSA Litigation?
   B. Strategy Approaches, the Spectrum and Shaping
   C. Before Conditional Certification
   D. After Conditional Certification
III. Resolving Discovery Disputes
IV. Discovery Considerations for Summary Judgment and Other Procedural Mechanisms
V. Discovery Considerations for Trial
Questions We’ll Consider

• Have the *Dukes v. Wal-Mart* and *Behrend v. Comcast* decisions changed the strategic considerations for discovery in FLSA cases?

• What are the most common discovery challenges counsel face when litigating FLSA collective action lawsuits—from initiation through resolution of the case?

• What strategies have been effective for counsel in wage and hour collective action litigation for obtaining essential information in the least expensive manner?

• What is the scope of evidence that is discoverable before and after conditional certification of the collective class and how can you limit or best manage discovery?
Brief FLSA Foundational Overview

SECTION 1
FLSA Filings Continue to Rise

- Practitioners are well aware of the 400% Increase from 2000 to 2011
- From 2011-2012, FLSA filings increased only 1%
  - Commentary suggested a possible trend toward slower growth in FLSA filings
- Plaintiffs filed 7,764 FLSA cases from April 2012-March 2013—a 10% increase
FLSA Overview

• The FLSA authorizes actions to recover damages for violation of the Act’s minimum wage and overtime provisions and to enforce the retaliation prohibition. 29 U.S.C. §216(b) and (c).

• FLSA actions can be “individual” or “collective.” If collective, employees “opt in” to join the case. Those who do not opt-in are not bound by the result and can pursue their own lawsuits.

• There is a two-year statute of limitations, which can be extended to three years for violations that are “willful.” 29 U.S.C. §255(a).

• Most courts apply a “two-tier” framework – (1) notice phase – whether to conditionally certify the action (lenient standard); and (2) decertification phase (more stringent standard).

• The focus is on whether sufficient evidence exists to suggest that the named plaintiffs and putative class members are “similarly situated.”
FLSA Theories

• Recent filings highlight several areas of focus

• Traditional theories:
  – Misclassification
  – “Off the clock”
  – Miscalculation of overtime

• Plus some newer wrinkles:
  – Automatic Deductions
  – Rounding
  – Remote work and the challenges of technology
  – Tip pooling and tip credits
“Similarly Situated” Key Factors

✓ The employment and factual settings of the plaintiffs
✓ Evidence of a company-wide policy
✓ The various defenses available to defendants
✓ Considerations of fairness, procedure and manageability
Typical FLSA Case Sequence

1. Filing
2. Preliminary, limited discovery
3. Early motion for conditional certification
4. If conditionally certified, broadened discovery
5. Potential motion to decertify
6. Resolution – dismissal, settlement or trial
Discovery Contours for FLSA Actions

The “certification” stage generally determines the scope:

• **Before** conditional certification – more limited
• **After** conditional certification – more robust (but often still quite limited in light of “representative” context)
A Starting Place – Have *Dukes* and *Comcast* Affected FLSA Litigation?

**Discovery Limitations & Strategies**
Overview of *Dukes* and the Landscape

- The *Dukes* plaintiffs alleged unequal pay and promotional opportunities for women at Wal-Mart
- Prior to *Dukes*, litigation trend was to certify classes based on company-wide statistics, expert views, and anecdotal evidence
- Post-*Dukes*, focus is shifting back to employer policies and decisions – reinforcing that certification requires a “rigorous analysis” and issues common to all class members
The *Dukes* Decision Itself

- Claims for individualized relief, like back pay sought by the *Dukes* plaintiffs, cannot be brought under FRCP 23(b)(2)
- “Trials by formula” are prohibited
- Commonality prong not satisfied
## Key Impact Areas from *Dukes*

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<th>Commonality</th>
<th>Expert Testimony</th>
<th>Trial by Formula</th>
<th>Subjectivity</th>
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| • Need “common answers,” not just common questions | • “Significant proof” required to bridge the wide gap between an individual’s claim and the existence of a class of people who have suffered the same injury  
• Application of *Daubert* at certification stage | • Employer has the right to raise individual affirmative defenses under Title VII  
• “Trial by formula” is not an acceptable replacement for that right | • Allowing discretion by local supervisors in decisions should itself raise no inference of discrimination  
• Showing invalidity of one manager’s use of discretion does nothing to demonstrate invalidity of another’s |
Effects of *Comcast*

- **Behrend v. Comcast** is an antitrust case, not an employment case. But it still matters.
- The plaintiffs sought to represent a Rule 23 class of cable subscribers in an antitrust suit.
- Building on *Dukes*, the Majority concluded Plaintiffs failed to establish Rule 23(b)(3) predominance because the expert’s model could not be applied to establish class-wide damages.
- Post *Comcast*, defendants will argue that the plaintiffs must establish their ability to show damages on a class-wide basis at certification.
Their True Significance?

• *Dukes* and *Comcast* suggest that the issues of common damages – and methods of proof for those damages – are more likely to arise in relation to de-certification

• Defendants argue *Dukes* and *Comcast* tighten certification standards and signal the potential decline of the class action remedy

• Plaintiffs counter that the cases are factually specific decisions arising from unique situations
  – *Dukes*: large-scope context, limited to discrimination cases
  – *Comcast*: issue was based on admissibility and application of one expert’s report and majority disclaimed intent to break new ground
Does *Dukes* Concern FLSA Cases?

- The *Dukes* litigation did not involve the FLSA or the §216(b) analysis
- *Dukes* only concerned Rule 23 certification standards
- Traditionally, courts have distinguished between Rule 23’s “commonality” standard and § 216(b)’s “similarly situated” standard
- Nonetheless, Defendants are seeking application of the Rule 23 guidance to the §216(b) analysis
- Courts are often considering *Dukes* – still divided on results, but instructive to analysis
Cases Finding *Dukes* Impact §216(b)


- **MacGregor v. Farmers Insurance Exchange**, No. 2:10-CV-3088, 2011 WL 2981466, *4 (D.S.C. July 22, 2011) (denying §216(b) notice relying in part on *Dukes*, saying “This court need not base its decision that plaintiffs have failed to present even a modest factual showing of a common policy or plan on *Dukes*, as numerous district courts have reached similar results without the benefit of this clearly reasoned Supreme Court decision. However, if there is not a uniform practice but decentralized and independent action by supervisors that is contrary to the company’s established policies, individual factual inquiries are likely to predominate and judicial economy will be hindered rather than promoted by certification of a collective action.”).

- **Boelk v. AT&T Teleholdings, Inc.**, et al., No. 3:12-cv-0040 (W.D. Wis. Jan. 10, 2013) (applying *Dukes* and Rule 23 analysis to deny conditional certification, in part, due to advanced discovery)

- **Amir v. Sunny’s Executive Sedan Serv., Inc.**, No. 1:13-cv-161 (E.D. Va. July 30, 2013) (slip op.) (denying conditional certification, in part, because the Supreme Court, in *Dukes*, rejected “trial by formula” and because the defendants were entitled to present their individualized defenses)
Cases Applying a Rule 23-Type Analysis at the Decertification Stage

- **Spellman v. American Eagle Express, Inc.**, 2:10-CV-01764 (E.D. Pa. July 21, 2011) (slip op.) (order denying motion for reconsideration of decision granting notice, but stating “At this second stage, AEX may argue that Dukes’s analysis of what constitutes a ‘common question’ is persuasive to this Court’s analysis of whether an FLSA collective action should be certified.”).

- **Tracy v. N.V.R., Inc.**, No. 04-CV-6541L (W.D. N.Y. Apr. 29, 2013) (decertifying a collective action and denying Rule 23 certification in suit alleging nationwide misclassification of sales persons due to variety of practices “in different locations, under different managers, who performed duties outside their offices to varying degrees and in different ways” based, in part, on Dukes’ and Comcast’s requirements).

- **Espenscheid v. Direct Sat USA, L.L.C.**, 705 F.3d 770 (7th Cir. 2013) (determining there “isn’t a good reason to have different standards for the certification of two different types of actions” and applying Rule 23 standards to a collective action at the decertification stage).
FLSA Cases Finding No *Dukes* Impact

- **Bouaphakeo v. Tyson**, No. 5:07-CV-04009-JAJ, 2011 WL 379362 (N.D. Iowa Aug. 25, 2011) (rejecting defendants’ argument that the decision in *Dukes* compels the court to overturn its prior certification of a class of Tyson employees who may not have been compensated for all work performed prior and subsequent to “gang time.”).

- **Sliger v. Prospect Mortgage, LLC**, No. S-11-465 LKK/EFB (E.D. Cal. Aug. 24, 2011) (granting notice and in footnote declining to consider *Dukes* because Rule 23 standards were not applicable to §216(b) motion).


- **Creely v. HCR ManorCare, Inc.**, No. 3:09-CV-02879 (N.D. Ohio July 1, 2011) (finding the import of *Dukes* unavailing because “the Sixth Circuit has drawn a distinction between Rule 23(a)(2)’s ‘commonality’ requirement and the FLSA’s ‘similarly situated’ requirement, expressly declining to apply Rule 23’s standard to FLSA claims.”).

- **Mitchell v. Acosta Sales, LLC**, No. CV 11-1796 (C.D. Calif. Dec. 16, 2011) (holding that *Dukes* does not apply at the fairly lenient conditional certification phase or the more stringent second stage).


- **Castro v. M & B Restaurant Group**, No. CV13-00926 (C.D. Cal. Aug. 1, 2013) (noting the employer’s argument about *Dukes* commonality but dismissing it because “certification requirements for FLSA collective actions are more lenient than those required for class actions under Rule 23”)


Dukes and Comcast – Looking Ahead

• Smaller cases, more likely focused on a facility or business unit
• Little impact at conditional certification of FLSA suits
• Bigger potential effect at decertification of FLSA suits and certification of state-law Rule 23 actions
• Less of a distinction between class v. merits discovery
• Likely employer challenges to the use of representative evidence and “trials by formula”
• Plaintiffs may be asked to demonstrate ability to prove class-wide damages
• More searching inquiry by courts for “the glue” where challenge is to discretionary decisions
• More Daubert challenges
The Big Picture Drives The Little One

The overall litigation strategy frames each discovery decision.
The Strategy Continuum

- **Rugged**
  (Scorched Earth Approach)

- **Easygoing**
  (Open to Variety of Approaches)

- **Reasonable**
  (The Middle Ground)
A Spectrum of Strategy Factors

- Client Goals
- Size of Affected Business
- Familiarity with FLSA Litigation
- History with Opposing Counsel
- History with Litigation Type
- Impact of Result on the Industry/Business
- Budget Considerations
- Emotional Investment
Client Approach to Decision-Making

How best to help different types of clients with strategic discovery decisions?
A Framework for Discovery Decisions

Rule 26 is the starting place and sets the general scope.

• “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

F.R.C.P. 26(b)(1)
Rule 26 sometimes provides protection...

- “A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden....”

F.R.C.P. 26(c)(1)
But, significantly, Rule 26 requires cooperation and collaboration –

• “In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan.”

F.R.C.P. 26(f)(2)
Rule 26 principles are perhaps most meaningful in class/collective litigation.
A collaborative discovery approach can lead to creative, cost-efficient solutions and help both parties assess the case earlier.
The Initial Strategy Test – Preservation

- Document preservation obligations are important for plaintiffs and defendants
- Preservation is both a pitfall area and a challenge for the budget
- Key is to try and balance diligent efforts with reasonable contours
- Early court intervention is sometimes needed to “confirm” appropriate scope and give confidence to move ahead
For Employers – Sweeping Obligations

- Be mindful of early obligation to issue internal “litigation hold notice” once there is a “reasonable anticipation of litigation.” *Zubulake v. UBS Warburg* (Zubulake IV), 220 F.R.D. 212 (S.D.N.Y. 2003); *see also Pension Committee v. Bank of America Securities*, LLC, 210 WL 184312 (S.D.N.Y. Jan. 15, 2010) (“failure to issue written litigation hold notice constitutes gross negligence.”).

- Be broad with notification to appropriate segment of employees, and ensure special follow-up with “key players.”

- Remember, particularly in FLSA litigation, to provide specific notification and guidance to IS employees and others who maintain centralized pay/timekeeping records and email systems.
Recent S.D.N.Y. Preservation Ruling

- *Pippins v. KPMG* – S.D.N.Y.
- FLSA collective action and NY state class action claims alleging misclassification of audit associates
- Potential class of approximately 2,500 to 3,000 members
- Preservation dispute concerning hard drives of potential class members
- Attempt at collaboration between the parties, but no agreement
- KPMG filed a motion for protective order
- Magistrate and District Judge imposed broad preservation obligations, holding that every potential class member is a “key player” for preservation purposes until opt-in period has ended
Strategies for Doc Collection + Costs

• Highly dependent on factual matters in each case.
• Collaborate with counsel early and consider potential cost sharing – easier to approach the topic if done prior to undertaking action.
• Consider a “menu” approach – here are the types of documents we have, and here is what it will cost to get them for X region, business unit, employee classification, etc.
• Many courts have e-discovery protocols that guide the document collection, search, and production process – for example, the Eastern District of Pennsylvania, Middle District of Tennessee, and Seventh Circuit Electronic Discovery Pilot Program (various district courts within the Seventh Circuit).
• Even if not a part of your court’s process, consider proposing an e-discovery protocol.
Special E-Discovery Considerations

- Agree on a protocol for electronic matters
- Designate an e-discovery coordinator for each party
- Engage vendors early
- Involve the right people – knowledge is power
- Make stipulations re non-waiver of privilege ("claw-back")
- Discuss whether and to what extent email discovery will be needed
- Share and agree on search terms in advance
- Don’t forget about records of third parties
- Ask for your opposing party’s input on potential document sources – avoid surprises later
Before Conditional Certification

Discovery Limitations & Strategies
Pre-Cert Fact Gathering by Plaintiffs

- Factual Interviews
- Declarations
- Key Policies
- Investigators
- Advertising
- Emails, Letters and Websites
Early Discovery of Plaintiff Contact Info


• Courts that have denied such discovery have held it to be premature prior to a decision on whether notice should be approved. See, e.g., Barton v. The Pantry, Inc., 2006 U.S. Dist. LEXIS 62989, at *4-6 (M.D.N.C. Aug. 31, 2006).
Other Types of Pre-Cert Discovery

- The conditional certification standard is generally considered a modest one, so extensive pre-cert discovery is not typically allowed.
- The early certification decision is sometimes made based on detailed complaint allegations, as supported by sworn statements, and not through expansive discovery.
- Some courts will, however, allow for limited discovery prior to the initial certification decision.
What “Other” Discovery is Allowed?

• Beyond permitting discovery of potential class members’ contact information prior to conditional certification, courts will typically also allow discovery that relates to or is necessary for defining the proposed class. See Long v. Landvest Corp., 2006 U.S. Dist. LEXIS 16369, at *14-15 (D. Kan. Mar. 31, 2006).

• For example, courts have granted motions to compel in the pre-conditional certification timeframe relating to compensation and timekeeping policies, job descriptions, and prior litigation and administrative proceedings relating to a defendant’s wage and hour practices. See, e.g., Sjoblom v. Charter Communications, LLC, 2008 U.S. Dist. LEXIS 1001, *2, 8 (W.D. Wis. Jan. 4, 2008); Tucker v. Labor Leasing, Inc., 155 F.R.D. 687 (M.D. Fla. 1994).
Why Is More Not Allowed?

• Courts denying more extensive discovery sought by defendants generally do so on the grounds that such discovery is inconsistent with the two-step process for certification, generally reasoning that extended discovery:
  – Leads defendants to argue for applying the more stringent second-stage standard; or
  – Causes unacceptable delay, given that the statute of limitations will continue to run until a decision is made.

• Other courts have focused more on the need for early notice due to the running of the statute of limitations in rejecting efforts by defendants to obtain discovery prior to a ruling on notice. See Doucoure v. Matlyn Foods Inc., 554 F. Supp. 2d 369, 374 (E.D.N.Y. 2008).
Strategy – How Much Do You Want?

- The amount of discovery conducted during the pre-conditional certification timeframe can affect the otherwise “lenient” standard. This is a strategic consideration area.
- Some courts have permitted the extent of discovery to affect the standard. See, e.g., Boelk v. AT&T Teleholdings, Inc., et al., No. 3:12-cv-0040 (W.D. Wis. Jan. 10, 2013) (reasoning that “it is appropriate to apply more scrutiny to plaintiffs’ claims” due to significant discovery and denying conditional certification).
- And, some have not. See, e.g., Neary v. Met. Prop. & Cas. Ins. Co., 517 F. Supp. 2d 606, 618 (D. Conn. 2007) (rejecting defendant’s argument for applying the second stage standard because while some discovery was completed, it was not as far along as in the cases relied upon by defendant).
Observations on Early Discovery

• If pre-conditional certification discovery is requested by a plaintiff, it is more likely to be granted.
• If it is requested by a defendant, it is more likely to be denied.
• In any event, pre-notice requests for discovery should be narrowly-tailored to enhance likelihood the Court will agree.
• On occasion, the parties agree to focused discovery before notice is sent out and prior to a conditional certification decision.
After Conditional Certification

Discovery Limitations & Strategies
Post-Cert Discovery Contours

• In the post-certification phase, discovery scope will be broadened. The parties will be looking ahead to the decertification stage, which involves a much more stringent standard as to the “similarly situated” question.

• The process typically begins with the parties working to propose an agreeable discovery plan. If it cannot be agreed, the court will intervene and define the plan.

• As a representative action, sampling is a common aspect of the discovery approach. In the post-\textit{Dukes} era, this is still likely to continue as the prevailing approach during the discovery stage, but any conclusions from samples will likely be subject to greater scrutiny after discovery.

• If opt-ins number in the few hundred, an individualized approach to discovery is more likely. If greater, a representative approach of some sort and related collaboration on sampling is nearly certain.
Factors in the Framing of a Plan

• Potential dispositive issues
• The amount in controversy
• Number of likely opt-ins
• Character of document discovery
• Geographic considerations
• Potential stipulations
• Propriety of case consolidation
Discovery on a “Microcosm”

- As a case management approach, some courts have had parties select a certain number of opt-in plaintiffs as a microcosm of the entire class and conduct limited discovery to those opt-ins.

  - The district court directed each side to choose three test plaintiffs for purposes of discovery and dispositive motions.
  - The parties eventually filed cross motions for summary judgment, and the Court granted them in favor of defendant for all six plaintiffs and for the remaining 2,300 opt-in members.
  - The Eleventh Circuit affirmed judgment on the six opt-ins, but vacated as to the non-test plaintiffs because the district court had not given them the required 10-day notice pursuant to FRCP 56(c).
Random Sampling – Current Views

- Increasingly, courts have turned to random selection of opt-ins for discovery, in order to assure that evidence will be genuinely “representative.”

- Parties have jointly agreed to random selection. *See, e.g.*, Gross v. Am. Std., Inc., 2009 U.S. Dist. LEXIS 113448, 3-4 (E.D. Tex. Dec. 4, 2009) (parties agreed to limit discovery to three Named Plaintiffs, 19 individuals who submitted declarations in support of the Motion for Notice, and 84 opt-ins selected at random by the parties).


Strategic Considerations

• Throughout discovery – even during cooperative planning with other counsel – maintain and preserve arguments related to the impropriety of a sampling approach and any conclusions that might be drawn from “representative” evidence.

• Build a record for challenging the opinions of experts – in the post-Dukes world, courts will likely be more willing to address Daubert challenges when considering certification questions.

• Consider discovery approaches that will focus broad allegations or broad defenses on particular segments or divisions of the business. Some courts are looking to narrow expansive cases in the post-Dukes litigation environment.
SECTION 3

Resolving Discovery Disputes
Addressing Discovery Disputes

• Plan to be able to say (when a problem arises): “we reached out and sought their input on [x, y, or z] long ago.”
• Agree to as much as you can before approaching the court, so the area of dispute for the court is as narrow as possible.
• When it comes time for briefing, tell both a substantive and a procedural story. Consider a timeline.
• Experts and/or vendors may be important for significant discovery disputes.
Case Study: When Parties Do Not Agree

In Re: Pilgrim’s Pride Litigation

• Coordinated in the Western District of Arkansas.

• Extensive discovery plan briefing was undertaken by the parties and presented to the district court.

• The parties suggested varying time and scope of discovery approaches – each arguing their plan was more appropriate and targeted to the issues.

• See generally, In Re Pilgrim’s Pride FLSA Litigation, 489 F. Supp. 2d 1381 (J.P.M.L. 2007).
Case Study: When Parties Do Not Agree

_In Re: Pilgrim’s Pride Litigation_

- Ultimately, the Court set a discovery schedule that combined requests from both sides – focused on limits and contours.
  - Test facilities for discovery
  - Hour limits on depositions
  - Limitations on written discovery
  - Prescribed document production for those to be deposed
Discovery Considerations for SJ and Other Procedural Tools

SECTION 4
Bifurcation to Manage Costs

• Bifurcation is governed by FRCP 42(b), which provides:
  – “For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.”

• Bifurcation is often a matter of stipulation or can be raised by motion – the approach can be applicable to trial and/or discovery.

• Discretionary to the trial court.
Multi-District Litigation

• A common approach to managing multiple similar actions is to seek consolidation or coordination through a multi-district transfer under 28 U.S.C. § 1407.

• MDL transfers are common in FLSA cases where sufficient common factual issues exist. Additional factors are:
  – Where the earliest case was filed;
  – Where the most procedurally advanced case is pending;
  – What is most convenient for the parties and witnesses; and
  – Which court has the resources to handle a transferred case.
Procedural Mechanisms

Summary Judgment

• Summary judgment is a tool for case shaping
• Requires early focus in discovery to build appropriate factual record
• In light of *Dukes* and the potential for stronger decertification motions, summary judgment has potential to emerge as more of a force in FLSA litigation
Discovery Considerations for Trial

SECTION 5
Selected Trial Issues in FLSA Litigation

Representative Aspects

• Test Plaintiffs
• Bellwether Trials
• ADR Considerations
  – Mediation
  – Focus Groups
  – Mini-Trials
Representative Evidence

• The scope of representative testimony will vary depending on the facts of each case. See, e.g., Herman v. Hogar praderas de Armor, Inc., 130 F. Supp. 2d 257, 265 (D.P.R. 2001) (“the adequacy of the representation is based on the nature of the work, working conditions, and on-the-job relationships.”).

• No fixed ratio for determining the percentages of employees who must testify.

• The District of Kansas recently confirmed a jury award where Plaintiff presented testimony from only 5 plaintiffs and an expert who had completed a time study to support the claims of over 5,000 individuals from two facilities. Garcia v. Tyson Foods, Inc., 890 F.Supp.2d 1273 (D. Kan. 2012).

• In contrast, at least one Circuit Court has affirmed decertification where Plaintiff’s counsel could not demonstrate the existence of a “representative” sample of class members. Espenscheid v. Direct Sat USA, L.L.C., 705 F.3d 770 (7th Cir. 2013) (finding no evidence the 42 proposed witnesses were representative of the 2300-employee conditionally certified class).
Potential for DOL Testimony at Trial

Compliance Officer

- In some instances, the parties may rely on testimony or reports of a compliance officer from the Department of Labor with respect to liability or damages. *E.g., Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986) (refusal to admit compliance officer’s testimony about back wage comparisons was error).
Damage Calculations

Burden of Proof

• If the employer fails to produce evidence of the precise amount of work or evidence to rebut the reasonableness of the inference to be drawn from the employee’s evidence of work performed without proper compensation, “the court may then award damages to the employee, even though the result be only approximate.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).

Precision v. Approximation

• The employee is not required to compute FLSA damages with precision, but rather need only present evidence sufficient to estimate damages through a “just and reasonable inference.” *Id.* at 687-88.
Damages – How Much Precision?

Recent Examples

• The West Coast Litigation Involving Farmers (California)
• The East Coast Litigation Involving Geico (District of Columbia)
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