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***293** DIFFERENCES BETWEEN RULE 23 CLASS ACTIONS AND FLSA § 216(B) COLLECTIVE ACTIONS; TIPS FOR ACHIEVING CLASS AND COLLECTIVE ACTION CERTIFICATION; AND CERTIFICATION POST-DUKES

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***295 I. IN GENERAL**

A. Collective or "Opt-In" Actions Under the FLSA

1. A claim for minimum wages or overtime under the FLSA may *not* be pursued as a traditional class action under FRCP 23. Rather, the only comparable mechanism for collective litigation of such claims is § 216(b):

"An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought*." 29 U.S.C. § 216(b).

2. Section 216(b) was enacted in response "to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

3. Because of the requirement that a would-be plaintiff file a formal, written "consent" with the court before joining a collective action under the FLSA, these actions are often referred to as "opt-in" actions.

B. "Opt-Out" Class Actions Under State Wage-And-Hour Laws

1. Generally, because state wage-and-hour laws do not contain provisions similar to § 216(b) of the FLSA, courts will permit them to be litigated as a class action under Rule 23 (or procedural equivalents under the applicable state law).

2. When Rule 23 actions are certified for alleged violations of state law, they are typically certified as 23(b)(3) "opt-out" actions.

3. Collective actions are distinguished from the opt-out approach utilized in class actions under FRCP 23. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). "In contrast, potential members of a Rule 23(b)(3) class must be given only the opportunity to opt out of the class action; they will automatically be included in the class if they do not speak up." ***296** *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (citing Fed. R. Civ. P. 23(c) (2)(B); *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003)).

C. Hybrid "Opt-In/Opt-Out" Actions

1. Often plaintiffs assert claims under both the FLSA and relevant state laws. Typically, this occurs where the state law provides for a recovery that is distinct or more generous than would be available under federal law -- for example, the state law may provide for recovery of "straight time" wages (whereas the FLSA would only afford relief for unpaid overtime wages).

2. There has been much litigation over whether such hybrid actions are permissible.

a. Preemption or "inherent incompatibility" arguments: Allowing state law actions to recover wages available under the FLSA to proceed under FRCP 23 undermines Congressional intent embodied in FLSA § 216(b). *See, e.g., Knepper v. Rite Aid Corp.*, -- F.3d --, 2012 WL 1003515 (3d Cir. Jan. 12, 2012).

b. Practicability arguments: Participants may be confused by the notice telling them to opt-in if they wish to pursue their FLSA claims, but at the same time, telling them they need to opt-out if they wish not to be bound by a judgment on their state law claims. Further, if the putative class member simply ignores the notice, the disposition of her state law claims may effectively dispose of her FLSA claims as well--based on principles of *res judicata* or collateral estoppel--even though she never "consented" to participate in the action (as required under § 216(b)). *See, e.g., Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 455 (W.D. Pa. 2007) *ultimate holding called into doubt by Knepper*, 2012 WL 1003515, at *5.

c. Rule Enabling Act ("REA") arguments: The REA prevents using procedural rules in a manner that may "abridge, enlarge or modify any substantive right." Because § 216(b) created a right of employers to be free from representative claims under the FLSA, allowing a virtually identical state law claim to proceed under Rule 23 would "abridge" that right, in violation of the REA. *See, e.g., Ellis*, 527 F. Supp. 2d at 455.

***297** 3. Arguments against permitting hybrid actions have had only limited success, and several circuits have permitted such actions based on the facts presented to them. *See Knepper*, 2012 WL 1003515 (rejecting argument that "inherent incompatibility" between § 216 and Rule 23 precluded federal jurisdiction over a dual FLSA § 216(b) and state-law class action); *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 249 (2d Cir. 2011) (same); *Ervin*, 632 F.3d 971 (same and also holding that district court could certify class action for state-law claims for unpaid wages, even though it would require a dual opt-out/opt-in class for state and FLSA claims, respectively).

4. However, the courts that have rejected the defense arguments above have typically done so without exploring in detail the practicability arguments related to *res judicata* and collateral estoppel.

II. KEY DIFFERENCES BETWEEN RULE 23 AND SECTION 216(b) ACTIONS THROUGHOUT THE COURSE OF A LITIGATION

A. Initial Pleadings

1. Tolling of Statute of Limitations.

a. Under *American-Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), a Rule 23 complaint tolls the statute of limitations for all putative class members.

b. By contrast, the filing of an FLSA collective action tolls only the claims of those individuals who have expressed an intent to "opt-in" to the action by filing a consent form with the court. *See, e.g.*, *Perez v. Comcast*, 2011 WL 5979769, at *2 (N.D. Ill. Nov. 29, 2011) (citing 29 U.S.C. §§ 255, 256; *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982)).

c. Thus, absent a tolling agreement between the parties or court order granting equitable tolling, the limitations period for the vast majority of putative collective action members continues to run long after the complaint is filed.

d. From a practical standpoint, the absence of sufficient proof to support a motion for conditional certification means at least some discovery will proceed before the motion is filed. Unlike a Rule 23 action, the statute of limitations continues to run for potential plaintiffs in an FLSA action until they affirmatively opt-in. 29 U.S.C. § 256(b). Thus, time is of the essence. ***298** Sometimes courts will grant motions for equitable tolling when a delay in receiving discovery is through no fault of Plaintiffs. *Curless v. Great Am. Real Food Fast, Inc.*, 2012 WL 143602, at *5-6 (S.D. Ill. Jan. 18, 2012). But, "district courts have not applied equitable tolling uniformly in FLSA cases." *Id.*; *see also Perez*, 2011 WL 5979769, at *2-3 (summarizing differences in the application of equitable tolling). Too much discovery can prompt a second stage analysis in the first instance (*see infra* § II.C.), although some courts will decline this approach if the discovery was conducted at the defendant's request.

2. Sufficiency of Class or Collective Action Allegations.

a. A putative class action under Rule 23 requires detailed pleading each of the applicable Rule 23 requirements. *See* Fed. R. Civ. P. 23(a)-(b). It also requires the pleading of an appropriately tailored class, which takes into account the binding effect of judgment on all class members who do not opt-out, so that the court may properly tailor any class notice. *See id*. 23(c).

b. A § 216(b) collective action arguably requires less rigorous, or at least less specific, allegations. The plaintiff need only plead that the putative collective action members are "similarly situated" within the meaning of § 216(b).

3. Class and Collective Action Waivers and Arbitration, post-*Concepcion*.

a. In *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Supreme Court made clear that state laws disfavoring class action waivers contained in arbitration agreements are preempted by the Federal Arbitration Act. *Concepcion v. AT&T Mobility LLC*, 131 S. Ct. 1740, 1745 (2011).

b. Even before *Concepcion*, courts enforced class and collective action waivers in cases involving claims for unpaid wages under state law and the FLSA, respectively. *See, e.g.*, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (enforcing collective action waiver and compelling arbitration of plaintiffs' individual FLSA overtime claim); *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 296, 298 (5th Cir. 2004) (same).

***299** c. After *Concepcion*, at least one court has refused to enforce an arbitration agreement on the ground that the right to pursue a collective action is a "substantive" right under the FLSA, which cannot be waived. *Raniere v. Citigroup Inc.*, 2011 WL 5881926, at *17 (S.D.N.Y. Nov. 22, 2011) (currently on appeal to the Second Circuit). However, this is clearly the minority view. *See, e.g.*, *Carter*, 362 F.3d at 298 ("[W]e reject [plaintiff's] claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA."); *Horenstein v. Mortg. Mkt., Inc.*, 9 F.App'x 618, 619 (9th Cir. 2011) (same); *Boehringer Ingelhelm Pharmaceuticals Inc.*, 812 F. Supp. 2d 886, 896 (N.D. Ill. 2011) (same); *LaVoice v. UBS Fin'l Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (disagreeing with *Raniere* as inconsistent with the Second Circuit's precedent applying the Federal Arbitration Act and ordering plaintiff's FLSA claim to arbitration); *Rose v. New Day Fin'l, LLC*, 816 F. Supp. 2d 245 (D. Md. 2011) (rejecting argument that arbitration agreement was

unenforceable because it waived a collective action right).

d. After *Concepcion*, courts have ruled that the absence of an express agreement to arbitrate on a class or collective basis does not preclude a finding that the parties agreed to arbitrate as a class. *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011); *Sutter v. Oxford Health Plans*, LLC, 2011 WL 734933, at *4-5 (D.N.J. Feb. 22, 2011); *S. Communications Servs., Inc. v. Thomas*, 2011 WL 5386428, at *10 (N.D. Ga. Nov. 3, 2011). *But see Kinecta Alt. Fin'l Solutions, Inc. v. Malone*, -- Cal. Rptr. 3d --, 2012 WL 1416619 (Cal. App. 2 Dist. Apr. 25, 2012) (holding that parties could not be compelled to arbitrate class claims absent express agreement to that effect).

e. After *Concepcion*, the NLRB issued a decision holding that a collective action waiver violated the employees' NLRA rights to engage in concerted activities. *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). Since *Horton*, at least one court has refused to enforce a collective action waiver on the ground that such waivers contravene the employee's right under the NLRA to engage in "concerted activities." ***300** *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318, at *3 (W.D. Wis. Mar. 16, 2012) (excising collective action waiver provisions and ordering that plaintiff's "claims must be resolved through arbitration [where] she must be allowed to join other employees"). However, other courts have rejected such arguments. *See, e.g.*, *LaVoice*, 2012 WL 124590, at *6 (rejecting argument that collective action waiver violates the NLRA); *Sanders v. Swift Transp. Co. of Ariz., LLC*, -- F. Supp. 2d --, 2012 WL 523537, at *4 n.1 (N.D. Cal. Jan. 17, 2012) (rejecting argument based on NLRA because Plaintiff had not alleged in her complaint that her claims were covered by the NLRA).

f. Finally, plaintiffs have had limited success arguing that arbitration agreements containing class or collective action waivers are unconscionable, because the plaintiff's "potential recovery would be too meager to justify the expenses required for" individual arbitration of the claim. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 551-53 (S.D.N.Y. 2011), *appeal docketed*.

B. Discovery And Fact Investigation Issues

1. Class-wide discovery in Rule 23 actions generally requires some preliminary showing that the Rule 23 requirements are likely satisfied, or that discovery is likely to substantiate the Rule 23 allegations. *See, e.g.*, *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

2. Discovery beyond the named plaintiffs in an FLSA collective action is arguably unavailable until the court has "conditionally certified" the action. *See infra* § II.C.

3. Contacting putative class or collective action members.

a. In a Rule 23 action, attorneys *generally* are free to contact putative class members directly, provided appropriate disclosures are made and no coercive methods are employed, until a class has been certified (but note, jurisdictional variations exist, such that contacting putative class members is improper). Once a class is certified, all class members (except those who opt out) are represented parties and any contact by defense counsel is improper. *See, e.g.*, *EEOC v. Mitsubishi Motor Mfg of Am., Inc.*, 102 F.3d 869, 870 (7th Cir. 1996); *Camilotes v. Resurrection Health Care Corp.*, 2012 WL 245202, at *2 (N.D. Ill. Jan. 25, 2012).

***301** b. In § 216(b) actions, prior to a motion for conditional certification being granted, defense counsel may contact putative collective action members, provided appropriate disclosures are made and coercive tactics are not employed. Plaintiff counsel may as well, but they are subject to ethical rules barring direct solicitation. Furthermore, even after conditional certification is granted, courts have taken the view that until an individual affirmatively "opts-in," the same rules for contacting unrepresented, putative class members apply. *See Camilotes*, 2012 WL 245202, at *2-7.

C. Differing Procedures And Certification Standards

1. Rule 23 standards are statutory, FLSA standards are judicially created.

a. Unlike Rule 23 class actions, the FLSA does not specify how collective actions are to proceed. Consequently, the management of 216(b) actions is left to the discretion of the district courts. *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008) (citing *Hoffmann-La Roche*, 493 U.S. at 170-72).
b. Under § 216(b), employees can sue on their own behalf and for "similarly situated" persons. Section 216(b) establishes two requirements for a representative action: (1) the plaintiffs must actually be "similarly situated"; and (2) all plaintiffs must sign and file a written affirmative consent to participate in the action. 29 U.S.C. § 216(b); *Hoffmann-La Roche*, 493 U.S. 165 at 167-68. Similarly situated persons are permitted to "opt in" the suit. This type of suit is called a "collective action."

2. Courts have developed a two-stage certification process for § 216(b) collective actions.

a. Stage One: Conditional Certification.

i. Conditional certification requires a showing that the plaintiffs and members of the putative collective action are "similarly situated," and were "victims of a common policy or plan that violated the law." *Berry v. Quick Test, Inc.*, 2012 WL 1133803, at *2 (N.D. Ill. Apr. 4, 2012) (quotations and citations omitted).

***302** ii. While the plaintiff bears a minimal burden, she generally must support her condition certification request with some evidence, and cannot merely rely on the allegations in her complaint. *See, e.g.*, *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996) (requiring "substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage the defendants' affidavits to the contrary."); *Rottman v. Old Second Bancorp, Inc.*, 735 F. Supp. 988, 990 (N.D. Ill. 2010) ("Although the inquiry is undemanding, the court is under no obligation, as it would be on a motion to dismiss, to accept the plaintiff's allegations as true. Rather, the court evaluates the record before it, including the defendant's oppositional affidavits, to determine whether the plaintiffs are similarly situated to other putative class members.").

iii. "Generally plaintiffs can satisfy the 'similarly situated' requirement by making 'a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y.1998). Because the similarly situated standard has never been decided by the Supreme Court or by any circuit courts, courts apply different standards.

iv. The approach used by most courts is lenient. Plaintiffs must be similarly situated; they need not be identically situated. *Lang v. DirecTV, Inc.*, 2011 WL 6934607 (E.D. La. Dec. 30, 2011). Some courts have found plaintiffs who operate in different geographical locations and under different managers and supervisors may be deemed similarly situated. *Id*.

v. A minority of courts apply a more stringent Rule 23-type approach. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995). For example, in *Shushan v. University of Colorado*, 132 F.R.D 263 (D. Colo. 1990), the court determined that "while the 'opt-in' feature of section 216 is manifestly 'irreconcilable' with the 'optout' feature of rule 23, it does not necessarily follow that every other feature of rule 23 is similarly irreconcilable ***303** with section 216." *Id.* at 266. The court justified a rule 23 standard by stating, "[i]f Rule 23 were wholly inapplicable, then [a class] under section 216 would be practically formless . . . ." *Id*. Under *Shushan*, plaintiffs must prove the existence of a definable, manageable class, and that plaintiffs are proper representatives of the class. *Id*. at 268. This requires plaintiffs to provide individualized proof that the claims of every single optin plaintiff can be presented to a jury with some measure of efficiency, and thus the analysis is more akin to that for class certification under Rule 23. *Id*. at 265 (holding that a plaintiff must "satisfy all of the requirements of rule 23, *insofar as those requirements are consistent with* 29 U.S.C.A. § 216(b)")

vi. Discovery can affect the standard used for conditional FLSA certification. According to some district courts, "the parties will have engaged in discovery, perhaps limited or perhaps extensive, and so the standard for certification at the notice stage will appropriately be less lenient." *Lang*, 2011 WL 6934607 at *5 (citations omitted); *see also*, *Basco v.*

Wal--Mart Stores, Inc., 2004 WL 1497709 (E.D. La. July 2, 2004); *Pfohl v. Farmers Ins. Group*, 2004 WL 554834, *3 (C.D.Cal., Mar.1, 2004) (moving directly to second stage where parties did not dispute discovery was undertaken); *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (applying stricter standard where discovery was completed). This does not, however, raise the plaintiffs' burden at the conditional certification stage to the level that applies at the decertification stage. *Id*. "That standard is only appropriate after discovery is largely complete and the case is ready for trial." *Lang*, 2011 WL 6934607 at *6. Instead, some courts apply a hybrid approach. *Id*.

vii. Defendants will typically oppose motions for conditional certification by establishing through employee declarations (or deposition testimony), policy documents, and possibly time-keeping data or statistical evidence that employees are not sufficiently similar to justify collective litigation of their claims.

***304** viii. Relevant considerations for the court will include, for example:

-- Do all putative collective action members perform the same job functions?

-- Has the plaintiff identified a common, allegedly unlawful policy or practice, which applies to all putative class members?

-- Does the employer maintain uniform time-keeping practices or systems, or do they differ among job functions or locations?

-- Do all putative collective actions members work in the same location? If so, is there evidence preliminarily showing that duties and policies are the same across locations?

ix. The effect of Conditional Certification: The court will authorize a notice form to be sent to all members of the conditionally certified collective action, informing them of the lawsuit and of their right to "opt-in" to the lawsuit by signing an enclosed consent form. (The form of notice generally is subject to the class action notice principles developed in the Rule 23 context.)

b. Stage Two: Decertification.

i. "The second stage occurs much later [than the first stage], after plaintiffs have opted in and after discovery. At the second stage, which is more akin to class certification under Rule 23, the court considers much more closely whether the action should proceed as a collective action." *Knipsel v. Chrysler Group LLC*, 2012 WL 553722, at *1 (E.D. Mich. Feb. 21, 2012). "[T]he court has much more information on which to base its decision and, as a result, [it] employs a stricter standard." *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 497 (D.N.J. 2000).

ii. There is a debate as to whether the second stage standard is akin to a Rule 23 analysis.

-- "Although elevated at the second stage, the 'similarly situated' requirement is less stringent than the requirement that common questions predominate in certifying class actions under Rule 23 [.]" ***305** *Frye v. Baptist Mem. Hosp.*, 2010 WL 3862591, at *3 (W.D. Tenn. Sept. 27, 2010).

-- Nevertheless, courts sometimes refer to Rule 23 standards, such as commonality and predominance, when adjudicating certification issues under the FLSA. *See Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) ("[I]f common questions predominate, the plaintiffs may be similarly situated even though the recovery of any given plaintiff may be determined by only a subset of those common questions.")

iii. Naturally, the defendant must file a motion to decertify the class. The motion will rely on the discovery record developed throughout the case, including depositions of "opt-in" plaintiffs, affidavits and/or depositions of putative class members who have not opted in, affidavits and/or depositions of supervisors and managers of putative class members, the employer's policy documents, and often expert reports and expert testimony.

3. Class Certification of State Law Claims Under Rule 23.

a. Class certification motion practice is really no different than in any other Rule 23 action.

b. Typically, if a class is to be certified, the Court will do so under Rule 23(b)(3), because plaintiffs are primarily seeking monetary relief. The main battle-ground, therefore, has traditionally been over whether common questions predominate over individualized ones.

c. However, the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v.* Dukes, 131 S.Ct 2541 (2011), has provided some fertile ground for arguments against certification, particularly where plaintiffs allege a variety of policies or practices underlying their claims for unpaid wages. *See infra* § III.

D. Different Defenses Exist Depending On Whether Claims Are Predicated On The FLSA Or State Law

1. Under the FLSA, a plaintiff must prove that (1) she worked compensable time, (2) that the employer had actual or constructive ***306** knowledge of that work, and (3) that she was not paid for the work at issue. Primary defenses go to each of these elements.

a. Did the employee perform "compensable" work?

i. Defendants may show that the activity in question was not "integral or indispensible" to the employee's primary job duty.

ii. Defendants may show that the work at issue was *de minimis*.

b. Did the employer have actual or constructive knowledge of the work being performed?

i. Defendant may show that it had no reason to know that the work had been performed, particularly when the employee works independently.

ii. Defendant may argue that plaintiff's failure to record the time at issue, or notify the employer of the work at issue, precludes an actual or constructive knowledge finding.

c. Was the employer paid for the work at issue?

i. Defendant may show that the employer received a grace period payment that covered the period at issue.

ii. Defendant may argue that overpayments made during the same period offset any underpayments.

iii. For minimum wage claims, Defendant may show that even if employee was not compensated for short periods, on average, his pay still exceeded the applicable minimum wage.

d. Examples of Affirmative Defenses peculiar to the FLSA.

i. Defendant may show that the plaintiff is exempt.

ii. Limitations arguments based on a three year limitations period (or two years if willful violations are not alleged).

iii. Good-faith reliance on a written ruling, order, policy or regulation of the DOL. This defense arises under § 10 of the Portal-to-Portal Act, and is a complete defense.

iv. Good-faith defense to a claim that defendant willfully violated the FLSA, under § 11 of the Portal-to-Portal ***307** Act. This defense only precludes liquidated damages (*i.e.*, damages over a three-year rather than a two-year period). Requires

both objective and subjective good-faith.

v. Failure to arbitrate claims. (See discussion above).

2. State law defenses turn largely on the state laws at issue.

a. State statutory claims for unpaid wages.

i. State versions of the FLSA often require the same or similar showings to establish liability as required above under the FLSA. For example, a claim for unpaid overtime under the Illinois Minimum Wage Law will require the same showing required under the FLSA, and generally will be subject to the same defenses.

ii. However, unique defenses to state statutory claims will arise where the statute provides for relief not available under the FLSA.

-- E.g., the Illinois Wage Payment and Collection Action, 820 ILCS 115, allows for recovery of "straight time" pay (unlike the FLSA). However, it also requires the plaintiff to establish an agreement to pay a certain wage that was not honored; this requirement, in turn, creates unique defenses.

-- E.g., a minimum wage claim under Florida law can be dismissed for failure to provide the employer with pre-suit notice and a demand for payment. Fla. Stat. § 448.110(6)(a).

b. State common law claims (*e.g.*, breach of contract; unjust enrichment; conversion)

i. The available defenses to such claims are very dependent on the jurisdiction.

ii. Common defenses include:

-- That common law claims are preempted by any available state statutory claims for unpaid wages.

-- That common law claims are preempted by the FLSA to the extent they seek identical remedies ***308** available under the FLSA. *See, e.g.*, *Anderson v. Sara Lee Corp.*, 508 F.3d 181 (4th Cir. 2007).

-- That any implied contract claims is hopelessly inconsistent with the allegations underlying the classwide allegations. *See, e.g.*, *Fenn v. Litton Servicing LP*, 2010 WL 8318866, at **2-3 (M.D. Fla. Dec. 10, 2010).

-- Unique statute of limitations arguments, particular to the state law at issue. *See, e.g.*, Idaho Code § 45-614 (providing for six-month limitation period for some claims, but a two-year limitation period for others).

E. The Damages Arising For FLSA Claims May Differ Substantially From Those Available Under State Law

1. The following remedies are available under the FLSA:

a. Successful plaintiffs are entitled to recover their unpaid overtime or minimum wages (not straight-time), an equal amount in liquidated damages, and reasonable attorneys' fees. 29 U.S.C. § 216(b); *see also Batt v. Micro Warehouse, Inc.*, 241 F.3d 891, 893 (7th Cir. 2011).

b. Claims must be brought within two-years. However, if a "willful" violation is shown (which courts often presume), then the limitations period extends to three-years. 29 U.S.C. § 255.

c. The court may deny a request for liquidated damages if "that the act or omission giving rise to [the FLSA violation] was in good faith" and if the defendant had "reasonable grounds for believing that his [conduct] was not a violation of the" FLSA. 29 U.S.C. § 260.

2. State laws often provide similar or more generous recoveries, such as treble damages, straight time pay, interest or other penalties. *See, e.g.*, Ill. Wage Payment and Collection Act, 820 ILCS 115 & 735 ILCS 5/13-206 (together allowing for recover of straight time pay required under "contract or agreement" between the parties, as well as attorneys' fees, liquidated damages, and 10-year limitations period).

***309 F. Different evidentiary rules**

1. On a motion for § 216(b) conditional certification "courts in [the Second Circuit] regularly rely on [hearsay] evidence to determine the propriety of sending a collective action notice." *Winfield v. Citibank, N.A.*, 2012 WL 423346 (S.D.N.Y. Feb. 9, 2012) (citing *Moore v. Eagle Sanitation*, 276 F.R.D. 54, 59 (E.D.N.Y. 2011)); *see also Lujan v. Cabana Mgmt.*, 2011 WL 317984, at *4 n. 9, *6 (E.D.N.Y. Feb. 1, 2011) (noting that "courts frequently consider hearsay in deciding whether to issue class notice" and that striking hearsay statements is "an approach not taken in this district given the 'modest factual showing' required at the notice stage"); *Zivali v. AT&T Mobility LLC*, 646 F. Supp. 2d 658, 662 (S.D.N.Y. 2009) ("Defendants' argument that plaintiffs' declarations are comprised of idiosyncratic, unrepresentative, and conclusory allegations based on impermissible hearsay is of no moment."); *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 321-22 (S.D.N.Y. 2007) (rejecting defendants' objection that declarations in support of plaintiff's motion for conditional certification contained "inadmissible hearsay, speculation, personal beliefs, and conclusions").

2. In other Circuits, a split in authority exists over whether the district court may consider inadmissible hearsay when deciding a § 216(b) motion for conditional certification. *E.g. Wiyakaska v. Ross Gage, Inc.*, 2011 WL 4537010, at *3 (S.D.Ind. Sept. 28, 2011) (recognizing split in the Seventh Circuit); *Simmons v. Valspar Corp.*, 2011 WL 1363988, at *3 (D.Minn. Apr. 11, 2011) (recognizing split in the Eighth Circuit). While a district may permit inadmissible evidence, the same court may decide to consider only competent admissible evidence in the Rule 23 context. *Compare Molina v. First Line Solutions*, 566 F. Supp. 2d 770, 789 n.20 (N.D. Ill. 2007) (inadmissible evidence allowed on motion for FLSA conditional certification) *with Short v. FMC Corp., Inc.*, 1987 WL 10297, at *6 (N.D. Ill. Apr. 24, 1987) (disallowing inadmissible evidence on a motion for Rule 23 certification). Thus, it is important not to assume that even well-established Rule 23 standards apply in the FLSA context.

***310 G. Differences Affecting Settlement**

1. The Court Approval Process.

a. Settlement of any FLSA claim requires supervision of either the DOL or the courts.

i. The parties will jointly file a motion approval, similar to preliminary approval under Rule 23. Typically, this includes submitting not only the settlement agreement, but also the notice packet and releases that will be distributed to putative class members.

ii. The approval process of a § 216(b) action does not include a mechanism for putative class members to object to the terms of the settlement.

iii. However, in some circumstances, putative class members represented by counsel will attempt to intervene in the matter under Rule 19 for purposes of reviewing the settlement.

-- This typically occurs when the settlement terms are under seal.

-- Courts have not been particularly receptive to this approach, particularly when the putative class member has delayed in seeking intervention.

-- Difficult for would-be intervenors to establish "standing" or that their interests may be harmed since they will not be bound by the settlement unless they opt-in.

iv. "The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement." *Khait*, 2010 WL 2025106, at *6 (citing *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984)).

-- Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *Id*. (citing *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 n.8 (11th Cir.1982)).

***311** -- "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." *Id*. (citing *Lynn's Food Stores*, 679 F.2d at 1353-54). "If the proposed settlement reflects a reasonable compromise over contested issues," the settlement should be approved. *Id.; see also deMunecas v. Bold Food, LLC*, 2010 WL 3322580 (S.D.N.Y. Aug. 23, 2010).

b. Settlement under Rule 23 requires the standard preliminary approval, fairness hearing, and final approval proceedings. Fed. R. Civ. Pro. 23(e).

i. "Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. . . . To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). "To determine substantive fairness, courts determine whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974)." *deMunecas v. Bold Food, LLC*, 2010 WL 3322580 (S.D.N.Y. Aug. 23, 2010).

c. Hybrid settlements, involving both an "opt-in" settlement procedure for FLSA claims and an "opt-out" procedure for state law claims.

i. The approval process will follow the Rule 23 procedures.

ii. Unique issues arise in attempting to craft an understandable class notice.

2. Confidentiality.

a. FLSA § 216(b) settlements. Courts are split over whether settlements can be reviewed *in camera* or filed under seal.

i. Courts often permit a confidential approval process and submission under seal. *See e.g.*, *King v. Wells Fargo Home Mortgage*, 2009 WL 2370640 at *1 (M.D. Fla. July 30, 2009); *Trinh v. JPMorgan Chase & Co.*, 2009 WL 532556 at *1 (S.D. Cal. Mar. 3, 2009); ***312** *Harrison v. First Horizon Home Loan Corp.*, No. 07-2404, Doc. No. 23 (D. Kan. Feb. 4, 2008)

ii. On the other hand, many courts have found that the very policy requiring DOL or court supervision of FLSA settlements suggests that settlement agreements should not be permitted to be submitted under seal. *See, e.g.*, *Poulin v. Gen'l Dynamics Shared Resources, Inc.*, 2010 WL 1813497 (W.D. Va. May 5, 2010); *Glass v. Krishna Krupa, LLC*, 2010 WL 4064017 (S.D. Ala. Oct. 15, 2010).

b. Rules 23 settlements. Filing under seal generally is not going to be an option, and any side agreements must be disclosed. Fed. R. Civ. Pro. 23(e).

3. The Settlement Claims Process.

a. The primary difference in the claims process for Rule 23 as compared to FLSA § 216(B) settlements is that, in the latter, consents and releases will need to be filed with the court.

b. In addition, because participants must affirmatively act by submitting a consent form under an FLSA § 216(b) settlement, such settlements will have a much lower claims rate.

III. TIPS FOR SECURING CLASS CERTIFICATION

A. Understand that when it comes to FLSA conditional certification, *Speed is the essence of war*. Sun Tzu, "The Art of War."

1. It is imperative to move quickly because the statute of limitations continues to run until potential plaintiffs affirmatively opt-in. 29 U.S.C. § 256(b) (why speed is more critical in FLSA than in Rule 23 setting).

2. The goal is not merely achieving conditional certification, but doing so *quickly*.

B. Avoid anything which could delay notice

1. Many circumstances can delay notice.

a. For example, the defendant may file a motion to dismiss based on claimed pleading deficiencies pursuant to ***313** *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Occasionally these efforts are successful. *Ochoa v. Pearson Educ., Inc.*, 2012 WL 95340, at *3 (D.N.J. Jan 12, 2012).

b. Eeven when they are not, the time it takes the Court to rule upon a dispositive motion could delay notice by many months or longer.

c. The defendant may also attempt to derail notice by insisting on conducting discovery before the motion for conditional certification is brief or ruled upon.

d. Defendant may argue that the motion is akin to a motion for summary judgment, and that they have a right to engage in discovery under Rule 56(d).

2. Even after the court grants notice, the defendant may try to stall by interposing objections -- meritorious and otherwise -- to the form of the notice itself. Most of these delays can be avoided by getting a motion for notice on file first.

C. Seek Equitable Tolling

1. When confronted with a situation where a delay in issuing notice is unavoidable -- due for example, to procedural delays -- seek equitable tolling.

a. But receiving this kind of discretionary relief is far from certain. *McGlone v. Contract Callers, Inc.*, 2012 WL 1174722, at *6 (S.D.N.Y. April 9, 2012) (equitable tolling granted based on delay in ruling on 216(b) motion); *Hintergerger v. Catholic Health System*, 2009 WL 3464134, at *15 (W.D.N.Y. Oct. 21, 2009) (equitable tolling denied despite 13 month delay in ruling on 216(b) motion).

2. Because of the uncertainties, the best approach is to do everything possible to avoid delays in issuing notice.

D. Avoid Engaging in Discovery or Waiting for An Answer Before Filing a Motion for Conditional Certification

1. Ideally, a motion for conditional certification should be filed with or immediately after filing the complaint.

***314** a. There is no rule that states you must wait for the defendant to answer before moving for notice.

b. Aside from the fact that the statute of limitations continues to run, there are several reasons for moving quickly including:

i. preventing "pick off" attempts by the defendant based on Rule 68. *See Ward v. Bank of New York*, 455 F.Supp.2d 262, 270 (S.D.N.Y.2006); *Briggs v. Arthur T. Mott Real Estate LLC*, 2006 WL 3314624 *3 (E.D.N.Y.2006). In general, courts hold that an offer of judgment pursuant to Rule 68 will not render an action moot when the plaintiff has diligently pursued conditional certification. *Velasquez v. Digital Page, Inc.*, 2012 WL 382923, at *3 (E.D.N.Y. Feb. 2, 2012).

ii. conveying the urgency of providing notice to the Court, which is more likely to take the matter seriously and move quickly.

c. Engaging in any significant discovery will likely delay and distract from filing the Section 216(b) motion, and may even provide the defendant with information to defeat it.

E. Conduct a Thorough Pre-Filing Investigation

1. Gaining a concrete understanding of the facts, the accessible evidence, and what you likely can and cannot prove is important in all cases, but it is absolutely critical in FLSA collective actions.

a. The goal is to move for certification *quickly*, it is vital to realistically define the claims, scope, limits and possible defenses from the start.

b. Unlike past years, district courts, even without prompting by defendants, are dissecting the evidentiary support for the plaintiff's claims at any early stage, whereas in past simply asserting "the defendants failed to pay for all overtime worked" was sufficient. Some of the initial considerations include:

i. Are the plaintiffs claiming unpaid minimum wage, overtime, both or something else (i.e., unpaid bonuses or contractual sums)?

ii. What kind of a case is it (i.e., off-the-clock, misclassification, etc)?

***315** iii. What time periods or specific work do plaintiffs allege went unpaid (i.e, pre-shift work, post-shift work, work though unpaid meal periods or breaks, etc)?

iv. Who are the members of the putative class? (i.e., is it definable by title, job duty, or something else)?

v. Are the claims realistically certifiable? If so, which ones?

vi. What is the geographic scope of the scope of the case (i.e., one location, multiple locations, state-wide, nationwide or something else)?

vii. Who are the defendants (i.e, corporate entities, including any parents and subsidiaries, and individuals)?

viii. What evidence do you have immediate access to (i.e., testimony of your clients and other witnesses, documents, emails, etc)?

ix. What employer-employee agreements exist? (i.e., arbitration agreement, class waiver or collective bargaining agreement)?

c. Conducting a comprehensive pre-suit investigation and thorough evaluation of the legal and factual merits accomplishes several goals:

i. It enables you to draft a complaint which will survive any motion to dismiss (based on *Iqbal* or otherwise);

ii. It minimizes risk that the 216(b) motion will be defeated;

iii. It allows the Court an opportunity to rule quickly or for the defense to stipulate;

iv. It gives you a high degree of credibility with the Court and the defendant.

F. Know Your District Court and Your Circuit

1. Because the standards governing the notice process are largely judicially created, expect a certain degree of inconsistency even in the same courtroom.

2. The dearth of appellate court precedent on the applicable standard is also causing a fair amount of confusion, conflict and unpredictability among the district courts in this Circuit which apply varying ***316** evidentiary standards to reach contradictory results on virtually indistinguishable facts.

G. Draft a well-written and well-supported motion, legally and factually

1. Do not take anything for granted when crafting the motion for notice.

a. For example, do not assume the court knows the Section 216(b) standards are different than the Rule 23 standards.

b. Do not assume the court knows -- or follows -- the general rule that questions over the merits, factual disputes, credibility, liability, damages, and trial management are not considered at the conditional certification stage. *E.g.*, *Hernandez v. Merrill Lynch & Co., Inc.*, 2012 WL 1193836, at *3 (S.D.N.Y. April 2, 2012).

c. A defendant may directly or indirectly insert such matters into their oppositions despite the general rule.

2. Preparing declarations in support of the motion also requires a balancing act.

a. The goal is to provide just enough information to achieve certification.

b. An over-inclusive declaration or one that overreaches could provide ammunition for the argument that the plaintiffs are not "similarly situated" or leave them exposed to credibility attacks at deposition.

IV. CLASS LITIGATION POST-*DUKES*

A. FLSA § 216 Certification

1. The reasoning employed in *Dukes* concerning commonality and the avoidance of "mini-trials" has been asserted both at the conditional certification and decertification stage.

2. These arguments have had only limited success at the conditional certification stage. *See Blaney v. Charlotte-Mecklenburg Hosp.*, 2011 WL 4351631 (W.D.N.C. Sept. 16, 2011) (denying motion for conditional certification, reasoning based on *Dukes*, that employer's "decentralized" policy concerning payment for interrupted meal ***317** breaks undermined commonality); *MacGregor v. Farmers Ins. Exch.*, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011) (finding that *Dukes* was "illuminating" even in the § 216(b) context, and denying conditional certification because plaintiffs' claims would require detailed individual inquiries); *Bouthner v. Cleveland Const., Inc.*, 2012 WL 738578 (D. Md. Mar. 5, 2012) (denying motion for conditional certification, but rejecting argument that *Dukes* warrants displacing the two-step certification procedure courts employ under § 216(b)). *But see Pippins v. KPMG*, 2012 WL 19379 (S.D.N.Y. Jan. 3, 2012) (granting plaintiffs' motion for conditional certification, and opining that *Dukes* was "inapplicable" to certification under FLSA § 216(b)); *Ware v. T-Mobile USA*, -- F. Supp. 2d --, 2011 WL 5244396 (M.D. Tenn. Nov. 2, 2011) (granting Nashville and Colorado call-center employees' motion for conditional certification (but not nationwide); rejecting arguments based on *Dukes* that plaintiffs had

failed to establish a sufficient interest among members of the putative class in joining the litigation).

3. More likely *Dukes*-type arguments will fly at the decertification stage, where the certification standard is more akin to Rule 23 certification.

B. Rules 23 Certification

1. *Dukes* arguments are now routinely made, often on motions to reconsider prior class certification decisions.

2. These arguments have some consistent success in misclassification cases and cases where plaintiffs allege that they were denied overtime as a result of multiple different types of practices. *See, e.g.*, *Brady v. Deloitte & Touche LLP*, 2012 WL 1059694 (N.D. Cal. Mar. 27, 2012) (granting motion to decertify Rule 23 class, explaining that "exempt status turns on what employees actually do" and given the variation in duties among class members "[t]here is a significant risk that the trial would become an unmanageable set of mini-trials"); *Chavez*, 2011 WL 809453 (denying Rule 23 certification of plaintiffs' misclassification claims); *Aburto v. Verizon Cal. Inc.*, 2012 WL 10381 (C.D. Cal. Jan. 3, 2012) (denying class certification of Verizon managers misclassification claims, finding an absence of common questions under Rule 23(a)(2) and that individualized inquiries also meant that Rule 23(b)(3) could not be satisfied).

***318** 3. However, in cases involving relatively small putative classes and homogenous claims concerning the practices that led to unpaid wages, *Dukes*-based arguments are much more difficult to sustain. *See, e. g., Ross v. RBS Citizens N.A.*, 2012 WL 251927 (7th Cir. Jan. 27, 2012) (affirming Rule 23 certification and distinguishing the certified class, which included declarations from approximately 10% of all putative class members offered in support of certification, from the large putative class at issue in *Dukes*).

890 PLI/Lit 293

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