

**The Wage and Hour Track: Litigation du Jour --
Litigating Wage and Hour Class Cases From A-Z
-- From Class Certification Through Appeal**

**The Contents of Decertification Motions
and Judicial Notice in
Conditionally Certified FLSA Actions**

PAUL J. LUKAS
Nichols Kaster and Anderson, PLLP
4600 IDS Center
80 South 8th Street
Minneapolis MN 55402
Phone: (612) 256-3205
Firm Web: www.nka.com
Email: lukas@nka.com



THE VOICE FOR EMPLOYEES

I. DECERTIFICATION OF A CONDITIONALLY CERTIFIED FLSA ACTION.

Decertification, a possibility in the second of the two-stage FLSA certification process, is an area of FLSA litigation that is starting to heat up. In the past, decertification was almost always granted. Only few cases existed to which plaintiffs could cling to when attempting to defeat decertification. Recently, the likelihood of decertification has become less predictable, as a number of courts in high-profile FLSA cases have denied defendants' motions to decertify for a number of reasons.

The purpose of this brief paper is to illustrate the decertification standard used by the courts, to track the evolution of decertification decisions, to examine strategic reasons parties should or should not move for, or oppose, decertification, and to provide helpful citations to a wide range of cases that address these issues for those interested in FLSA collective actions.

A. The Two-Stage FLSA Certification Process.

An action under the FLSA may be maintained against “any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). The FLSA does not define the term “similarly situated,” and there is little circuit law on the subject. Kalish v. High Tech Inst., No. Civ.04-1440, 2005 WL 1073645, at *1 (D. Minn. Apr. 22, 2005). Many courts follow a two-step process to determine whether plaintiffs are similarly situated for certification of a collective action under the FLSA. See, e.g., Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001) (citing Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995)); Frank v. Gold'n Plump Poultry, Inc., No. 041018JNERLE, 2005 WL 2240336, at *2 (D. Minn. Sept. 14, 2005); Kalish, 2005 WL 1073645, at *1 (citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001)); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004); Koren v. Supervalu, Inc., No. Civ.00-1479 ADM/AJB, 2003 WL 1572002, at *15 (D. Minn. Mar. 14, 2003).

In the first stage, the court utilizes a fairly lenient standard to examine the pleadings and affidavits in the record and to determine whether it should “conditionally” certify the class. See Hipp, 252 F.3d at 1218 (citing Mooney 54 F.3d at 1213-14; Kalish, 2005 WL 1073645, at *1; Koren, 2003 WL 1572002, at *15; Moss v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000). After conditional certification, potential opt-in plaintiffs are typically notified of the action, and these plaintiffs join the action by filing opt-in forms with the Court. See Kalish, 2005 WL 1073645, at *1.

The second stage of the similarly situated analysis occurs after notice has been sent, the deadline to join the action has passed, and discovery is complete. It is usually triggered by a motion to decertify the class brought by the defendant. Id. If, after considering the entire factual record, the court determines that the plaintiffs are not similarly situated, it may then grant decertification and dismiss the opt-in plaintiffs without prejudice. Leuthold, 224 F.R.D. at 467.

At the second stage, courts generally consider three factors: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant that are individual to each plaintiff; and (3) fairness and procedural considerations. *See, e.g., Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2006 WL 2830015, at *3 (D. Minn. Sept. 26, 2006) (citing *Thiessen*, 267 F.3d at 1102-03); *Frank*, 2005 WL 2240336, at *2 (citing *Thiessen*, 267 F.3d at 1102-03); *Bradford v. Bed Bath & Beyond*, 184 F. Supp. 2d 1342, 1346 (N.D. Ga. 2002); *Moss*, 201 F.R.D. at 409. With respect to the first and second factors, the court again determines whether the plaintiffs are in fact “similarly situated” so that they may proceed collectively through trial, or whether the case should be severed. *Kalish*, 2005 WL 1073645, at *1. At this juncture, the “similarly situated” standard is less lenient than at the first—the court now uses a higher standard to analyze this issue. *Anderson v. Cagle*, 488 F.3d 945, 953 (11th Cir. 2007); *see also Koren*, 2003 WL 1572002, at *15 (citing *Mooney*, 54 F.3d at 1214); *Ray v. Motel 6*, No. 3-95-828 1996, WL 938231, at *2 (D. Minn. Mar. 18, 1996). This is because “the court has much more information on which to base its decision, and [can therefore make] a factual determination on the similarly situated question.” *Nerland v. Caribou Coffee Co.*, No. 05-1847 (PJS/JJG), slip op. at 6 (D. Minn. Apr. 6, 2007) (citations omitted). The third factor, fairness and procedural considerations, is properly considered for the first time during this second-stage analysis. Note that the factors necessary for class certification under Rule 23 are not considered at either stage of the FLSA certification process. *Lewis v. Nat’l Fin. Sys., Inc.*, No. 06-1308 (DRH)(ARL), 2007 WL 2455130, at *2 (E.D.N.Y. Aug. 23, 2007) ([T]he requirements of Rule 23 do not apply to the approval of a collective action and, therefore, no showing of numerosity, typicality, commonality, and representativeness need be made.”).

B. The Evolution of FLSA Decertification Caselaw.

Until recently, courts have consistently applied the second-stage standard to routinely grant motions for decertification once the case has already been conditionally certified, notice has been sent, and significant discovery has been conducted. *See Mooney*, 54 F.3d at 1214 (“[N]o representative class [as of 1995] has ever survived the second stage of review”). Decisions such as *Bradford*, 184 F. Supp. 2d 1342, and *Moss*, 201 F.R.D. 398, were undoubtedly the exception, not the rule.

The trend of late, however, provides a more balanced result with such motions. For example, in some recent high-profile cases, courts denied defendants’ motions for decertification. *E.g., Frank v. Gold’n Plump Poultry, Inc.*, No. 04-CV-1018, slip op. (D. Minn. Sept. 24, 2007) (denying to decertify a class of workers with donning and doffing claims); *Pendlebury v. Starbucks Coffee Co.*, No. 04-80521-CIV, slip op. (S.D. Fla. Sept. 20, 2007) (denying defendants’ motion to decertify a misclassifications class of coffee shop managers); *Hutton v. Bank of Am.*, No. CV 03-2262-PHX-ROS, slip op. (D. Ariz. Mar. 31, 2007) (rejecting defendant’s motion to decertify a class of bank managers in a misclassification case); *Caribou Coffee*, slip op. (maintaining a class of misclassified coffee shop managers); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *5

(M.D. Tenn. Sep. 26, 2006) (stating that despite defendant's written policies to the contrary, plaintiffs submitted ample evidence that a policy of improperly recording wages and requiring "off-the-clock" work existed); Doornbos v. Pilot Travel Ctrs. LLC, No. 04CV00044, slip op. (S.D. Cal. Apr. 25 2005) (refusing to decertify a class of misclassified restaurant and travel managers); Mendez v. Radec Corp., 232 F.R.D. 78 (W.D.N.Y. 2005) (denying decertification of a class in an off-the-clock case). These decisions indicate that the denial of decertification is becoming less the exception than in previous years.

This is not to say that cases are not still routinely decertified. Recent decisions in which cases were decertified include: Reyes v. Texas Ezpawn, L.P., No. CV-03-128, 2007 WL 101808 (S.D. Tex. Jan. 8, 2007) (decertifying a class of assistant retail managers where defendant claimed plaintiffs were exempt administrators); O'Brien v. Ed Donnelly Enters., Inc., No. 2:04-CV-00085, 2006 WL 3483956, at *4 (S.D. Ohio Nov. 30, 2006) (granting defendants' motion for decertification for a class of fast food employees in an off-the-clock suit); Threatt v. CRF First Choice, Inc., No. 1:05-cv-117, 2006 WL 2054372 (N.D. Ind. July 21, 2006) (granting defendant's motion to decertify a misclassification class of home-care nurses); Epps v. Oak Street Mortgage LLC, No. 5:04-CV-46-OC-10GRJ, 2006 WL 1460273 (M.D. Fla. May 22, 2006) (decertifying a class of loan officers with off-the-clock claims); Carlson, 2006 WL 3830015 (granting decertification in a misclassification case with a class of sales agents, analysts and service support employees); Johnson v. TGF Precision, No. A. H-03-3641, 2005 WL 1994286 (S.D. Tex. Aug. 17, 2005) (granting defendant's motion to decertify an off-the-clock class of hairstylists and salon receptionists). The following discussion provides insight into the courts' currently evolving analyses.

1. Factual Discrepancies and Individualized Defenses for Misclassification Claims.

With misclassification cases, courts traditionally decertify classes because factual variations exist regarding the plaintiffs' locations, job duties, titles, and use of discretion. E.g., Sharer v. Tandberg, Inc., No. 1:06-cv-626 (JCC), 2007 WL 676220, at *3 (E.D. Va. Feb. 27, 2007) ("The Opt-Ins in this case were also situated differently with respect to job titles and responsibilities."); Reyes, 2007 WL 101808 at *2-4 (granting defendant's motion to decertify upon finding that individual stores implemented the policies for hiring, drafting schedules and making daily bank deposits). Courts traditionally find factual discrepancies even when plaintiffs occupy the same positions. See, e.g., Threatt, 2006 WL 2054372 at *2-4 (pointing to class's variance in shifts, number of customers, customers' needs, and co-worker support even though all plaintiffs adhered to the same employment policies and state regulations). Such reasoning makes the certification of classes that extends beyond a single establishment's workforce seem nearly impossible.

According to these courts, such variations make it difficult for defendants to meaningfully allege that plaintiffs qualify as exempt executives, administrators, and/or professionals under the FLSA. This is typically because the applicability of a particular exemption rests upon an examination of plaintiffs' day-to-day activities. See, e.g., Reyes,

2007 WL 101808, at *5 (citing Morisky v. Public Serv. Elec. and Gas Co., 111 F. Supp. 2d 493, 499 (D.N.J. 2000)) (“[T]he relevant statutory [administrative and executive] exemption criteria will require an individual, fact-specific analysis of each [plaintiff’s] job responsibilities.”); Carlson, 2006 WL 2830015, at *7-10 (finding that although plaintiffs performed many of the same job duties, their day-to-day tasks varied and this made it difficult for defendant to assert an administrative exemption defense); Threatt, 2006 WL 2054372 at *7 (declaring that defendant could not properly assert plaintiffs’ work fell under the companionship service exemption without presenting an individual, factual analysis as to each plaintiff’s day-to-day activities). This reasoning suggests that collective actions for misclassification cases are nearly impossible to litigate.

Interestingly, recent case law provides a more class-friendly approach to analyzing factual discrepancies and individual defenses. Courts are considering the overall similarities between plaintiffs rather than inquiring into the day-to-day variations in their responsibilities. See, e.g., Pendlebury, slip op. at 29 (“[E]very class under § 216(b) will have differences; however, class members need only be similar, not identical”); Hutton, slip op. at 3 (“While Client Managers are managed by different Market Managers depending on their office location, this fact is not relevant for these time periods because all of the potential Plaintiffs were affected identically by Defendant’s decision not to classify the Client Managers as overtime eligible under the FLSA.”); Doornbos, slip op. at 4-5 (“In spite of the fact-specific nature of the exemption inquiry, courts allow collective action treatment if Plaintiffs can demonstrate that they held identical or similar positions.”). In denying defendant’s motion to decertify a conditionally certified FLSA action, Judge Schiltz of the Minnesota Federal District Court articulately stated:

Gold’n Plump exaggerates the factual differences among employees on various shifts and in different departments. If one zooms in close enough on anything, differences will abound; even for a single employee doing a single job, the amount of time that she spends donning and doffing on Monday will differ, at least minutely, from the amount of time that she spends donning and doffing on Tuesday. But plaintiffs’ claims need to be considered at a higher level of abstraction.

Frank, No. 04-CV-1018, slip op. at *8.

Furthermore, these courts found that company-wide decisions to classify a set of workers as exempt under the FLSA constituted uniform policies. Focusing more on defendants’ actions rather than the plaintiffs’ work activities “significantly lessens any concerns about variations in plaintiffs’ employment circumstances.” Nerland, slip op. at 17 (citation omitted); see also Hutton, slip op. at 3 (“[A]ll the potential Plaintiffs were affected identically by Defendant’s decision not to classify [them] as overtime eligible under the FLSA”). These courts reason that because employers do not determine employees’ exemption status on a worker-by-worker basis, employees should be allowed to challenge the exemption status in the aggregate. E.g. Pendlebury, slip op. 11 (highlighting that the decision to classify store managers nationwide is based upon the

“job itself, not the incumbent performing the job”); Nerland, slip op. 17-18 (“The Court finds it disingenuous for [Defendant], on one hand to collectively and generally decide that all store managers are exempt from overtime compensation without any individualized inquiry, while on the other hand, claiming that plaintiffs cannot proceed collectively to challenge the exemption.”).

This departure from focusing on day-to-day factual discrepancies among class members also weakens employers’ claims that they will have to assert various defenses against individual plaintiffs. E.g. Hutton, slip op. at 4 (“Defendant’s defense will in large measure be the same with respect to all Plaintiffs—that Defendant properly classified Plaintiffs as exempt.”); Doornbos, slip op. at 8 (“Because Plaintiffs have shown, however, that the class members’ job responsibilities are similar and Pilot’s procedures are standardized by the corporate office . . . it is unlikely that the defenses against their claims are going to differ.”). Disputes arising from plaintiffs’ credibility and/or the proper amount of damages should not be considered “defenses” for decertification purposes. Pendlebury, slip op. at 30-31; Nerland, slip op. at 19.

2. Factual Discrepancies and Individualized Defenses for Claims of Off-the-Clock Work, Donning and Doffing and Misreported Wages.

Traditionally, individual claims that plaintiffs worked off-the-clock or that their managers routinely adjusted their recorded hours are insufficient to survive decertification. E.g., O’Brien, 2006 WL 3483956 at *4 (“Plaintiffs’ allegations makes clear that . . . consideration of individualized issues would predominate”); Epps, 2006 WL 1460273 at *7 (“even assuming that Oak Street had a corporate policy of discouraging overtime, each Plaintiff and opt-in Plaintiff’s proof of a violation will be individualized because it depends upon how or whether each individual manager implemented the policy with regard to each individual plaintiff”); Johnson, 2005 WL 1994286 at *4, 7 (“Plaintiffs may have prima facie claims for FLSA violations at different times, in different places, in different ways, and to differing degrees [but these] individualized claims and individualized defenses, all of which are highly fact intensive, would not only dominate but would swallow and consume the entire case.”). To avoid this problem, plaintiffs must present proof of a common policy or scheme which violates the FLSA. Of course, savvy defendants no longer implement written policies contrary to wage and hour laws, making this difficult to prove.

Furthermore, courts have found that such varying factual discrepancies traditionally lead to individualized defenses. In off-the-clock claims, the following defenses may lead to individualized inquiries: “whether the employees truly worked ‘off-the-clock’ . . . , whether such work would fall within a de minimus exemption, . . . whether the employee actually worked more than forty hours a week, or whether he or she accepted the benefits of scheduling flexibility” King v. West Corp., No. 8:04CV318, 2006 WL 118577, at *15 (D. Neb. Jan. 13, 2006).

As with misclassification cases, courts dealing with this line of claims have recently begun reframing the issues in a more class-friendly manner. E.g. Wilks, 2006 WL 2821700 at *3 (“similarly situated does not mean identically situated”) (citing Moss, 201 F.R.D. at 409). In doing so, these courts focus less on the variance between violations and more on whether the violations occurred at all, on a class-wide basis. Id. at *5 (stating that despite defendant’s written policies to the contrary, plaintiffs submitted ample evidence that a practice of improperly recording wages and requiring off-the-clock work existed). Variance can be addressed later, when calculating damages. Frank, slip op. at 6 (“The varying practices of the supervisors may mean that some employees have less damage than others . . .”).

At the decertification stage, these courts instead ask whether wage distribution and policies were centrally controlled. Wilks, 2006 WL 2821700 at *6 (“[Defendant’s] stores’ time-keeping and overtime practices were dictated at the national level, rather than in each different locality As such, these practices applied to each of the plaintiffs, regardless of the specifics of his or her particular job.”). Even a policy not to adopt a legal corporate-wide policy may be enough to find factual similarities. Frank, slip op. at 6 (“The bottom line is that Gold’n Plump has, at a minimum, decided not to require that its employees be paid for donning and doffing. That no-policy policy has allegedly injured all members of the putative class and is properly challenged through a class action.”). These courts also hold that defenses available for this line of cases can be properly settled on a class-wide basis. Id.

3. Fairness and Procedural Consideration for All Collective Actions.

When considering the effects of trying a collective action, courts traditionally focus on the impact on defendants of having to combat multiple individualized claims along with the effect on the courts of certifying complicated and unworkable classes. E.g. Carlson, 2006 WL 2830015 at *11 (“The Court cannot fairly and efficiently administer collective actions that require individualized inquiry into the exempt status of several hundred individuals.”); King, 2006 WL 118577, at *15 (“The exempt or non-exempt status of 177 opt-in plaintiffs would need to be determined on a job-by-job, or an employee-by-employee basis, resulting in essentially individual trials, even if a class were certified.”); Johnson, 2005 WL 1994286 at *7 (finding that “[f]airness and procedural considerations weigh persuasively in favor of decertification” because of the highly intensive factual inquiries necessary).

Recently, some courts considered the effect of decertification on opt-in plaintiffs who are then forced to file individual claims. Such refilings would not only be burdensome on plaintiffs, but would also be unworkable for the courts as well. Wilks, 2006 WL 2821700 at *8 (“[A]ny requirement that each plaintiff prove his or her claims individually would waste more judicial time and resources than trying their cases individually would preserve.”); Doornbos, slip op. at 9 (“Collective treatment will also result in the economy of judicial resources.”). Additionally, multiple-case litigation would result in varying outcomes dealing with essentially the same issues. Hutton, slip op. at 4 (“[If] the individual Plaintiffs maintained separate suits, inconsistent

interpretations of whether Defendant properly classified Plaintiffs as overtime exempt may result.”). To avoid this outcome, courts “must balance [the benefits of lower costs and efficient judicial resolution] with any potential detriment to the defendant and the potential for judicial inefficiency as a result of collective treatment.” Pendlebury, slip op. at 32 (citation omitted); see also Nerland, slip op. at 20.

C. Strategic Considerations and Reasons for the Swinging Pendulum.

In the legal reasoning behind the recent surge in denials of FLSA decertification motions, a far more practical rationale exists. In the past, decertification of a conditionally certified collective action was viewed by defendants as the death knell of the case, much like the denial of certification in a Rule 23 class action. Having been decertified in an FLSA case, plaintiffs’ counsel is left with the options of: (1) settling the claim at a discount; (2) leaving the plaintiffs to refile on their own to pursue their relatively small claim; or (3) spending resources they either do not have, or are unwilling to spend, and refile in numerous jurisdictions around the country. With few plaintiffs’ attorneys choosing the third option, defendants greatly benefited from the procedural victory obtained through decertification.

The more recent trend, however, is for plaintiffs’ attorneys to select the third option and pursue the claims in as many different courts as necessary. In addition, decertified cases have been reunited under the authority of the multi-district litigation panel, making it more efficient and less expensive for plaintiffs’ counsel to continue to prosecute the decertified FLSA case. See, e.g., In Re: C.H. Robinson Worldwide, Inc., Overtime Pay Litig., MDL-1849 (Joan N. Erickson, D. Minn.); In Re: Tyson Foods, Inc. Fair Labor Standards Act Litig., MDL-1854 (Clay D. Land, M.D. Ga.). Once plaintiffs’ counsel has committed the resources to pursuing the case in multiple jurisdictions, the defense’s advantage is gone, and decertification can be a costly, ineffective and dangerous strategy for defendants. Indeed, the tide has shifted to the point where in one recent case, the plaintiffs moved for decertification to prevent defendant from gaining the strategic advantage of bringing the motion in the eleventh hour of the lawsuit. Parler v. KFC Corp., Civil No. 05-2198, Dkt. Nos. 169, 180 (D. Minn. 2007).

This growing reality is reflected in the recent decisions denying decertification, with the courts looking harder at the practical result of decertification, and weighing whether it benefits the parties or the court to decertify the case and send plaintiffs all around the country to pursue the same claims.

II. THE CONTENTS OF THE JUDICIAL NOTICE IN A CONDITIONALLY CERTIFIED FLSA ACTION.

In some cases, the court's granting of conditional certification and judicial notice simply marks the beginning of a new fight over the language of the notice. The purpose of this section is to describe the general standard for language in the judicial notice, and discuss how the Courts have resolved disputes regarding what should and should not be included.

A. The Standard for the Contents of Judicial Notice.

Judicial notice is a creature of judicial control, recognized by the United States Supreme Court in Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989). As a result, there is nothing in the FLSA itself, or in the supporting regulations, providing guidance as to the proper contents of such a notice. Even the Supreme Court, in establishing this procedure, was intentionally vague, declining to examine the terms of notice because it was simply confirming "the existence of the trial court's discretion, not the details of its exercise." Id. at 170. Rather, the Supreme Court provided more general direction, encouraging trial courts to become involved in the notice process early, to help maintain control of the litigation, and to provide "timely, accurate, and informative" notice to potential plaintiffs "concerning the pendency of the collective actions, so that they can make informed decisions about whether to participate." Id. The court also warned that trial courts "must be scrupulous to respect judicial neutrality and "take care to avoid even the appearance of judicial endorsement of the merits of the action." Id. at 174. Other than these general parameters, trial courts are left to their discretion to provided neutral and accurate notice.

B. Typical Language Contained in a Judicial Notice.

Typically, the Courts approve the notice presented by the plaintiffs, revise the requested notice to reflect objections from defendant, or, after granting judicial notice, direct the parties to agree on the language of the notice and return to the Court only if agreement cannot be reached. See Swallows v. City of Brentwood, 2007 WL 2402735 (M.D. Tenn. Aug. 20, 2007) ("Counsel for the parties are expected to formulate an agreed-notice which is neutral in tone and sets forth the basics of Swallows' claim, the Defendants' defenses and a deadline for potential Plaintiffs to opt-in to the lawsuit."); Harris v. Healthcare Servs. Group, Inc., 2007 WL 2221411, at *4 (E.D. PA July 31, 2007). Because the statute of limitations continues to run on each plaintiff until the date he or she files an individual consent form, plaintiffs' counsel should be mindful to prevent this negotiation process from significantly delaying notice. 29 U.S.C. §§ 256, 216(b); see Baden-Winterwood v. Life Time Fitness, 484 F. Supp. 2d 822, 826 (S.D. Ohio 2007).

On occasion, the trial court will publish the approved notice with its decision on conditional certification and notice. See Lynch v. USAA, 491 F. Supp. 2d 357 (S.D.N.Y.

2007); Anglada v. Linens ‘n Things, Inc., 2007 WL 1552511 (S.D.N.Y. April 26, 2007). The topics typically included in approved notice include:

1. Title: Notice of Pendency of Lawsuit;
2. Description of the Lawsuit;
3. Description of Persons Eligible To Join;
4. How To Join the Lawsuit;
5. Effect of Joining or Not Joining the Lawsuit;
6. Statute of Limitations Implications;
7. No Retaliation Permitted;
8. Identification of Plaintiffs’ Counsel; and,
9. Statement of Judicial Authorization for Notice and No Decision on the Merits.

See Lynch, 491 F. Supp. 2d at 372.

C. Common Issues Regarding the Language in Judicial Notice.

As would be expected, the parties often disagree over the inclusion or exclusion of certain provisions or the language used in the notice. The disputes are predictable, with plaintiffs seeking language that encourages potential class members to join and defendants seeking language designed to discourage potential plaintiffs from joining. Just as predictably, the trial courts, following the Supreme Court’s dictate of neutrality, tend to pull the parties toward the middle. Many trial court decisions regarding the language of judicial notice are made by oral order or informal letter briefs. As such, parties fighting over a specific issue may have to look hard for guidance on certain specific issues. Examples of these disputes include the following:

1. Mandatory Participation in Litigation. Defendants often seek a provision that sets forth the pre-trial and trial activities the potential plaintiffs may be expected to participate in should they join, such as depositions, answers to written discovery and trial testimony. Plaintiffs, complaining that such language is merely designed to intimidate people, oppose such language. As would be expected, the courts tend to agree to provide some mention of case participation, without presenting a parade of horrors that would unfairly discourage potential participants.

2. Third Year Claims. Many disputes arise over the scope of class, or who should receive the notice. The most common disagreement arises over whether notice should be sent to persons who only have a claim within the third year of the statute of limitations. Defendants argue that because a third year of damages is available only if plaintiffs prove “willfulness,” it should not be presumed that willfulness will be found and a third year of damages appropriate. Plaintiffs argue that at such an early stage of the litigation they should not be required to prove willfulness, and that it is easier to include the person for purpose of notice and exclude them only if plaintiffs do not prevail on the issue. Otherwise, Plaintiffs may be required to litigate the matter for months or years with the statute of limitations running, ultimately rendering the issue moot. In two recent

cases, the courts sided with the plaintiffs, finding that the scope of the notice should include persons who worked in the position within three years. Burch v. Qwest Comms. Int'l, Inc., No. 06-3523 (MJD/AJB), 2007 WL 2254747 (D. Minn. July 24, 2007) (“[A]t this early stage of the litigation, the Court cannot tell if the alleged violation was willful or not. Exclusion of potential plaintiffs based on application of the two-year statute of limitations would be premature at this juncture.”); Cryer v. Intersolutions, Inc., No. 06-2032 (EGS), 2007 WL 1053214 (D.D.C. April 7, 2007).

3. Impact of Signed Arbitration Agreements. The second most common dispute over the scope of notice involves whether notice should be sent to those who have signed arbitration agreements. Defendants argue that because these employees have agreed to arbitrate their claims, they should not be the subject of court-ordered notice. Plaintiffs argue that: (1) the defendant has not moved to compel arbitration and should not be allowed to benefit from the possibility of doing so; and/or (2) the enforceability of the agreements is not determined at the early conditional certification stage. At least two courts have sided with plaintiffs on this issue. Stanfield v. First NLC Fin. Servs., No. 4:06-cv-03892, Dkt. No. 110 (N.D. CA, Dec. 5, 2006); Pontius v. Delta Fin. Group, No. 04-1747, Dkt. No. 23, p.9 (W.D. PA 2005).

4. Defense Counsel’s Contact Information. Defendants often argue that their counsel’s contact information should be included in the notice, on the grounds that employees may be more comfortable talking to representatives of the company than plaintiff’s counsel or may have information that they want to share that does not support the claims made in the lawsuit. Plaintiffs argue that it is confusing to the potential class members to include opposing counsel’s contact information and challenge defense counsel as to what they would say if called. At least one court has sided with plaintiffs, refusing to include the defense counsel contact information. In Cryer, the court ruled that it could find “no reason to include defense counsel” on the notice, because “Defense counsel does not play a role in managing the distribution of the notice or the gathering of consent forms,” and “including additional lawyers only creates the potential for confusion of those who received the notice.” 32007 WL 1053214, at *3. However, in doing so, the court acknowledged cases that have included defense counsel contact information. Id. at *4 (citing Belcher v. Shoney’s Inc., 927 F. Supp. 249, 254 (M.D. Tenn. 1996)).

5. Deadline to Join. Plaintiffs typically seek 90 days from the mailing of the notice for the deadline for joining the case. Defendants typically seek 30 days, or something less than 90. One court recently gave the plaintiffs 90 days (Cryer, 32007 WL 1053214), but 60 or 75 days is not uncommon. Regardless of the deadline set, the parties should be cognizant that late opt-in forms will inevitably come in. Should defendant be too recalcitrant with respect to adding the late opt-ins to the action, plaintiffs could simply file a second action with those opt-ins. For this reason, defendants should be flexible regarding the addition of late opt-ins, while also considering the fact that at some point, the opt-ins must stop so the parties can finalize discovery, trial plans, and damage calculations with the certainty of a known class.

6. Attorney's Fees, Costs, and Fee Shifting Liability. In a recent case, Defendant sought to include the following language in the judicial notice:

Should the lawsuit not succeed, however, any person who joined the lawsuit may be collectively and/or proportionately liable to reimburse [Defendant] for its costs of suit—such as filing fees or deposition transcripts—and/or [Defendant's] attorneys' fees.

Stanfield, 4:06-cv-03892, Dkt. 135 (N.D. CA, Dec. 5, 2006). The trial court granted Defendant's request, striking the "and/or [Defendant's] attorneys' fees" language from the paragraph. Citing Bell v. Mynt Entertainment, LLC, 223 F.R.D. 680, 683 (S.D. Fla 2004), the court found that because the FLSA does not provide for "prevailing party" fee shifting, the likelihood of fee shifting in defendant's favor in an FLSA collective action was not sufficient enough to warrant the warning. Stanfield, 4:06-cv-03892, Dkt. 135 at *2. Later in the order, the court did approve language that plaintiff's recovery would be reduced by attorney's fees should they prevail. Id. at *4.

With respect to the warning regarding filing fees and deposition costs, the court rejected plaintiffs' argument that the fee agreement with their counsel required the plaintiffs to pay costs only if plaintiffs prevail, rendering the warning a meaningless attempt to intimidate potential plaintiffs. The court found that "[a]lthough Plaintiff's counsel has agreed to absorb all costs 'unless and until Plaintiffs achieve successful resolution through judgment or settlement,' potential Plaintiffs should be made aware that they may be liable for costs if they prevail." Id. at *2. The court did not explain the inconsistency of ruling that plaintiffs should be warned that they may be liable for costs should they prevail, and ordering language in the notice relating to costs should they "not succeed."

7. Decertification and Its Impact. Detailed descriptions of the two-stage certification process or its impact by both plaintiffs and defendants have been rejected by the courts in favor of general statements that the potential plaintiff's participation is conditional. For example, in Stanfield, the court rejected defendant's request that the notice include language stating "your continued right to participate in this action will depend upon a later decision by the Court that you and the named Plaintiffs are 'similarly situated' in accordance with applicable laws, and that it is appropriate for this case to proceed as a collective action." Id. at *2-3. Although finding that the statement was technically accurate, the court found that it was confusing and redundant in light of the fact that the notice already stated: "Your right to participate in this lawsuit may depend on a later decision by the United States District Court that you and the representative Plaintiffs are not 'similarly situated.'" Id. at 3.

Similarly, one court recently rejected plaintiffs' request to include the following language in the "consent to join" form that sought to overcome the problem of having to send and collect new consent forms should the case eventually be decertified:

If this case does not proceed collectively, I also consent to join any subsequent action to assert claims against [Defendant] . . . where I did not receive compensation for all my time worked.

Burch, 2007 WL 2254747. The court concluded that the “language is not necessary and is confusing,” and also pointed out that the language was not included in any of the examples approved in previous FLSA cases. Id. at *10.

8. Control Over Litigation Decisions. The rules governing class actions in federal court, Rule 23 of the Federal Rules of Civil Procedure, do not apply in FLSA collective actions. Lewis, 2007 WL 2455130, at *2. As such, language that implies or confuses the two types of litigation have been rejected by the courts. For example, in Stanfield, Defendant sought the following language:

The representative plaintiffs and class counsel will make key decisions concerning the litigation, the method and manner of conducting this litigation, and all other matters pertaining to this lawsuit. These decisions will be binding upon you, unless you object.

4:06-cv-03892, Dkt. 135 at *3. Contesting this language, Plaintiffs argued that the proposed sentence:

. . . seeks only to frighten putative class members by inferring that, if they join this lawsuit, all decisions will be effectively out of their hands. This is untrue. All class members in a collective action have the right to opt-out at any time prior to accepting a settlement agreement or final resolution, and may consult with Plaintiffs’ counsel at any point during the litigation.

Id. The court agreed with plaintiffs, stating that the proposed sentence is misleading in that it implies that class members will have no input into the litigation.

In conclusion, recent opinions suggest that decertification is no longer a sure thing a the second-stage analysis, and an order granting decertification is not necessarily a clear win for defendant. Before reaching those issues, however, the parties must carefully consider what should and should not be contained in the notice to the potential opt-ins.