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Section of Labor and Employment Law

LITIGATING WAGE & HOUR CLASS ACTIONS

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I. “COLLECTIVE” ACTIONS UNDER THE FAIR LABOR STANDARDS ACT (“FLSA”)

A. Collective Actions

The FLSA expressly provides for collective action of the rights guaranteed by the Act in § 216(b). That section provides in relevant part: “An action to recover the liability prescribed [by the Act] 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 become 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.*” *Id* (emphasis added).¹

This analysis typically will apply to claims brought under the FLSA, the Age Discrimination in Employment Act (“ADEA”), and the Family and Medical Leave Act (“FMLA”).

B. Governing Statute

A collective action alleging violations of the FLSA is properly brought under § 216(b) rather than Rule 23 of the Federal Rules of Civil Procedure.

1. Many courts have held that the two actions are mutually exclusive. *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996); *Partlow v. Jewish Orphans’ Home*, 645 F.2d 757, 758 (9th Cir. 1981); *Lachapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (ADEA claim); *Hoffmann v. Sbarro*, 982 F. Supp. 249, 263 (S.D.N.Y. 1997); *Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 92-93 (D.N.J. 1983) (ADEA claim).²
2. Employers should be aware, however, that, while courts have held that plaintiffs may not pursue an FLSA claim as a class action under Federal Rule of Civil Procedure 23, some plaintiffs have successfully filed FLSA collective actions under § 216(b) together with *state law* wage and hour class action claims under Rule 23 – essentially

¹ The consent requirement is a product of the Portal-to-Portal Act of 1947, which was enacted in response to an excessive number of suits filed by plaintiffs lacking a personal stake in the litigation. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

² Numerous Age Discrimination in Employment Act (the “ADEA”) decisions are instructive because the ADEA, 29 U.S.C. § 626(b), specifically adopts the FLSA enforcement provisions contained in 29 U.S.C. § 216(b). Thus, decisions interpreting the requirements for maintaining a class action under the ADEA are equally relevant to FLSA cases.

circumventing the FLSA's "opt-in" requirement. This results in the awkward scenario where an "opt-in" class proceeds together with a much larger "opt-out" class on separate but similar claims. There is a distinct split of authority in the courts over this issue:

- a. Cases acknowledging propriety of allowing Rule 23 and § 216(b) claims to proceed together: *See, e.g., Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001); *Brzychnalski v. UNESCO, Inc.*, 35 F. Supp. 2d 351 (S.D.N.Y. 1999); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304 (D. Mass. 2004); *DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003); *Goldman v. Radio Shack Corp.*, No. Civ.A. 2:03-CV-0032, 2003 WL 21250571 (E.D. Pa. April 16, 2003).
- b. Cases declining to allow Rule 23 and § 216(b) claims to proceed together: *See, e.g., Trezyvant v. Fidelity Employer Servs. Corp.*, 434 F. Supp. 2d 40 (D. Mass. 2006); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462 (N.D. Cal. 2004); *Bartelson v. Winnebago Indus., Inc.*, 219 F.R.D. 629 (N.D. Iowa 2003); *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574 (N.D. Ill. 2004); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998); *Aquilino v. Home Depot U.S.A., Inc.*, No. 04-CV-4100 (PGS), 2006 U.S. Dist. LEXIS 48554 (D. N.J. July 17, 2006).

C. The "Opt-in" Requirement

1. Written consent: The major difference between a collective action under § 216(b) and class action under Rule 23 is the requirement that a potential plaintiff (who is not named in the complaint) must file a written consent with the court to "opt-in" to the FLSA suit. Thus, under § 216(b), the *res judicata* effect of a judgment applies only to the named parties and additional class members who have filed valid opt-in consents with the court. In contrast, once a class has been certified under Rule 23, any member who does not affirmatively "opt-out" of the class will be bound by the judgment. *See, e.g., Kinney Shoe Corp. v. Vorbes*, 564 F.2d 859 (9th Cir. 1977); *Lachapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).
2. Notice to potential plaintiffs: The issue of whether the courts should grant plaintiffs' request to provide formal notice to other potential members of the FLSA collective action was decided by the United States Supreme Court in *Hoffman La-Roche v. Sperling*, 493 U.S. 165 (1989). In *Sperling*, the Court held that district courts have the

discretion in appropriate ADEA (and thus also FLSA) cases to facilitate notice to potential plaintiffs pursuant to § 216(b). The majority of district courts have taken the position that notice to potential plaintiffs is not only appropriate but also desirable because it is an effective case-management tool. *See, e.g., Realite v. Ark Rest. Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 1998); *Hoffmann v. Sbarro*, 982 F. Supp. 249 (S.D.N.Y. 1997); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294 (N.D. Cal. 1991).

D. Showing Necessary for Notice and “Certification” of Collective Action

1. Section 216(b) provides only that plaintiffs must be “similarly situated” in order to pursue an FLSA collective action, and there is little guidance as to what this means. Very few courts of appeal have reached the issue of how the “similarly situated” requirement should be met. *See, e.g., Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995) (discussing various methodologies, but declining to adopt one). The district courts have interpreted the “similarly situated” requirement in various ways, but two common approaches predominate.
 2. The “ad-hoc” approach: The majority of district courts have adopted a two-stage, “ad hoc” approach to deciding whether plaintiffs are “similarly situated” such that they may proceed as a collective action under the FLSA – meaning that they address the facts on a case-by-case basis with few hard and fast rules.
 - a. Generally, in the first stage, plaintiffs must make a *very* minimal showing that they are “similarly situated” in order for the court to order notice to other potential plaintiffs. This is a liberal or “modest” standard that plaintiffs may easily satisfy by providing affidavits or other conclusory statements that they are, in fact, similarly situated. *See, e.g., Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001); *Hoffmann v. Sbarro*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997); *Realite v. Ark Rest. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D. N.J. 1987); *Wynn v. NBC*, 234 F. Supp. 2d 1067 (C.D. Cal. 2002). At the end of the first stage, the collective action is “conditionally” certified for purposes of notice and discovery.
 - b. At the close of discovery, the court may revisit the “similarly situated” question using a stricter standard. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1101 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002). If discovery reveals that the plaintiffs are not, in fact, “similarly situated” or that individual

issues predominate over common ones, the Court may “decertify” the collective action and dismiss the claims of the “opt-in” plaintiffs without prejudice. *Id.*; *Realite*, 7 F. Supp. 2d at 308.

3. Rule 23-based approach: A minority of courts have analyzed the “similarly situated” requirement in § 216(b) using the framework of Rule 23 – with some courts further distinguishing between the current Rule 23 framework and the pre-1966 Rule 23 framework applicable to “spurious” class actions.
 - a. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002) (comparing and contrasting “ad-hoc” approach with current Rule 23 approach and pre-1966 Rule 23 approach); *Bayles v. Am. Med. Response*, 950 F. Supp. 1053 (D. Colo. 1996) (same).
 - b. These courts have thus required plaintiffs to show the Rule 23(a) requirements of numerosity, typicality, commonality, and adequacy of representation and that common questions of law or fact predominate over individual ones.

II. CLASS ACTIONS UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A Rule 23 analysis may apply to wage and hour claims that are brought under many state laws. To proceed as a class, plaintiffs must meet all requirements of Rule 23(a) and fit into one of the Rule 23(b) classifications.

A. Rule 23(a) Requirements

1. Numerosity: *Compare Harper v. ULTA Salon Cosmetics & Fragrance, Inc.*, No. 1:05-CV-1285-TWT, 2005 U.S. Dist. LEXIS 38049, at *4 (N.D. Ga. Dec. 23, 2005) (“Although mere numbers are not dispositive, the Eleventh Circuit’s general rule is that ‘less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.’”) (citation omitted), *and Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 485 (S.D.N.Y. 2005) (“[i]f proposed class is forty members or more, the numerosity requirement is met”), *and Marable v. Dist. Hosp. Partners, L.P.*, No. 01-02361, 2006 U.S. Dist. LEXIS 62168, at *22 (D.D.C. Aug. 31, 2006) (potential class of approximately 30 former employees was too small to satisfy numerosity requirement), *with Lukovsky v. City and County of San Francisco*, No. C 05-00389, 2006 U.S. Dist. LEXIS 3174, at *6 (N.D. Cal. Jan. 17, 2006) (even if the purported class totaled 50 members, it still would not satisfy the numerosity requirement).

2. Commonality: *Compare Reeb v. Ohio Dep't of Rehabilitation*, 435 F.3d 639, 644-45 (6th Cir. 2006) (“[I]n order to find typicality and commonality, the precise nature of the various claims must be examined. . . . [I]t is not sufficient for] a plaintiff [to merely] assert[] that an employer’s decisionmaking with regard to all employees in the protected group manifests itself in the same general fashion . . . [since] the same general policy of discrimination can affect many different aspects of employment, such as hiring, firing, promoting, giving benefits, providing vacation time or delegating work assignments. . . . [A] general policy of discrimination is not sufficient to allow a court to find commonality or typicality”), *with Dukes v. Wal-Mart*, 222 F.R.D. 137 (N.D. Ca. 2004), *aff’d*, 474 F.3d 1214 (9th Cir. 2007) (certifying nationwide class where decisions indisputably were made by individual store managers: “while some variations exist, there is a basic organizational structure that is consistent across store types and throughout the company’s domestic stores in important respects. Furthermore, the policies governing in-store compensation and promotions uniformly provide for managers to exercise significant subjectivity in making pay and promotion decisions. Indeed, although the parties disagree about many of the fine points, they essentially agree that Wal-Mart managers make pay and promotion decisions for in-store employees in a largely subjective manner.”).

3. Typicality: *Compare Reeb v. Ohio Dep't of Rehabilitation*, 435 F.3d 639, 645 (6th Cir. 2006) (“[T]he typicality requirement is not met if the named plaintiffs do not represent an adequate cross-section of the claims asserted by the rest of the class. Employment discrimination claims require proof that particular managers took particular employment actions and that either the managers were motivated by a discriminatory animus or the actions resulted in a disparate impact upon the class; the district court is therefore required to examine the incidents, people involved, motivations, and consequences regarding each of the named plaintiffs’ claims to determine the typicality element of Rule 23(a) . If there are members of the class that will be asserting [hiring, firing, promoting, [] benefits, [] vacation time or [] work assignments claims], then there needs to be a class representative who is arguing the same thing – or the plaintiffs must show how their claims are typical in the absence of such a named plaintiff – in order for the district court to find typicality.”) (internal citation and quotation omitted), *with Ellis v. Costco Wholesale Corp.*, No. C 04-03341 MHP, 2007 U.S. Dist. LEXIS 2103, at *18 (N.D. Cal. Jan. 11, 2007) (“as a general matter, individualized defenses do not defeat typicality”), *and Satchell v. FedEx Corp.*, No. C 03-02659 SI, No. C 03-02878 SI, 2005 WL 2397522, at *7-8 (N.D. Cal. Sept. 27, 2005) (“Given the permissive standard for typicality, the Court finds that

the claims of the putative class representatives are reasonably coextensive with those of absent class members, even if they have not experienced each and every form of alleged discrimination”).

4. Adequacy of representation: The plaintiffs’ attorneys must be “qualified, experienced, and generally able to conduct the proposed litigation.” *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). Representative plaintiffs cannot have conflicts with the class they purport to represent. See, e.g., *Harris v. Initial Sec., Inc.*, No. 05 Civ. 3873 (GBD), 2007 U.S. Dist. LEXIS 18397, at *21 (S.D.N.Y. March 7, 2007) (plaintiffs were not adequate representatives because they were former employees who would be more interested in monetary relief, which would conflict with current employees whose primary interest might be injunctive relief); *Colindres v. Quietflex Mfg.*, 235 F.R.D. 347, 376 (S.D. Tex. 2006) (where named plaintiffs agree to forgo compensatory damages on a class wide basis, their interest conflicts with class members who were former employees who sought compensatory damages)

B. Rule 23(b) Requirements:

1. Rule 23(b)(1): The prosecution of separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class, or would be dispositive of the rights of individuals who were not parties to the adjudication.
2. Rule 23(b)(2): The party opposing the class must have acted or refused to act on grounds generally applicable to the class, thereby making it appropriate to award final injunctive relief or corresponding declaratory relief with respect to the class as a whole
 - a. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998): In its seminal decision in *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit held that where plaintiffs seek compensatory and punitive damages on behalf of a class, monetary relief cannot be considered merely “incidental” to equitable relief, rendering class certification inappropriate under Rule 23(b)(2).
 - b. The Sixth, Seventh, and Eleventh Circuits have adopted the *Allison* rule.

Reeb v. Ohio Dep’t of Rehabilitation, 435 F.3d 639, 641 (6th Cir. 2006) (“Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for

money damages will always predominate over requested injunctive or declaratory relief”).

Jefferson v. Ingersoll Int’l, Inc., 195 F.3d 894, 898 (7th Cir. 1999) (“If Rule 23(b)(2) ever may be used when the plaintiff class demands compensatory or punitive damages, that step would be permissible only when monetary relief is incidental to the equitable remedy. . . . On this subject we agree with the fifth circuit’s principal holding in *Allison* “).

Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (relying on *Allison*, holding plaintiffs’ compensatory damage claim in disability benefits case inappropriate for Rule 23(b)(2) class because it was not incidental to requested injunctive relief; “Because the Eleventh Circuit has not yet established specific criteria for determining when monetary damages are incidental to equitable relief, we look to [*Allison*] for guidance.”).

- c. The Second and Ninth Circuits have rejected *Allison*.

In *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001), the circuit rejected what it called *Allison*’s “bright-line bar to (b)(2) class treatment of *all* claims for compensatory damages and other non-incidental damages (e.g., punitive damages),” and held that a district court must make an *ad hoc* determination, “assess[ing] whether (b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case.” (citations and internal quotations omitted; emphasis in original).

Molski v. Gleich, 318 F.3d 937, 949 (9th Cir. 2003), expressly disapproved *Allison* and its “bright-line” test for determining when injunctive relief primarily is sought. Instead, plaintiffs may seek monetary damages under (b)(2) where they “flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.” (citing *Allison*) (emphasis in original).

3. Rule 23(b)(3): The court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

- a. In general: Rule 23(b)(3) does not presume the same level of homogeneity as Rule 23(b)(2). Two consequences of this are (1) subsection (b)(3) offers greater procedural protections than (b)(2) (*e.g.*, required notice, opt-out rights); and (2) to ensure that a class action really is an appropriate device, subsection (b)(3) requires courts to be sure that there is a need for a class action (*i.e.*, common issues *predominate*) and that a class action is the best way to handle the ensuing litigation in terms of efficiency, manageability, *etc.* See *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 682 (N.D. Ga. 2001) (“Rule 23(b)(3) classes are generally heterogeneous in nature, and the predominance and superiority requirements, which are not found in Rule 23(b)(2), reflect that heterogeneity.”).
- b. Predominance of common issues: The Rule 23(b)(3) “predominance” inquiry focuses on the legal and factual questions surrounding each putative class member’s claims and is “far more demanding” than Rule 23(a)’s commonality requirement. When this heightened predominance requirement is not met, class certification is not proper. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (“[P]laintiffs’ claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination.”); *but see Alliota v. Gruenberg*, 237 F.R.D. 4, 11-12 (D. D.C. 2006) (common questions predominate in ADEA case brought by current and former employees who claimed that a reduction-in-force adversely affected older workers; even though the court acknowledged that “plaintiffs’ claims and damages may be individualized in nature”)
- c. Superiority of class action device: Rule 23(b)(3) also requires that a class action be “superior to other available methods for the fair and efficient adjudication of the controversy.” Among the factors that a court is to consider in making this determination are “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3).

III. INITIAL STRATEGIC DECISIONS

A. Choice of Forum

1. Federal Court: Original and Supplemental Jurisdiction

Federal District courts have original jurisdiction over wage and hour claims brought under the FLSA. See, e.g., *Parker v. Wing*, 935 F.2d 1174, 1176 (11th Cir. 1991) (“[T]he FLSA allows suits to recover overtime liability against any public agency, including the United States or any federal agency, “in any Federal or State court of competent jurisdiction.”); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984) (“there is no question that the court had jurisdiction under 29 U.S.C. § 216(b) to decide whether appellees’ overtime claims were exempt from the FLSA”).

The same federal court also may exercise supplemental jurisdiction over a related state claim. 28 U.S.C. § 1367. To do so, however, the state claim must arise from the same set of facts as the FLSA claim. See *Lyon v. Whisman*, 45 F.3d 758, 759 (3rd Cir. 1995) (claims arising from the employment relationship insufficient; “Lyon’s FLSA claim involved very narrow, well-defined factual issues about hours worked during particular weeks. The facts relevant to her state law contract and tort claims . . . were quite distinct. In these circumstances it is clear that there is so little overlap between the evidence relevant to the FLSA and state claims, that there is no “common nucleus of operative fact” justifying supplemental jurisdiction over the state law claims.); but see *Prakash v. American Univ.*, 727 F.2d 1174, 1183 (D.C. Cir. 1984) (“the federal and nonfederal claims [plaintiff] advances ‘derive from a common nucleus of operative facts’ -- [the plaintiff’s] contract dispute with the university”).

A recurring question is whether a district court can allow an opt-in FLSA claim and a state law claim under Rule 23 to proceed simultaneously. Some courts have allowed plaintiffs to proceed with both claims. E.g., *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 490 (E.D. Cal. 2006) (“In past cases, this Court has not shied away from certifying a Rule 23(b)(3) class action simply because of the presence of an FLSA opt-in collective action in the same case.”).

Other courts preclude the two claims from proceeding together, except for those who have opted in to the FLSA claim. E.g., *Lenthold v. Destination America, Inc. et al.*, 224 F.R.D. 462, 469-70 (N.D. Cal. 2004) (reasoning that a federal court cannot possibly have pendent jurisdiction over the state law claims of any persons who do not opt in to the FLSA class, because those persons have no federal claim to which they could “append” a state law claim).

2. **State Courts: Concurrent Jurisdiction**

Section 216(b) of the FLSA also grants subject matter jurisdiction over wage actions brought by an employee to state courts. 29 U.S.C. § 216(b) (“An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . 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 similar situated . . .”).

3. **Removal: Federal Question Jurisdiction**

The United States Supreme Court has held that the language of the FLSA – “An action . . . may be maintained . . . in any Federal or State court” – permits removal to federal court under federal question jurisdiction. *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (“Nothing on the face of 29 U.S.C. § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition.”)

4. **Transfer: 28 U.S.C. Section 1404**

Although the plaintiff filing the lawsuit will choose the forum in which the case is filed, defendants often will seek to transfer the case to another forum that is more convenient. Federal courts have broad discretion to transfer cases between districts: “For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district . . . where it might have been brought.” 28 U.S.C. § 1404(a).

To support a motion for transfer, the moving party must establish: (1) that venue is proper in the transferor district; (2) that the transferee district is one where the action might have been brought; and (3) that the transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506 (C.D. Cal. 1992).

Once venue is determined to be proper in both districts, courts evaluate the following factors to determine which venue is more convenient to the parties and the witnesses and will promote the interests of justice: (1) plaintiff’s choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial

in each forum. See *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001).

Courts have found “the interest of justice” to be a factor that may be separate and apart from the convenience of the parties and witnesses. E.g., *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986) (“The ‘interest of justice’ is a separate component of a § 1404(a) transfer analysis, . . . and may be determinative in a particular case, even if the convenience of the parties and witnesses might call for a different result.”) (citations omitted).

Moreover, the plaintiff’s choice of forum may not always receive deference. See, e.g., *Fabus Corp. v. Asiana Express Corp.*, 2001 U.S. Dist. LEXIS 2568, at *4 (N.D. Cal. Mar. 5, 2001) (“The degree to which courts defer to the plaintiff’s chosen venue is substantially reduced where the plaintiff’s venue choice is not its residence”); *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 26802, at *14 (N.D. Cal. Oct. 14, 2003) (“[T]he transfer statute has a built-in mechanism to remedy the evils of forum-shopping by giving little or no weight to the plaintiff’s choice of forum away from home and without ties to the controversy.”).

B. Arbitration Issues

As employers and employees increasingly have entered into arbitration agreements, disputes have arisen whether wage and hour claims under the FLSA are arbitrable, and if so, whether collective actions can be precluded or limited.

1. Arbitrability of FLSA claims

FLSA claims can be made subject to binding arbitration. In *Kuebner v. Dickinson & Co.*, 84 F.3d 316, 317 (9th Cir. 1996), a worker sued his former employer for unpaid wages and overtime under the FLSA. The employer moved to compel arbitration, citing an employment contract that required arbitration for “any dispute, claim, or controversy . . . arising out of the employment or termination of employment” of the plaintiff. *Id.* at 318. Plaintiff contended that the FLSA conferred substantive rights, including a jury-trial right, and that arbitration was inconsistent with the enforcement scheme Congress adopted. The Ninth Circuit disagreed, holding that the worker had to submit his FLSA claims to arbitration. *Id.* at 319-21.

Other courts have reached the same conclusion. E.g., *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (FLSA claims may be arbitrable); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (“Since the Supreme Court has already held that

the FAA is compatible with the ADEA, we reject [plaintiff's] structural argument that there is an inherent conflict between the FAA and the FLSA.” (citation omitted); *Veliz v. Cintas Corp.*, No. 03-01180 (SBA), 2005 WL 1048699, at *3 (N.D. Cal. May 4, 2005) (“[W]hen an employee agrees to arbitrate, she forfeits any procedural rights arising from the FLSA, while retaining her substantive rights (e.g., the right to obtain substantive relief) in arbitration.”).

2. Class Action Waivers

Some employers have included provisions in their arbitration agreements that ban class or collective arbitrations. Such provisions may be found unenforceable, depending on the jurisdiction.

In *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), the California Supreme Court concluded that, “in some cases,” class action waivers should not be enforced, based on case-by-case consideration of certain factors. The court therefore remanded the case to the trial court for a determination of whether, “in this particular case,” the class action waiver should be invalidated. The Court identified three factors for trial courts to consider in deciding whether a class-arbitration waiver would be valid: (1) the modesty of individual awards, which might render claims too small to warrant litigation in the absence of a class mechanism; (2) the risk of retaliation against current employees who sue individually without the protection of anonymity afforded to Rule 23 “opt-out” class members; and (3) the lack of awareness of one’s legal rights. *Id.* at 463. The *Gentry* Court also concluded that the ability to opt out of the arbitration agreement did not preclude a finding of unconscionability, because the Court concluded that the employer’s description of the arbitration program was misleading, rendering any failure to opt out an uninformed decision.

Other courts have enforced a ban on class or collective arbitration. In *Horenstein v. Mortgage Market, Inc.*, Civ. No. 98-1104-AA, 1999 U.S. Dist. LEXIS 22995 (D. Or. July 23, 1999), the plaintiff, though bound by an arbitration agreement, attempted to bring an FLSA collective action in court. The defendant moved to compel arbitration. Plaintiff resisted, contending that the arbitration agreement was unenforceable because it expressly prohibited collective actions. The district court rejected that contention, *id.* at *4 (absence of the right to proceed collectively does not render the arbitration provisions unenforceable), and the Ninth Circuit affirmed, 9 Fed. Appx. 618 (9th Cir. 2001). See also *Adkins*, 303 F.3d at 503 (“Plaintiff points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a

nonwaivable right to a class action under that statute.”) (internal quotations and citations omitted); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (affirming order compelling arbitration in FLSA collective action; “The [arbitration agreement’s] prohibition of class actions and discovery limitations are consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court”) (internal citations and some internal quotations omitted), *cert. denied*, 126 S. Ct. 2020 (2006); *Veliz v. Cintas Corp.*, No. 03-01180 (SBA), 2005 WL 1048699, at *2, *5 (N.D. Cal. May 4, 2005) (“Precedent establishes that even an inability to proceed on a class or collective basis in arbitration has no impact on a plaintiff’s ability to vindicate his or her substantive statutory rights [under the FLSA]. . . . [The agreement therefore was] not unconscionable.”).

The very presence of a dispute regarding the enforceability of class action waivers could lead the court to conclude that a class action should not be certified. In *Lozano v. AT & T Wireless Servs., Inc.*, No. CV-02-00090-AHS, 2007 U.S. App. Lexis 22430 (9th Cir., Sept. 20, 2007), which is not an employment case, the Ninth Circuit affirmed the denial of class certification under Rule 23, because varying state laws governing the enforceability of class action waivers defeated commonality: “[W]hile the district court found the class action waiver to be unconscionable under California law, it also recognized that the waiver may not be unconscionable under other states’ laws. The district court therefore determined that predominance was defeated because [the company’s] intent to seek arbitration of the class would necessitate a state-by-state review of contract conscionability jurisprudence.” *Id.* at 21-22.

3. **Place of Arbitration Provisions**

Some arbitration agreements do not preclude class or collective actions, but require an employee to arbitrate his or her claim in a particular location, such as in the county where he or she worked. Such “place-of-arbitration” provisions have been upheld. The court in *Carter v. Countrywide Credit*, 362 F.3d 294, 299-300 (5th Cir. 2004), compelled arbitration of an FLSA claim, rejecting plaintiff’s contention that the agreement’s localized venue provision was unreasonable. See also *In re Cintas Corp. Overtime Pay Litigation*, 2007 WL 1089695, at *6-7 (enforcing an arbitration venue provision and dismantling an MDL case by sending the litigants back to the venues where they had contracted to arbitrate).

IV. COMMUNICATING WITH PUTATIVE CLASS MEMBERS

A. Before the Class Action Complaint Is Filed

1. Generally, employers are free to communicate with potential class members before a class complaint is filed.
2. The company may use these communications in an attempt to survey employee interests or preferences, to remedy alleged grievances, to obtain releases from liability, to discuss settlement offers with individual class members, or to obtain information for the defense of the case.
3. Plaintiffs' pre-certification communications with putative class members: In *Parris v. Superior Court*, California's Second Appellate District held that the trial court should have dismissed the plaintiffs' motion for leave to engage in pre-certification communications as unnecessary. *Parris v. Super. Ct.*, 135 Cal. Rptr. 2d 90, 101 (Ct. App. 2003). To require judicial approval of such communications would reflect an unconstitutional prior restraint on speech. Instead, the trial court "may rule on the propriety of precertification communications only if the opposing party seeks an injunction, protective order or other relief." *Id.* at 101-02. Further, such orders are appropriate only where the defendant has made "a showing of direct, immediate and irreparable harm" and must be narrowly drawn. *Id.* (quoting *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476 (5th Cir. 1980)).

B. After the Class Action Complaint Is Filed, but Before Class Certification

1. Communications through discovery tools:
 - a. The normal discovery process is available for communications with named plaintiffs (and to a limited extent with potential class members) to gather evidence to oppose class certification.
 - b. Of course, discovery can be an expensive, time-consuming, and sometimes ineffective method of investigating the class allegations.

2. Communications through *ex parte* contact with unrepresented putative class members:
 - a. Some courts have local rules prohibiting or limiting such communications.
 - b. A blanket prohibition on all communications with putative class members before class certification, in the absence of specific findings warranting such a prohibition, is unconstitutional. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981) (“an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties”).
 - c. Before class certification, communications with putative class members generally are not barred by the ethical prohibitions on communications with parties represented by counsel. *See Babbitt v. Albertson’s, Inc.*, No. C-92-1883, 1993 U.S. Dist. LEXIS 18801, at *5 (N.D. Cal. Jan. 28, 1993) (“under California law potential parties to a class action are *not* deemed part[ies] . . . represented by counsel”) (citations and internal quotations omitted); *Winfield v. St. Joe Paper Co.*, No. MCA 76-28, 1977 U.S. Dist. LEXIS 13357 (N.D. Fla. 1977) (allowing defense counsel to contact members of proposed class of employees to obtain pertinent information before certification, and finding that the requirements of DR7-104(a)(1) do not apply to putative class members who did not retain counsel to represent them before class certification). *But see Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662 (E.D. Pa. 2001) (holding Pennsylvania’s Rule of Professional Conduct prohibited defense counsel from contacting or interviewing potential fact witnesses who were putative class members in a class action concerning the same matter, without the consent of counsel for the named plaintiffs).
 - d. As a general rule, defense counsel may continue to communicate with putative class members to investigate claims and gather evidence after the class action complaint is filed, as long as they do not make misleading statements and do not attempt to convince putative class members to opt-out of the class or dissuade them from participating in the class action. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.24 (1995); 3 ALBA CONTE & HERBERT B. NEWBERG ON CLASS ACTIONS §§ 15.11 and 15.19 (3d ed.

1992) [hereinafter “NEWBERG”]; *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 295, 298 (D. Mass. 2004) (rejecting assertion that “employer-employee relationship is all that is required to warrant preclusion of communications because that relationship is inherently coercive”). *See also Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590 (2d Cir. 1986) (lower court’s order limiting communications with putative class members was not an abuse of discretion because the court issued the order after finding evidence of specific abuse); *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994) (prohibiting defendant from engaging in further communications with putative class members after the defendant’s president contacted putative class members on three separate occasions to warn them not to join the class action); *Belt v. Emcare*, 299 F. Supp. 2d 664, 669 (E.D. Tex. 2003) (court restricted *ex parte* communications with class members until the end of trial because defendant’s communications “preyed upon . . . fears and concerns”).

C. After Class Certification

1. During the period after certification, but before the expiration of the exclusion period, courts are concerned about communications with putative class members and there is a much greater risk that the court might find the communication to be prohibited by ethical rules that forbid contact with represented parties. *See* NEWBERG § 15.15 (“During the exclusion period, the status of class members is particularly amorphous.”). During this period, courts are more likely to issue an order prohibiting further communications, require the employer to issue corrective notices or impose sanctions. *See, e.g.*:
 - a. *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (communications by employer during the opt-out period, which advised class members that participation in suit would require them to submit to onerous legal proceedings, and which resulted in an “extraordinary percentage” of opt-outs, were prohibited and required corrective notice and a new opt-out period).
 - b. *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986) (issuing an order prohibiting further communications to class members following class certification, after finding that a letter was sent to class members containing materially false and misleading statements).

- c. *Haffer v. Temple Univ.*, 115 F.R.D. 506 (E.D. Pa. 1987) (in a class action regarding alleged discrimination in the university's intercollegiate athletic program, the court ordered corrective notice and imposed sanctions after the university distributed a memo that urged coaches and staff not to condemn the university as long as they were still employed by it, and which contained false and misleading statements designed to urge class members not to meet with class counsel).
2. Once a class is certified and the time for exclusions has expired, communications with class members are prohibited by ethical rules that forbid contact with represented parties. See, e.g., *Winfield v. St. Joe Paper Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (holding that contact between employer's personnel manager and a class member regarding lawsuit was improper).
3. Communications with class members in the ordinary course of business may be permissible even after class certification. See, e.g., *Rochlin v. Cincinnati Ins. Co.*, No. IP00-1898-CH/K, 2003 WL 2185231, at *21 (S.D. Ind. July 8, 2003) (allowing a questionnaire sent to class members even though it related to litigation because it was in direct response to the normal course of business); *High v. Braniff Airways, Inc.*, 20 Fed. R. Serv. 2d 439 (W.D. Tex. 1975) (court entered a protective order after class certification allowing employer to send personnel questionnaire relating to day-to-day operations, but prohibiting defendant's counsel from reviewing the responses).
4. Communications with managerial employees who are class members also may be permissible. See, e.g., *Shores v. Publix Super Mkts., Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 859985, at *3-4 (M.D. Fla. Nov. 25, 1996), *order vacated*, No. 95-1162-CIV-T-25E, 1997 WL 714787 (M.D. Fla. Jan. 27, 1997) ("Defense counsel have the unequivocal right to conduct *ex parte* communications with managerial employees to discover the acts, omissions and statements of those employees in their managerial capacity for which Publix may be liable.").

V. CLASS ACTION DISCOVERY ISSUES AND STRATEGY

A. Names and Addresses of Purported Class Members

Plaintiffs often will seek the names and addresses of purported class members early in the litigation. In FLSA cases, the requests often are coupled with a request to the court to give notice regarding the litigation. Courts typically allow the discovery upon a showing that the requested information relates to employees who are "similarly situated" and is not overbroad. See *Schved v. General Electric Co.*, 159 F.R.D. 373, 375-76

(N.D.N.Y. 1995) (“plaintiffs need only describe the potential class within reasonable limits and provide some factual basis from which the court can determine if similarly situated plaintiffs exist”).

In Rule 23 class actions, where class certification requires a more substantial evidentiary showing, Defendants typically resist early requests for names and addresses, often on the grounds that the group information requested is overbroad and raises significant privacy concerns. Some courts have concluded that the best method for addressing the latter issue is to contact potential class members to determine if they object to their name and address being provided to plaintiff’s counsel. *See Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007).

B. Written Discovery

1. Prepare and serve requests for production of documents and interrogatories.
2. Defendant’s responses to plaintiffs’ written discovery: Review complaint and claims carefully; determine scope of putative class and their claims in order to assess relevancy of requests and scope of responses.
3. Document productions: Prepare “rules” regarding production – *i.e.*, the categories of documents requested and the nature of the documents that would be discoverable under the requests, given the scope of the claims. For example, if the putative class does not include hourly employees, or if there is no named plaintiff who can properly represent them, the database including these employees should not be relevant. Review documents for privilege and privacy limitations.
4. Carefully review any expert reports prepared by your adversary and consider retaining your own consultant to critique it.

C. Depositions

1. Representative Plaintiffs: The testimony may be useful at the class certification stage and/or to secure summary judgment of the named plaintiffs’ claims.
2. Class Member Depositions: The plaintiffs’ testimony regarding their job history and skills, as well as their experiences and responsibilities with the company, can be an integral part of the opposition to class certification. “[A] party opposing the class may prefer to win

dismissal or summary judgment as to the individual plaintiffs without certification.” Fed. R. Civ. P. 23 Advisory Committee’s Note.

3. Federal Rule of Civil Procedure 30(b)(6) witnesses
 - a. The rule: “A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is required. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.”
 - b. The purpose of the rule is to compel an organizational defendant to produce witnesses who can testify about matters within the collective knowledge of the corporation’s employees and former employees.
 - c. Unlike a “regular” deposition, the 30(b)(6) deponent is not being asked for his or her personal knowledge of the facts. He or she is being asked for the *company’s* knowledge of the matters described in the notice.
4. Expert depositions
 - a. Challenging experts will be an essential tool in defeating class certification and winning on the merits. *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 661 (N.D. Ga. 2001) (“Without addressing the full panoply of issues relevant to the *Daubert* analysis, the court agrees that the opinions proffered by these experts are troublesome in several respects. For example, Dr. Barnow admitted in his deposition that his reports contain numerous errors including mathematical mistakes, the inclusion of wrong and misleading tables, counting as zeros disparities that really were not zeros, and missing an implied decimal that rendered some of the disparities incorrect and changed some of the variances. Additionally, the court is concerned by Dr. Barnow’s heavy reliance on assistants in completing his report. While there is nothing unseemly *per se* in an expert relying on his staff, Dr. Barnow seemed a bit uncertain as to which staff member actually performed which task. Moreover, in his deposition, Dr. Barnow displayed a lack of familiarity with the data and

source documents for his report, as well as some of the processes by which that information was analyzed. . . . Because Dr. Landy admittedly relied on Dr. Barnow's analyses in forming his conclusions, these same concerns arise with respect to Dr. Landy's opinions. . . . Finally, much of Dr. Landy's opinion concerns the work culture and climate at Lockheed's Marietta facility, even though he admittedly has never been to that facility or interviewed anyone at that facility." (Footnotes and citations omitted).

- b. Use the depositions of experts to support motions to strike the expert reports, which should be filed concurrently with the opposition to motion for class certification.

VI. CLASS CERTIFICATION AND DECERTIFICATION UNDER THE FLSA

A. "Conditional" Certification

The majority of district courts have adopted a two-stage, "ad hoc" approach to deciding whether plaintiffs are "similarly situated" such that they may proceed as a collective action under the. *See Trezvant v. Fidelity Employer Services Corporation, LLC*, 434 F. Supp. 2d 40, 43 (D. Mass. 2006) (finding that the majority of the courts in the First Circuit, and outside the First Circuit, have adopted the two-tier approach, and therefore adopting this approach).

Generally, in the first stage, plaintiffs make a very minimal showing that they are "similarly situated" in order for the Court to order notice to other potential plaintiffs. *See Morden v. T-Mobile USA, Inc.*, No. C05-2112 (RSM), 2006 WL 2620320, at *3 (W.D.Wash. Sept. 12, 2006) (rejecting defendants' argument that stricter "second stage" standard should apply at notice stage by distinguishing cases where district courts proceeded directly to second stage of the analysis "because the plaintiffs in those cases had already conducted substantial discovery"); *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 91, 95 (S.D.N.Y. 2003) (finding an employee's burden of showing class is "similarly situated," so as to issue a notice of opt-in rights in a collective action, is "minimal, especially since the 'determination that potential plaintiffs are similarly situated' is merely a 'preliminary' one") (internal citation omitted).

This initial showing uses a liberal or "modest" standard that plaintiffs often satisfy by providing affidavits or other conclusory statements that they are, in fact, similarly situated. *See, e.g., Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-547 (6th Cir. 2006) (finding that because certification is conditional at the notice stage, "plaintiff must show only that 'his position is similar, not identical, to the positions held by the putative class members'") (*citing Pritchard v. Dent Wizard Int'l*, 210 F.R.D. 591, 595 (S.D. Ohio 2002)); *Fortna v.*

QC Holdings, Inc., No. 06-CV-0016-CVE-PJC, 2006 WL 2385303, at *1 (N.D.Okla. Aug. 17, 2006) (finding that for purposes of “conditional certification,” the Court “requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan”) (quoting *Thiessen*, 267 F.3d at 1102)); *Gerlach*, 2006 WL 824652, at *3 (finding that the standard for certification at the notice stage is a lenient one, and that plaintiffs met that burden by showing that they all shared a job description, were uniformly classified as exempt from overtime pay, and performed similar job duties); *White v. MPW Industrial Services, Inc.*, 236 F.R.D. 363, 373 (E.D.Tenn. 2006) (finding that at the notice stage, “all that is required is substantial allegations supported by declarations, and once the plaintiff has met that burden, the case may be conditionally certified as a collective action, regardless of what exemptions the defendant wishes to assert at a later time”); *Leuthold*, 224 F.R.D. 462 (holding that under the two-tiered approach, the court must first decide, based primarily on the pleadings and any affidavits submitted, whether the potential class should be given notice of the action).

On the other hand, a “lenient” standard is still a standard, and some courts will deny even conditional class certification where the plaintiff’s evidence is meager. See *Sanders v. Drainfield Doctor, Inc.*, No. 6:06-CV-1216ORL28JGG, 2007 WL 1362723, at *3 (M.D. Fla. May 7, 2007) (denying certification of a potential class of twelve employees because the class was not numerous enough and because the Plaintiff did not “satisfy his burden of showing that additional employees are interested in opting into the case”); *Aguirre v. SBC Commc’ns, Inc.*, No. CIV.A.H 05-3198, 2007 WL 772756, at *15 (S.D. Tex. Mar. 12, 2007); *Simmons v. T-Mobile USA, Inc.*, No. CIV.A.H 06-1820, 2007 WL 210008, at *7-8 (S.D. Tex. Jan. 24, 2007) (holding that, despite producing approximately two dozen declarations, plaintiff was unable to meet his burden of showing a common policy or plan “even under a lenient standard”); *O’Donnell v. Robert Half Int’l, Inc.*, 429 F. Supp. 2d 246, 249-50 (D. Mass. 2006) (acknowledging that the standard for conditional certification at the “notice stage” is a “fairly lenient standard,” but nevertheless denying certification where plaintiffs, two former staffing managers in a single division of a single office, failed to demonstrate that they were similarly situated to account executives and account managers, and employees in other divisions and other parts of the county); *Prizmic v. Armour, Inc.*, No. 05-CV-2503 (DLI), 2006 WL 1662614, at *2, 3 (E.D.N.Y. June 12, 2006) (“[P]laintiff has not submitted any evidence . . . to demonstrate that he and other potential [P]laintiffs were victims of a common policy or plan Although the [P]laintiff’s burden at this initial stage is not onerous . . . some factual showing by affidavit or otherwise must be made.”); *Armstrong v. Weichert Realtors*, No. CIV.A. 05-CV-3120 (JAG), 2006 WL 1455781, at *1 (D.N.J. May 19, 2006) (even under the “modest factual showing standard,” plaintiff failed to demonstrate that he was similarly situated to the putative class members where plaintiff’s declaration made only “vague, general statements”

about “all Loan Officers employed by [the Defendant]”); *Landsberg v. Action Enters., Inc.*, No. 2:05-CV-0500, 2006 WL 745178, at *3-5 (S.D. Ohio Mar. 22, 2006) (denying Plaintiff’s motion for conditional certification where the Plaintiff’s affidavits were based on inadmissible hearsay and therefore could not be used to determine whether employees were similarly situated for § 216(b) purposes), *aff’d*, 2005 WL 3742221 (S.D. Ohio Dec. 15, 2006); *Rodgers v. CVS Pharmacy, Inc.*, No. 8:05-CV-770T-27MSS, 2006 WL 752831, at *4 (M.D. Fla. Mar. 23, 2006) (acknowledging the “fairly lenient standard” but nevertheless holding that plaintiff’s “unsupported beliefs and expectations that others may desire to opt in [were] insufficient to justify certification of a collective action and notice to a potential class”); *Flores v. Osaka Health Spa, Inc.*, No. 05 CIV. 962VMKNF, 2006 WL 695675, at *2-3 (S.D.N.Y. Mar. 16, 2006) (plaintiff need only make “a modest factual showing sufficient to demonstrate that [she] and potential [class members] together were victims of a common policy or plan that violated the law,” but nevertheless denying motion for conditional certification where plaintiff’s “broad conclusory allegations ... offer[ed] nothing of evidentiary value”) (citation omitted); *Morales v. Plantworks, Inc.*, No. 05 CIV. 2349 (DC), 2006 WL 278154, at *3 (S.D.N.Y. Feb. 2, 2006) (holding that, although § 216(b) class certification requires only a “modest factual showing,” plaintiff’s “[c]onclusory allegations are not enough” to prevail on a motion for conditional certification) (citation omitted).

Plaintiffs often point to job descriptions to show similarity, but some courts have rejected such evidence, by itself, as insufficient. *Forney v. TTX Co.*, No. CIV.A. 05 C 6257, 2006 WL 1030194, at *3 (N.D. Ill. Apr. 17, 2006) (applying “lenient” standard but denying plaintiff’s motion for notice; “[Plaintiff’s] reliance on job descriptions is unpersuasive. Whether similarly situated employees exist depends on the employees’ actual qualifications and day-to-day duties, rather than their job descriptions.”) (citations omitted); *see also King v. West Corp.*, No. 8:04CV318, 2006 WL 118577, at *14 (D. Neb. Jan. 13, 2006) (“The members of the proposed opt-in class have the same job title, and essentially the same job description[] [but] employees with the same job title are not ‘similarly situated’ for the purposes of an ‘opt-in’ FLSA class if their day-to-day job duties vary substantially.”) (citation omitted); *Smith v. Heartland Auto. Servs., Inc.*, 404 F. Supp. 2d 1144, 1151 (D. Minn. 2005) (“Plaintiffs may not rely on the job description itself as generalized evidence that they are mis-classified as exempt employees; [i]t is only once [the Court considers] the Plaintiffs’ testimony as to the degree to which other tasks are performed that the application of the exemption’ becomes an issue.”) (citation omitted); *Threatt v. CRF First Choice, Inc.*, No. 1:05CV117, 2006 WL 2054372, at *13 (N.D. Ind. July 21, 2006) (“[A]ctual facts govern the relevant analysis, not mere policies and procedures. ‘Whether similarly situated employees exist depends on the employees’ actual qualifications and day-to-day duties, rather than their job descriptions.’”) (citations omitted); *cf. Aguirre v. SBC Commc’ns, Inc.*, No. CIV.A.H 05-3198, 2007 WL 772756, at *12 (S.D.

Tex. Mar. 12, 2007) (“The members of the proposed opt-in class and the plaintiffs have the same job title, Developmental Coach Leader, but employees with the same job title are not ‘similarly situated’ for the purposes of an ‘opt-in’ FLSA class if their day-to-day job duties vary substantially.”).

Some courts also require that a plaintiff show that other similarly situated employees who desire to opt in. *Dybach v. Florida Dep’t of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991) (plaintiff’s evidentiary presentation must be sufficient to “satisfy [the district court] that there are other employees of the defendant-employer who desire to ‘opt-in’ and are ‘similarly situated’ with respect to their job requirements and with regard to their pay provisions”).

B. Motion for Decertification

At the close of discovery in a collective action, the Court may revisit the “similarly situated” question using a stricter standard. *See Comer*, 454 F.3d at 547 (finding that “[a]t the second stage, following discovery, trial courts examine more closely the question of whether particular members of the class are, in fact, similarly situated”); *Hipp*, 252 F.3d at 1218-19 (finding that “[a]t this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question”); *Reeves v. Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242, 247 (D.R.I. 1999) (finding that “[a]t the ‘post discovery’ stage, the court generally has much more information on which to base its decision, and can make a factual determination on the ‘similarly situated’ question”).

If discovery reveals that the plaintiffs are not, in fact, “similarly situated” or that individual issues predominate over common ones, the Court may “decertify” the collective action and dismiss the claims of the “opt-in” plaintiffs without prejudice. *See White*, 236 F.R.D. at 366; *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. 1998) (stating that “should discovery reveal that plaintiffs in fact are not similarly situated, or that only plaintiffs who worked in the same Ark restaurant or who held the same job type are similarly situated, [the court] may later decertify the class, or divide the class into subgroups, if appropriate); *see also Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J. 1998) (decertifying ADEA class after discovery evinced there was no common company policy or practice, and that lack of commonality would require individual trials).

At this stage, the burden remains on the plaintiffs to make a factual showing, based on the record developed in discovery, that those who opted-into the collective action are, in fact, sufficiently similarly situated to allow them to proceed collectively at trial. *See, e.g., Morisky*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000); *Reeves*, 77 F. Supp. 2d at 247; *Bayles v. American Medical Response*, 950 F. Supp. 1053 (D. Colo. 1996).

As with any “ad hoc” approach, it is difficult to set forth a precise set of guideposts for determining how “similarly situated” plaintiffs must be to survive this stage two analysis. See, e.g., *Pivonka v. Board of County Commissioners of Johnson County, Kansas*, No. 04-2598-JWL, 2005 WL 1799208 (D.Kan. July 27, 2005) (finding that “[d]uring this ‘second stage’ analysis, a court reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to defendant which appear to be individual to each plaintiff; fairness and procedural considerations; and whether plaintiffs made any required filings before instituting suit”); *White*, 236 F.R.D. at 367; *Stone v. First Union Corp.*, 203 F.R.D. 532, 542-543 (S.D.Fla. 2001) (finding that the factors in determining whether employees in ADEA collective action are “similarly situated” include: (1) whether employees all held same job titles; (2) whether employees worked in different geographic locations; (3) extent to which claimed discrimination occurred during different time periods and by different decision makers; (4) whether employees have provided statistically significant evidence of age discrimination; (5) whether employees all alleged similar, though not identical, discriminatory treatment; (6) whether employees have sufficiently pled and supported the allegation that the employer’s decision makers have articulated and manifested a clear intent to purge the employer of older employees; and (7) whether the employer took steps to implement its plan, such as by targeting older employees for criticism and building a ‘paper trail’).

C. Equitable Tolling

The FLSA expressly provides that its statute of limitations continues to run until a valid consent to sue is filed. 29 U.S.C. § 256(b); *Partlow v. Jewish Orphans’ Home of California, Inc.*, 645 F.2d 757, 760 (9th Cir. 1981).

As a result, plaintiffs often request “equitable tolling” to preclude potential collective action members’ claims from disappearing. Courts generally apply equitable tolling when extraordinary circumstances beyond the plaintiffs’ control make it impossible to file a claim on time, such as when there is error by plaintiffs’ counsel. See *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999); *Partlow*, 645 F.2d at 760 (district court could toll the statute of limitations under the FLSA for 45 days to permit class members who earlier filed invalid consents, due to plaintiffs’ counsel’s error, to execute proper consents); see also *Owens v. Bethlehem Mines Corp.*, 630 F. Supp. 309, 313 (W.D. Va. 1986) (equitable tolling warranted because the court delayed ruling on the plaintiffs’ certification motion for over a year).

Courts also will grant equitable tolling where a potential plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, but what constitutes “wrongful conduct” will always be disputed. See *Gerlach v. Wells Fargo & Co.*, No. C 05-0585, 2006 WL 824652, at *5 (N.D. Cal. Mar.

28, 2006) (refusing to apply equitable tolling even though defendants refused to produce contact information for potential collective action members, which prevented plaintiffs and their counsel from informing similarly situated potential plaintiffs about the case); *Clays v. Gandalf, Ltd.*, 303 F. Supp. 2d 890, 897 (S.D. Ohio 2004) (“[Plaintiff] claims he was informed by [Employer] in 1998 and/or 1999 that he was not eligible to receive overtime pay. Statements to that effect, however, do not constitute misrepresentations that would prevent [Plaintiff] from discovering the existence of his claim under federal and/or state law. To the contrary, such statements simply inform a plaintiff of facts that might give rise to claims he is entitled to pursue.”); *see also Redman v. U.S. W. Bus. Res., Inc.*, 153 F.3d 691, 695 (8th Cir. 1998) (“[e]ven if [the employer] explicitly stated that [the employees could not receive overtime compensation], [employees] have presented no evidence showing that [the employer] intended to mislead them”).

