FLSA Claims and Collective Actions: How to Avoid Claims and Defend Them

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The Fair Labor Standards Act ("FLSA") was enacted June 15, 1938 with the stated purpose of improving "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202. It is the most comprehensive U.S. legislation governing the payment of wages to employees. 29 U.S.C. §§ 201 et seq. The FLSA: (1) requires payment of a minimum wage; (2) requires payment of overtime wages to covered employees for hours worked in excess of 40 per week; (3) mandates equal pay for males and females doing equal work; (4) restricts employment of child labor; and (5) requires certain recordkeeping with respect to wages and hours. The FLSA is administered and enforced by the Wage and Hour Division ("WHD") of the United States Department of Labor ("DOL").

WHD enforcement activities result in frequent and significant awards for employees. In 2007 more than 311,000 employees received a total of $180.7 million in minimum wage and overtime back wages as a result of more than 21,900 completed investigations under the FLSA. See www.dol.gov/esa/whd/statistics/200712.htm. Overtime violations represented roughly 90% of the back wages collected in 2007, and 95% of the employees receiving back wages. Id. Interestingly, over $16 million was collected for approximately 12,000 employees for violations of the Overtime Security regulations, revised in 2004 and found at 29 C.F.R. Part 541. Id. The most common violation was a classification of employees as exempt when their primary duty was not "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers." Id. WHD allocates nearly 40% of its enforcement resources on investigations in nine selected low-wage industries: agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial services, and temporary help. Id. In 2007 WHD enforcement had a special emphasis on investigations related to low-wage workers in the Gulf Coast region whose job conditions were affected by Hurricane Katrina. Id.

In addition to government enforcement, employees themselves may sue their employers for alleged violations of the FLSA, either individually or as collective actions on behalf of others similarly situated. 29 U.S.C. § 216(b). In 2004 around 3,000 FLSA actions were filed in federal district courts, making FLSA cases the most commonly filed category of employment cases in the country. Robert K. McCalla, Wage and Hour Collective Actions: Strategies to Defeat Wage and Hour Claims at 182 (Oct. 21, 2004). Close to 800 of those cases were collective actions. Id. In the majority of these privately-filed FLSA cases, the dispute was whether the employer properly classified its employees as exempt from overtime pay. Michael A. Alaimo, James B. Thelan, & Jennifer L. Sabourin, Emerging FLSA Trends, 84-JAN Mich. B. J. 15 (2005). Other allegations included: (1) that employees were not being paid for preliminary or postliminary work; (2) that employers were requiring employees to work off the clock; or (3) that employers were improperly docking the pay of exempt employees. McCalla at 182.

FLSA collective actions continue to be filed frequently in the federal district courts. Industry news reports from the first months of 2007 highlight many new FLSA collective actions for overtime wages, most claiming that certain employees have been erroneously classified as exempt. See, e.g., Erik Larson, Sanofi-Aventis Sued by Reps for Overtime Pay,
EMPLOYMENT LAW 360 (January 9, 2007) (pharmaceutical representative overtime collective action in the district of San Francisco); Ben James, *Sanders Sued Over Employee Status under the FLSA*, EMPLOYMENT LAW 360 (January 9, 2007) (overtime collective action in Mississippi district court by employees claiming they were wrongfully classified as exempt); Anne Urda, *Merck Accused of Denying Overtime*, EMPLOYMENT LAW 360 (January 26, 2007) (reporting another collective action filing in the pharmaceutical industry, this time in New Jersey federal district court); Ron Zapata, *AXA Faces Class Action Over Overtime Pay*, EMPLOYMENT LAW 360 (February 7, 2007) (collective action for overtime wages by securities broker, filed on the heels of a January $45 million settlement by UBS Financial of similar claims); Erik Larson, *IBM Hit with Overtime Suit*, EMPLOYMENT LAW 360 (February 7, 2007) (proposed collective action for overtime wages brought by maintenance and support plan salesperson in Massachusetts federal district court, months after IBM settled California overtime suit by installation workers for $65 million); Ben James, *Mortgage Broker Faces FLSA Suit*, EMPLOYMENT LAW 360 (February 8, 2007) (collective action filed by loan officers in federal court in Detroit); Ben James, *Abercrombie & Fitch Hit with FLSA Suit*, EMPLOYMENT LAW 360 (February 12, 2007) (collective action by management trainee in Southern District of Florida); Bailey Somers, *FLSA Overtime Suit Targets A.G. Edwards*, EMPLOYMENT LAW 360 (February 12, 2007) (another collective action overtime suit by stockbroker, in Western District of Pennsylvania); Amanda Ernst, *Dell’s Call Center Reps File FLSA Overtime Suit*, EMPLOYMENT LAW 360 (February 12, 2007) (hybrid FLSA collective action and Oregon state law class action filed in the District of Oregon based on claims that Dell’s timekeeping software erroneously calculated call center employees’ working hours, denying them overtime wages). One obvious emerging trend is the filing of overtime wage claims in the pharmaceutical and financial services industries.

Why are FLSA collective action claims so popular? FLSA cases are appealing for two primary reasons. First, the FLSA is “essentially counterintuitive legislation,” in that many non-compliant practices are not obvious, and even sophisticated employers make mistakes. *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies, Wage & Hour, 239 DLR C-1* (Dec. 12, 2002). Many of the determinations required by the Act, for example, with respect to overtime classifications, are fact-intensive and detailed--there are not always easy, bright-line rules for employers to follow. *See, e.g., Mims vs. Starbucks Corp.*, 2007 WL 10369, 12 Wage & Hour Cas. 2d. (BNA) 213 (S.D.Tex. Jan. 2, 2007) (determining whether coffee-shop store managers are properly classified as exempt by fact-intensive examination of their duties and activities).

Second, payouts for plaintiffs (and their attorneys) can be quite large. An employer who violates the FLSA is liable for the unpaid wages, as well as an additional equal amount as liquidated damages, unless the employer can prove a good faith defense. 29 U.S.C. §§ 216, 260. Also, an award of attorneys’ fees and costs to a prevailing plaintiff is mandatory. *Tyler v. Union Oil Co.*, 304 F.3d 379, 399 (5th Cir. 2002). These generous damages provisions can lead to sky-high awards-or settlements-in many collective action cases. *See, e.g.*, Ron Zapata, *Coca-Cola Settles Wage Suit for $14M*, EMPLOYMENT LAW 360 (February 16, 2007) (reporting $14 million settlement of state law class wage claims brought by employees claiming they were required to work off the clock); DOL News Release No. 07-0110-NAT (January 25, 2007) (announcing $33 million consent judgment between Wal-mart and the WHD resolving overtime back wages claims); Marius Meland, *IBM to Pay $65M to Settle Overtime Suit*, EMPLOYMENT LAW 360 (November 23, 2006) (reporting employer’s agreement to pay $65
million to settle overtime claims of 32,000 installation and maintenance computer workers in collective action in Northern District of California); 85 DLR AA-1 (May 4, 2005) ($48.5 million overtime judgment against Farmers Insurance Exchange covering overtime pay and liquidated damages for misclassifying claims representatives); 203 DLR A-11 (Oct. 21, 2002) ($10 million settlement by Perdue Farms, Inc. for failure to pay for time spent putting on, taking off, and cleaning required sanitary and protective gear). Needless to say, employers’ mistakes can be costly.

Of course, individual employee claims, however successful, are significantly less lucrative for plaintiffs’ counsel than collective or class action claims. Accordingly, a primary defensive strategy for employers is to contest the certification of group claims, both under the FLSA and state wage and hour laws. This paper shall address the ways that employers can fight initial certification, obtain decertification, and seek to limit class parameters in FLSA collective actions, discuss the manner in which dual-filed actions, including FLSA collective action claims and state wage and hour class claims, are being handled by the courts, particularly after the passage of the Class Action Fairness Act of 2005, explore the option of arbitration of wage claims pursuant to a pre-dispute arbitration agreement, address certain other recent FLSA developments, and provide practical advice to employers for defending wage and hour collective actions as well as preventing them by ensuring compliance with the FLSA.

II. The FLSA Collective Action.

Section 216(b) of the FLSA is its private enforcement provision. 29 U.S.C. § 216(b). It states:

Any employer who violates [section 206 or 207 of the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to 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) The italicized language creates the possibility of “collective actions” for FLSA claims.

Collective actions are of an entirely different character than ordinary class actions under Rule 23 of the Federal Rules of Civil Procedure. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). In Rule 23 class actions, in order for a potential plaintiff not to be covered by the class action, the plaintiff must affirmatively “opt-out” of the litigation. Fed. R. Civ. P. 23. Under section 216(b), for a person to become a plaintiff, the person must “opt-in” with written consent filed at the court where the suit was brought. 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to such action unless he gives his consent in writing . . . and such consent is filed in the court . . .”). Notably, “Rule 23 cannot be invoked to circumvent the
consent requirement of [the FLSA].” *LaChapelle*, 513 F.2d at 288. And, unlike a class action under Rule 23, there is no tolling of an individual plaintiff’s claim until he or she files the consent to opt-in.

**A. Liquidated Damages and Limitations: Good Faith versus Willfulness.**

An employer who violates the FLSA is liable for the unpaid wages and “an additional equal amount as liquidated damages.” 29 U.S.C. § 216. However, this automatic award of liquidated damages is qualified by the employer’s good faith defense as described in 29 U.S.C. § 260:

> [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in § 16 of this title.

*Id.* Liquidated damages are considered compensation for the wrongful retention of wages, not punitive awards; accordingly, most courts recognize a strong presumption in favor of doubling and employers face a substantial burden to prove the good faith defense. *Mireles v. Frio Foods, Inc.,* 899 F.2d 1407, 1415 (5th Cir. 1990); *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 310 (7th Cir. 1986). Whether to award liquidated damages is a question of law left to the discretion of the trial court. 29 U.S.C. § 260; *Singer v. City of Waco, Tex.,* 324 F.3d 813, 822 (5th Cir. 2003). As a question of law, the good faith defense can be decided at the summary judgment stage, so employers with a strong argument for good faith should consider pushing for an early ruling on this issue to decrease the potential value of the plaintiff’s case.

The employer’s conduct also plays a role in determining the statute of limitations for FLSA claims. Actions for unpaid wages generally must be commenced within two years, but “a cause of action arising out of a willful violation may be commenced within three years.” 29 U.S.C. § 255(a). To prove a willful violation of the FLSA, a plaintiff must show that the employer “knew or showed reckless disregard” for whether its conduct was prohibited by the FLSA. *Reich v. Bay, Inc.* 23 F.3d 110, 117 (5th Cir. 1994). At least in the Fifth Circuit, a finding of willfulness for limitations purposes necessitates a mandatory liquidated damages award. *Tyler v. Union Oil Co.,* 304 F.3d 379, 399 (5th Cir. 2002). Although a court may be hesitant to rule on the limitations issue at the summary judgment stage, employers should seek early resolution of this issue as well.

**B. The Courts Have “Managerial Responsibility” for Providing Notice of Collective Actions to Potential Plaintiffs.**

The FLSA’s affirmative “opt-in” requirement for collective actions gives rise to the question of whether and how the court itself or plaintiffs and their counsel should or could inform other potential plaintiffs about the collective action and the right to “opt-in” the suit. Until 1989, whether courts had the authority under section 216(b) to directly issue “notice” to potential class members, or to take an active role in discovering or contacting potential plaintiffs, was unresolved. *Compare, e.g., Woods v. New York Life Ins. Co.,* 686 F.2d 578, 580-81 (7th Cir.
1982) (allowing court-approved notice) with McKenna v. Champion Int’l Corp., 747 F.2d 1211, 1212-17 (8th Cir. 1984) (disallowing court-approved notice). In 1989 the Supreme Court decided Hoffmann-La Roche, Inc. v. Sperling, concluding that courts had a “managerial responsibility to oversee the joinder of additional” plaintiffs in section 216(b) collective actions. 493 U.S. 165, 170-71 (1989). Although Hoffmann-La Roche involved an age discrimination claim, rather than a wage and hour claim, the Court’s rationale is applicable to FLSA claims because the Age Discrimination in Employment Act uses the 216(b) collective action procedure of the FLSA.

The Hoffmann-La Roche Court specifically held that the district court did not abuse its discretion by facilitating notice to potential plaintiffs, and that the court was correct to permit discovery of the names and addresses of discharged employees from the employer. Id. at 170. It expressly declined to examine the specific form of notice used by the lower court. Id. The Court recognized that “skilled trial judges” understand the “necessity for early judicial intervention in the management of litigation.” Id. at 171. The district court can ensure that notice is “timely, accurate, and informative” by “monitoring its preparation and distribution.” Id. The Hoffmann-La Roche Court cautioned, however, that the district court “must be scrupulous to respect judicial neutrality” and “avoid even the appearance of judicial endorsement of the merits of the action.” Id. at 174. If a court determines that notices proposed by the parties tend to present certain information in a biased manner, the court may even reject the parties’ proposed notices entirely and put forth its own objective notice. See, e.g., Krzesniak v. Cendant Corp., 2007 WL 4468678 (N.D. Cal) (rejecting both the plaintiffs and defendants proposed notices and setting forth its own objective notice). Hoffmann-La Roche notably did not require court supervision of notice; unless local rules or a court order indicate otherwise, court approval is not a prerequisite for the named plaintiff to contact potential class members. Nevertheless, most plaintiffs do seek court-managed notice. The plaintiff’s request for court-managed provision of notice to potential plaintiffs provides the employer’s attorney a first opportunity to minimize potential liability by attacking the viability of class status.

C. Class Certification of § 216(b) Collective Actions

Federal courts have discussed a variety of ways to evaluate class certification in § 216(b) collective actions, including the “ad hoc” approach, the two-stage approach, and the “spurious class action” approach. As a matter of practice, the majority of federal courts have followed the “two-stage” approach to class certification, illustrated by Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987). See, e.g., Mooney v. Aramco Services Co., 54 F.3d 1207, 1213 (5th Cir. 1995) (affirming the district court’s certification decision made using the Lusardi two-stage approach) (overruled on other grounds). Although the Mooney court refused to expressly approve or disapprove of the two-stage method, its description of the method is instructive.

Under the Lusardi approach, the trial court analyzes whether employees are “similarly situated” at two points in the litigation. Mooney, 54 F.3d at 1213. The first class determination is made at the “notice stage.” Because the court has only minimal evidence at this point, this determination is made using a lenient standard. Mooney, 54 F.3d at 1214 n.8. This initial analysis of whether employees are “similarly situated” results in “conditional certification” of a representative class. Mooney, 54 F.3d at 1214; see also Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (N.D. Fla. 1994). If the district court “conditionally
certifies” the class, potential class members receive notice and have the opportunity to “opt-in.” The action proceeds as a representative action throughout discovery. Mooney, 54 F.3d at 1214. A district court’s order conditionally certifying a collective action, or providing for notice to a conditionally certified class, is not an appealable collateral order. See Baldridge v. SBC Comm., Inc., 404 F.3d 930, 932-33 (5th Cir. 2005); Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 549 (6th Cir. 2006).

The second determination, made at or near the end of discovery, is often prompted by defendant’s motion for “decertification.” Mooney, 54 F.3d at 1214. At this stage the court has more information on which to base its determination whether the putative class members are similarly situated. Id. If the claimants are similarly situated, the district court permits the representative action to proceed to trial. If not, the district court decertifies the class and dismisses the opt-in plaintiffs without prejudice. The original plaintiffs (the former class representatives) then proceed to trial based on their individual claims. Id.

The courts applying this two-stage certification method do not define “similarly situated,” but consider several factors in deciding whether a class of employees are similarly situated. At the notice stage, the district court determines—usually based on the pleadings and any affidavits which have been submitted—whether the plaintiffs have shown that the putative class members “were together the victims of a single decision, policy or plan” in violation of the law. Mooney, 54 F.3d at 1213-14 and n.8; see also Villatoro v. Kim Son Rest., L.P., 286 F. Supp. 2d 807, 810 (S.D. Tex. 2003). The factors considered include disparate factual and employment settings of the individual plaintiffs, the various defenses available to the employer which appear to be individual to each plaintiff, and fairness and procedural considerations. Lusardi, 118 F.R.D. at 359. In Mooney, for example, the class initially was certified by the district court but, following extensive discovery, the court determined that the plaintiffs were not “similarly situated” and decertified the class, considering: (1) the widely disparate factual, employment, and discharge histories of the individual plaintiffs; (2) the variety of particular, differing, and sometimes unique defenses available to the defendant in contesting the varied and disparate claims of 130 or more employees; and (3) fairness and procedural considerations. 54 F.3d at 1214-16.

The Eleventh Circuit applies a slightly different test, allowing that “a plaintiff may establish that others are ‘similarly situated’ without pointing to a particular plan or policy, [however,] a plaintiff must make some rudimentary showing of commonality between the basis for his claims and that of the potential claims of the proposed class, beyond the mere facts of job duties and pay provisions.” Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1270 (N.D. Ala. 2004)(citing Grayson v. K Mart Corp., 79 F.3d 1086, 1095-96 (11th Cir. 1996)); see also Hipp v. Liberty Nat’l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001). Other courts have considered factors such as job titles, geographic locations, relevant time periods and relevant decision-makers to determine whether employees are similarly situated. Reyes v. Carnival Corp., 2005 WL 4891058 at *7 (S.D. Fla.) (citing Grayson and Hipp).

In addition to addressing whether potential class members are similarly situated, at least in the Eleventh Circuit, courts may consider whether there are other potential plaintiffs who desire to opt-in to the collective action. MacKenzie v. Kindred Hospitals East, L.L.C., 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003) (citing Dybach v. State of Fla. Dept. of Corrections,
942 F.2d 1562, 1567 (11th Cir. 1991). In *MacKenzie* the court denied plaintiff’s motion for notice based on plaintiff’s failure “to present any evidence of any individual’s interest in joining the lawsuit.” *Id.* As evidence of the existence of other employees who desired to opt-in to the collective action, courts consider any consents filed by employees, affidavits of other employees, and expert testimony that other potential class members exist. *Davis v. Charoen Pokphand (USA) Inc.*, 303 F. Supp. 2d 1272, 1278 (M.D. Ala. 2004). “[A] plaintiff’s mere stated belief in the existence of other employees who desire to opt-in is insufficient.” *Id.* (denying plaintiff’s motion for conditional certification and notice).

In sum, the key question under the *Lusardi* approach to class certification for § 216(b) collective actions is whether the putative plaintiffs are “similarly situated.” The courts address this question twice, once to determine whether to give notice to potential class members of their right to “opt-in” (and whether to allow discovery of potential class members’ names and addresses for such notice), and a second time, after discovery, to determine whether the class members are sufficiently similarly situated to justify trying their claims collectively.

A very few federal courts have followed the “spurious class action” approach, requiring the putative plaintiffs in a section 216(b) collective action to meet the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure—i.e., numerosity, commonality, typicality, and adequacy of representation. *Shushan v. University of Colorado*, 132 F.R.D. 263 (D. Colo. 1990). However, most federal courts considering the *Shushan* approach have criticized it. See, e.g., *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (finding a “fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 216(b)”); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (rejecting the Rule 23 class requirements and finding that the district court did not err in applying the “ad hoc” two-step approach); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n. 12 (11th Cir. 1996) (“it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under [Rule] 23”); *King v. GE Co.*, 960 F.2d 617, 621 (7th Cir. 1992) (stating that the section 216(b) procedure preempts the Rule 23 class action procedure); *Kaluom v. Stolt Offshore, Inc.*, 474 F.Supp. 2d 866, 872 (S.D. Tex. 2007) (finding the *Shushan* approach “unjustifiably punitive” because, under § 216(b), unlike Rule 23 class actions, statutes of limitation are not suspended until written consent by the opt-in plaintiffs is filed).

**D. Defense Strategies for Defeating Certification.**

Preventing or limiting class certification is the employer’s most potent strategy for limiting exposure to potentially enormous damage awards or settlements of collective FLSA claims. The employer can fight class certification directly, by contesting whether its employees seeking to form a class are in fact similarly situated, and indirectly, by attempting to resolve the representative plaintiff’s individual claim prior to class certification.

1. **Emphasizing Individual Circumstances to Avoid a Finding that Employees Are Similarly Situated.**

Employers’ counsel may attack collective certification directly by convincing the court that the putative class members are not similarly situated. Employers can: (1) refuse to
stipulate to notice; (2) argue that the proposed plaintiff class is not sufficiently similarly situated to warrant court-managed notice; (3) seek decertification of a conditional class once discovery has been completed; and (4) limit the breadth of the proposed class, both at the notice and decertification stages. The key to defeating certification, obtaining decertification, or narrowing the class is to focus on the individualized inquiries necessary to determine the employer’s liability to each employee. Testimonial evidence, including statements from other employees contradicting the plaintiffs’ allegations, may help to establish the wide variances in duties and circumstances of employment among the members of the proposed class. Employers also must introduce evidence that there is, in fact, no unified company decision, policy or plan that connects the proposed plaintiffs’ claims.

For example, in *Holt v. Rite Aid Corporation*, the court denied plaintiffs’ motion to facilitate notice to potential class members. 333 F. Supp. 2d 1265, 1275 (N.D. Ala. 2004). Plaintiffs contended that their employer had a uniform policy and practice that required “managerial” employees to work in excess of 40 hours per week without overtime pay and that the employees were not, in fact, managers because they performed the same tasks as hourly employees. *Id.* at 1269. The court noted that the plaintiffs were not pointing to a job description to demonstrate that the employees were primarily performing simple tasks; rather, they relied on testimony to establish the fact they were similarly situated. *Id.* at 1271. In response, the employer submitted the testimony of other employees who would have fallen into the class but who disputed the plaintiffs’ testimony. *Id.* at 1273. The employees objected to the court’s consideration of the testimony offered on behalf of the employer, but the court concluded that it was “appropriate to carefully consider the submissions of the parties with respect to the collective action allegations.” *Id.* at 1273-74. The court concluded that resolution of the claims required an individualized factual inquiry, which involved examining each employee’s day-to-day tasks. *Id.* at 1271.

Similarly, in *Mike v. Safeco Insurance Co.* the plaintiff claimed that insurance claims representatives had been incorrectly classified as exempt administrative employees under the FLSA and moved to certify a collective class. 274 F. Supp. 2d 216, 220 (D. Conn. 2003). The court refused to certify the class because the dispute was “extremely individual and fact-intensive.” *Id.* The court explained that the dispute required “‘a detailed analysis of the time spent performing administrative duties’ and ‘a careful factual analysis of the full range of the employee’s job duties and responsibilities.’” *Id.* Accordingly, the court held that the plaintiff had not provided evidence of a common thread binding his proposed class of employees. *Id.* at 220–221.

2. **Making an Offer of Judgment?**

In limited contexts, an employer may attempt to avoid collective action liability by quickly resolving the claim of the individual bringing the lawsuit. One way for an employer to do so is to offer full relief to the named plaintiffs (and any existing opt-in plaintiffs) under Federal Rule of Civil Procedure 68. Although court reaction has been mixed, employers have had some success in resolving putative FLSA collective actions this way prior to conditional class certification. Obviously, the employer and counsel must weigh the risk of liability in a collective action context against the payment necessary to offer the would-be class representative full relief.
Federal Rule of Civil Procedure 68 provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property to the effect specified in the offer, with costs, then accrued . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.


In MacKenzie, the defendant made an offer of judgment to plaintiff for more than full relief of his personal overtime wage claim, including attorneys fees and costs, which the plaintiff refused. Id. at 1214. Defendant then moved for dismissal for lack of subject matter jurisdiction, claiming that its offer of full relief rendered the controversy moot. Id. The Court rejected plaintiff’s argument that mootness arguments based on offers of judgment were inappropriate in FLSA collective actions, reasoning that a forced resolution of plaintiff’s claims does not adversely affect any other potential plaintiff’s rights because of the opt-in nature of § 216(b) actions. Id. at 1216. The Court granted defendant’s motion to dismiss, in a way, by entering judgment for the plaintiff in the amount of the offer. MacKenzie, 276 F. Supp. 2d at 1219. The Court placed great importance on two facts in making its decision: (1) no other individuals had opted-in to the collective action, or even shown an interest in doing so; and (2) plaintiff did not dispute that the amount of the offer, which was based on the employer’s produced payroll records, was greater than any amount plaintiff could have recovered at trial. Id. at 1214, 1216.

Similarly, in Taylor v. CompUSA the employer made full offers of judgment to the four plaintiffs and nine opt-in plaintiffs who alleged that CompUSA improperly classified their positions as non-exempt. 2004 WL 1660937 (N.D. Ga. 2004). The employer then argued that the case was moot because the plaintiffs had been offered full relief based on their own testimony and the action did not affect the rights of any of the employees who had not opted-in to the lawsuit. The court agreed and denied the plaintiffs’ motion to certify the matter as a collective action. Id.

In Waggener v. Cracker Barrel Old Country Store, Inc. the Eastern District of Texas dismissed an employee’s collective action claims after the employer made a Rule 68 offer of judgment. No. 1:03-CV-0249, Slip Op. at 13 (Mar. 24, 2004). The employer made the offer of judgment for more than four times the full amount of damages to which the plaintiff would be entitled if he prevailed at trial, requested that the court compel acceptance of the offer of judgment, and sought dismissal of the collective action as moot. Id. at 1, 3. The court found that the proposed judgment offered full relief and that an offer of full relief, even if not accepted, divested the court of jurisdiction. Id. at 12. The court specifically rejected arguments that the employer was manipulating Rule 68 to avoid liability under the FLSA, explaining that because plaintiffs have the decision whether to opt-in to the action, the rights of the class members are
not determined by the representative’s actions, and therefore resolution of the named plaintiff’s claim did not compromise the right of any other employee to sue the employer. *Id.* The court noted that no other plaintiffs remained in the suit and stated that the “[m]ere expectation that additional plaintiffs may eventually come forward is insufficient to satisfy the ‘opt-in’ requirement of an action under the FLSA.” *Id.*

Courts also have granted an employer’s motion to dismiss for lack of jurisdiction based on an offer of judgment where the plaintiff alleged both an FLSA collective action and a state law-based Rule 23 class action. *Ward v. Bank of New York*, 455 F. Supp. 2d 262, 270 (S.D.N.Y. 2006); accord *Briggs v. Arthur T. Mott Real Estate, L.L.C.*., 2006 WL 3314624 (E.D.N.Y.). The *Ward* court held that the offer of judgment of full relief on plaintiff’s FLSA claim rendered that claim moot, thus depriving the court of jurisdiction, where no additional plaintiffs had opted in and there was no dispute that the amount of the offer was sufficient to be full relief. *Ward*, 455 F. Supp. 2d at 270. Then, the Court exercised its discretion to dismiss the state law class action claim (which had not yet been certified), under the supplemental jurisdiction statute, 28 U.S.C. § 1367. *Id*; see also *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (holding that a district court’s denial of a motion to notify potential opt-in plaintiffs may not be reviewed on appeal after the named plaintiff’s personal claims have become moot because of a settlement).

The common threads in these cases have been that all existing individual plaintiffs or opt-ins received an offer and that the amount of the offer indisputably was greater than the full amount of damages the plaintiffs could be awarded at trial. Not all courts have been receptive of this strategy. In *Villatoro v. Kim Son Restaurant, L.P.*, the court issued class notice even though the plaintiff had rejected an offer of judgment covering all of his alleged damages and attorneys’ fees. 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003). The defendant did not argue mootness; rather, the defendant contended that the rejection showed an intent merely to incur attorneys’ fees. *Id.* The court found that plaintiff’s “rejection of a Rule 68 offer is not relevant to the issue presently before the Court, namely, whether there are individuals similarly situated to her in regard to underpayment of wages.” *Id.* Other courts have denied an employer’s motion to dismiss, typically when there is a dispute about whether the offer of judgment constitutes full relief, or when there is evidence of additional employees wishing to opt-in. See, e.g., *Geer v. Challenge Fin. Inv. Corp.*, 2006 WL 704933 (D. Kan.); *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517 (S.D. Fla.); *Reyes v. Carnival Corp.*, 2005 WL 4891058 (S.D. Fla.). A state court in Illinois also has rejected a mootness defense, finding that dismissal would violate public policy. See *Gelb v. Air Con Refrigeration and Heating*, 761 N.E.2d 265 (Ill. App. 2001) (explaining that “even if a court is to conclude, as we have, that full tender has been made, a question still exists as to whether the tender unfairly ‘picked off’ the prospective class action representative without offering him a full opportunity to develop his class action claim”).

The ultimate viability of offers of judgment as a defense to potential FLSA collective actions may vary with the jurisdiction and judge. However, early resolution of individual plaintiff’s claims to minimize liability remains a defense strategy worth considering.
3. Avoid Private Litigation through Self-Reporting to the DOL and a Consent Judgment.

An option for avoiding private litigation and the issues associated with aggressive plaintiffs’ counsel is to self-report and reach a settlement with the WHD of the DOL. For obvious reasons, this strategy requires a good working relationship with the local and regional district of the DOL that geographically would handle the matter. The filing of a consent judgment, giving effect to a settlement with the DOL, cuts off any private right of action as to the matter resolved.

Among points to consider are the risk of liability, the total exposure, the likelihood of the matter becoming an item for private litigation, and the existence of similar risky practices in other areas business divisions.

III. FLSA Collective Actions and State Law Class Actions.

A. Developments with “Dual-Filed” FLSA Collective Actions/State Law Class Actions in Federal Courts.

Many states have parallel wage and hour legislation that tracks or expands the Fair Labor Standard Act’s minimum wage and overtime requirements. Although federal law class wage claims must comply with the “opt-in” collective action procedure of section 216(b); state law wage claims provide the opportunity for a Rule 23 “opt-out” class action. See Matthew W. Lampe and E. Michael Rossman, Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action, 20 LAB. LAW. 311, 311 (2005). Because there are pros and cons to each type of proceeding, as well as to the varying remedies available under the FLSA and state law, employees are increasingly likely to “dual-file”—making both a state wage and hour class claim and a FLSA collective action claim in the same lawsuit. Id. Accordingly, federal district courts face the difficult management task of coordinating “opt-in” and “opt-out” class certification procedures. Before the enactment of the Class Action Fairness Act in 2005, federal jurisdiction over state law wage claims in such hybrid lawsuits was always based on supplemental jurisdiction, governed by 28 U.S.C. § 1367. Federal courts facing dueling “opt-in” and “opt-out” actions could, and often did, exercise their discretion to decline supplemental jurisdiction over the state law claims under § 1367(c). See, e.g., DeAsencio v. Tyson Foods, Inc., 342 F. 3d 301, 312 (3rd Cir. 2003) (holding that district court abused its discretion in exercising supplemental jurisdiction over Pennsylvania state law wage claim which presented novel and complex questions of state law and substantially predominated over FLSA claim); Jackson v. City of San Antonio, 220 F.R.D. 55, 59–60 (W.D. Tex. 2003) (finding that exercising supplemental jurisdiction over state law class action claim, although stemming from a common nucleus of operative fact as the FLSA claim, would be unwieldy because the procedures for handling opt-in federal collective actions and opt-out Rule 23 class actions are irreconcilable); Craven v. Canal Barge Co., Inc., No. 03-30849, 2004 WL 628884 (5th Cir. 2004) (holding that court’s jurisdictional dismissal of supplemental state law claims, so long as it is not a dismissal of the complaint, is not appealable).

More recently, however, federal courts confronted with dual-filed lawsuits have opted to exercise their supplemental jurisdiction over the accompanying state law class claims.
See, e.g., Lindsay v. Government Employees Ins. Co., 448 F.3d 416 (D.C. Cir. 2006) (reversing district court’s decision that FLSA opt-in class certification procedure precluded court from exercising jurisdiction over state law wage class action); Scholtisek v. The Eldre Corp., 229 F.R.D. 381 (W.D.N.Y. 2005) (granting conditional certification to opt-in FLSA class as well as class certification of state law class claims); cf. In re Farmers Ins. Exch., 466 F.3d 853 (9th Cir. 2006) (reviewing district court’s decision after bench trial of FLSA collective action and state law class action claims of insurance adjusters regarding overtime wages).

In DeAsencio v. Tyson Foods, Inc., current and former employees of chicken-processing plants brought claims for overtime wages based on the employer’s alleged practice of not paying employees for time spent donning and doffing required protective gear. 342 F.3d 301, 304 (3rd Cir. 2003). The plaintiffs brought a collective action under the FLSA and a Rule 23 class action based on the Pennsylvania Wage Payment and Collection Law (“WPCL”). Id. The district court granted plaintiffs’ request to issue notice to potential class members under the FLSA, and the employer mailed the court-approved notice. Id. at 304-05. By the end of the notice period, and after the court dismissed time-barred claims, the FLSA class totaled 447 persons. Id. After the close of discovery, the district court granted the plaintiffs’ motion for certification of a state law opt-out class of approximately 4100 persons. Id. Tyson appealed the class certification order, arguing that the district court should not have exercised supplemental jurisdiction over the state law class claim. Id. The court of appeals first held that the district court did not abuse its discretion in determining that the FLSA and WPCL actions “arose from the same controversy and shared a common nucleus of operative fact.” DeAsencio, 342 F.3d at 308. However, the court of appeals held the district court should have declined jurisdiction under section 1367(c). The WPCL claim required the plaintiffs to prove the existence of an implied contract—a legal hurdle not required by the FLSA. Id. at 309. Given the difference in size between the federal class and the state class, as well as this additional element in the state wage claim, the court concluded that the state-law action substantially predominated over the FLSA action. Id. at 312. In addition, the state law claim presented a novel and complex question of state law because Pennsylvania courts had not yet decided whether an implied contract could give rise to a WPCL claim. Id. at 309-10. Accordingly, the court held that the district court had abused its discretion in exercising supplemental jurisdiction over the Pennsylvania law claim. Id. at 312 (stating that “the inordinate size of the state-law class, the different terms of proof required by the implied contract state-law claim, and the general federal interest in opt-in wage actions suggest the federal action is an appendage to the more comprehensive state action”). In making this judgment, the court may have been influenced by its perception that “certification of the state-law class was plaintiffs’ second line of attack when the FLSA opt-in period yielded a smaller than desired federal class.” Id. See also Evancho v. Sanofi-Aventis U.S. Inc., No. CV 07-2266(MLC), 2007 WL 4546100 (D.N.J. Dec. 19, 2007) (“Plaintiffs . . . are not permitted to circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA”) (quotations omitted).

In contrast to DeAsencio, the D.C. Circuit in Lindsay v. Government Employees Ins. Co. concluded that the district court erred in refusing to exercise supplemental jurisdiction over a state law class claim for overtime wages. 448 F.3d 416, 418 (D.C. Cir. 2006). Plaintiffs were auto damage adjusters who claimed that their employer improperly classified them as exempt administrative employees under federal and state law. Plaintiffs sought certification of an “opt-in” FLSA collective action class and an “opt-out” Rule 23 class for the New York
Minimum Wage Act claim. *Id.* The district court granted plaintiffs’ motion for FLSA notice, but refused to certify the Rule 23 state law class as to claimants who chose not to opt-in to the FLSA collective action. *Id.* at 418-20. The district court concluded that it could exercise supplemental jurisdiction over the state law claims of only the initial plaintiffs and any opt-in plaintiffs. *Id.* at 420. The court of appeals disagreed. First, the court rejected the district court’s conclusion that 29 U.S.C. § 216(b) was a federal statute that expressly limited the court’s supplemental jurisdiction under 28 U.S.C. § 1367. *Id.* at 422. It also rejected the defendant’s argument that the New York law claims were not part of the same case or controversy as the FLSA claims. *Lindsay,* 448 F. 3d at 423. “[M]embers of both classes performed the same type of work for the same employer and were deprived of overtime compensation as a result of the same action taken by their employer.” *Id.* at 424. The court finally concluded that the procedural difference between a Rule 23 opt-out class and a section 216(b) opt-in class could not “curtail section 1367’s jurisdictional sweep.” *Id.* Accordingly, the court of appeals reversed the district court’s denial of class certification to the state law claimants who did not also opt-in to the FLSA claim, and remanded for a circumscribed determination of whether the district court should exercise supplemental jurisdiction over the state law class as a whole. *Id.* at 425. The Court stated that it did not consider the difference between the Rule 23 opt-out procedure and the opt-in collective action procedure to be “exceptional circumstances” that provide “other compelling reasons” for declining jurisdiction under section 1367(c)(4). *Id.*

The *DeAsencio* and *Lindsay* decisions illustrate the different outcomes that are possible when a federal court decides whether state-law class action claims should be heard under its discretionary exercise of supplemental jurisdiction. Employers faced with dual-filed FLSA collective actions and state law class claims should consider contesting jurisdiction of the state law claims, but must realize that a dismissal of a state law claim for lack of federal jurisdiction is a dismissal without prejudice. The plaintiffs may simply refile the state law class claims in state court—forcing the employer to fight on two fronts. An alternative strategy employers should consider is using the availability of the collective action procedure may to attack the certification under Rule 23 of the state law class. *Lampe,* et al, 20 LAB. LAW. at 331. For example, once a conditional collective action has been certified, an employer may use the small number of opt-ins to argue against the numerosity requirement of Rule 23 for the state law class. *Id.* (discussing *Thiebes v. Wal-Mart Stores, Inc.*, 2002 WL 479840 (D.Or. Jan. 9, 2002)). The existence of the collective action procedure also may be used to argue against the superiority of Rule 23. *Id.* (discussing *Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*, 2002 WL 1359411 (N.D. Ill. June 21, 2002)). The *Muecke* court held that “[b]ecause all of the companies’ present and former employees will have the chance to decide whether to opt-in to the [§ 216(b)] case, and because those who wish to do so will be before the Court, it makes no real sense to the Court to certify a class that will automatically include all of the employees unless they opt out.” 2002 WL 1359411 at *2. In sum, although dual-filed actions are increasingly used by plaintiffs to gain a strategic advantage, employers may find ways to use the dual-filing to their own benefit. *Lampe,* et al, 20 LAB. LAW. at 311.

### B. The Class Action Fairness Act of 2005

On February 18, 2005, the Class Action Fairness Act of 2005 (“CAFA”) was based by Congress out of concern that abuses of the class action device had caused harm to class members, adversely affected commerce and undermined public respect for the judicial system.
CAFA amends 28 U.S.C. § 1332 to create federal jurisdiction over class actions with minimal diversity of citizenship (i.e., one plaintiff and one defendant of diverse citizenship), and at least $5 million in controversy. 28 U.S.C. § 1332(d)(2). CAFA also adds a removal statute specifically for class actions, 28 U.S.C. § 1453, which allows any defendant to remove a class action without the consent of all defendants, lifts the one-year limitation on removal under § 1446(b) for class actions, and provides for an expedited appeal from an order granting or denying a motion to remand a class action. 28 U.S.C. §§ 1453(b)-(c).

CAFA’s expansion of federal court’s diversity jurisdiction applies to all state-law based class actions, including wage and hour class actions. The revisions to section 1332 include provisions under which the district court “shall” or “may” decline to exercise its jurisdiction. 28 U.S.C. §§ 1332(d)(3) & (4). The district court shall decline to exercise its jurisdiction under the “local controversy exception” and “the home-state exception.” 28 U.S.C. §§ 1332(d)(4)(A)-(B). Under the local controversy exception, the district court shall not exercise jurisdiction if (1) greater than two-thirds of the plaintiffs are citizens of the forum state; (2) at least one defendant whose alleged conduct forms a significant basis for the claim and from whom significant relief is sought, is a citizen of the forum state, (3) the principal injuries were incurred in the forum state; and (4) no other class action of similar claims was filed in the preceding three years. 28 U.S.C. § 1332(d)(4)(A). Under the home state exception, the district court shall not exercise jurisdiction if (1) two-thirds or more of the plaintiffs; and (2) the “primary defendant” are citizens of the forum state. The district court also “may, in the interests of justice and looking at the totality of circumstances,” decline to exercise jurisdiction based on various factors, including whether the claims involve matters of national interest. See 28 U.S.C. §§ 1332(d)(3)(A)-(F).

The federal district courts are just beginning to provide interpretive substance to the multitude of undefined terms in the new statutory language, including “significant basis,” “significant relief” under the local controversy exception, and “primary defendant” under the home rule exception. See, e.g., Lao v. Wickes Furn. Co., 455 F. Supp. 2d 1045, 1047 (C.D. Cal. 2006) (noting that CAFA is a statute in which “some major terms are left undefined” and is “a headache to construe”). Furthermore, the courts must grapple with how to allow the parties to prove both the $5 million amount in controversy as well as the number of plaintiffs resident of the forum state. See, e.g., Rippee v. Boston Mkt. Corp., 408 F. Supp. 2d 982, 986-987 (S.D. Cal. 2005) (in wage and hour case, allowing expedited discovery on amount in controversy issue, but refusing to allow class representative’s request for class survey as part of discovery, in part because defendant bore the burden of proving the $5 million amount in controversy).

In Lao, the court considered whether to remand a removed putative class action brought by furniture salespersons for unpaid wages and overtime under California law. 455 F. Supp. 2d at 1047. The defendants were a local California furniture store, as well as its out-of-state corporate owners. Id. At issue was whether the $5 million amount in controversy was met, whether it was a home-state controversy, and whether it was a local controversy. Id. at 1049. The court concluded that defendants had proven the amount in controversy. Id. at 1051. The Court then concluded, contrary to other courts, that defendants, as the removing party, bore the burden of proof with respect to the home-state and local controversy exceptions. Lao, 455 F.
Supp. 2d at 1060. Because most of the plaintiff employees worked for defendants in California, there was no serious dispute that two-thirds or more of the plaintiffs were residents of the forum state. *Id.* The court found that the furniture store owner, Wickes, was the primary defendant and was a citizen of the forum state, because it had its principal place of business in California. *Id.* at 1066. Accordingly, the district court remanded the case to state court, concluding that the local controversy rule applied. *Id.*

Despite the contrary conclusion in *Lao*, three circuit courts of appeals have held that the burden to prove exceptions to CAFA jurisdiction, such as the local controversy and home state exception, falls on the party seeking to establish the exception, usually the plaintiffs. *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Frazier v. Pioneer Arms, LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Hart v. Fedex Ground Package Sys., Inc.*, 457 F.3d 675, 679-80 (7th Cir. 2006); *see also Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70, 79 (S.D.N.Y. 2006) (stating that “placing the burden of the applicability of a CAFA exception on the party challenging federal jurisdiction . . . better protects against the risk of state courts adjudicating class actions with national ramifications . . . precisely the harm that Congress sought to alleviate . . .”).

It seems likely that, as in *Lao*, many wage and hour class claims will be subject to the home state exception because most of the plaintiff-employees will work for the defendant-employer in the state in which the employer has its principal place of business. Similarly, the local controversy exception will also often apply to employer-employee class disputes as most employees will reside where they work. *See, e.g., Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70, 79-80 (S.D.N.Y. 2006) (in case for unpaid wages under New York law, granting motion to dismiss for lack of jurisdiction based on application of the local controversy exception). In addition, many wage and hour claims will not meet the $5 million amount in controversy threshold. Thus, the effect of CAFA on wage and hour claims is likely to be felt mostly by multi-state, national employers. However, federal supplemental jurisdiction over state wage and hour class claims dual-filed with FLSA claims still exists in the wake of CAFA’s enactment; federal courts will continue to make decisions whether to exercise this discretionary jurisdiction over state-law wage and hour class actions.

IV. **Arbitration Agreements: Can Employers Opt Out?**

One way for an employer to manage the potential expense of wage and hour class or collective litigation is to establish a private dispute resolution program in which employees agree to arbitrate all claims for payment of wages. If an employee and employer have entered into an arbitration agreement, and the agreement covers claims for wages or other owed compensation, the employee may be barred from prosecuting a collective or class action in federal or state court. *See, e.g.*, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (affirming district court’s grant of motion to compel arbitration); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294 (5th Cir. 2004) (affirming district court’s grant of employer’s motion to compel plaintiffs to arbitrate FLSA claims); *Bailey v. Ameriquest Mtg. Co.*, 346 F.3d 821 (8th Cir. 2003) (reversing district court’s denial of employer’s motion to compel arbitration); *Penny v. Frisch’s Rest.*, 2005 WL 1432759 (6th Cir.) (reversing denial of employer’s motion to compel arbitration).
In Caley, a group of employees filed two class action lawsuits against Gulfstream, one raising FLSA claims and the other bringing claims under the ADEA and ERISA. Caley, 428 F.3d at 1364. The district court granted Gulfstream’s motions to compel arbitration in both cases, and the plaintiffs appealed. Previously, Gulfstream had instituted a comprehensive dispute resolution program, including arbitration, for all employment-related disputes, by mailing to employees a copy of the program, an explanatory cover letter, and a question and answer form, as well as posting the same information on its website. Id. The cover letter provided an effective date for the program, and stated that the program would be a “condition of continued employment.” Id. The program itself also stated that it was a contract and continued employment would constitute acceptance. Id. at 1365. The court of appeals concluded that the dispute resolution program satisfied the Federal Arbitration Act’s requirement of a written agreement to arbitrate. Caley, 428 F.3d at 1370. The court rejected the plaintiffs’ argument that their waiver of the right to a jury trial for a federal statutory claim was governed by a heightened “knowing and voluntary” standard, reasoning that “a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum.” Id. at 1371. The court concluded that general state contract law principles governed the agreement’s enforceability, and that the agreement in this case was enforceable under Georgia law. Id. at 1376-1279. In so holding, the court rejected plaintiffs’ arguments that: (1) continued employment was insufficient to constitute acceptance of the arbitration contract offer; (2) there was no consideration (the court found that Gulfstream could only modify the program with notice and was bound by the provisions in effect at the time it receives a claim); and (3) the program’s prohibition of class actions rendered it unconscionable. Id.

Similarly, in Carter v. Countrywide Credit Indus., Inc., the Fifth Circuit affirmed the district court’s motion to compel arbitration, holding that FLSA claims are subject to arbitration, and that an individual employee’s agreement providing for arbitration of such claims was enforceable. 362 F.3d at 297. The court noted that “individuals seeking to avoid the enforcement of an arbitration agreement face a high bar,” and that “there is nothing in the FLSA’s text or history” suggesting that the statute precludes arbitration. Id. The court rejected plaintiffs’ claim that “the inability to proceed collectively deprives them of substantive rights available under the FLSA,” relying on the Supreme Court’s decision with respect to ADEA claims in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991). Carter, 362 F.3d at 298. However, the court agreed with the district court’s conclusion that the fee-splitting provision of the arbitration agreement was unenforceable because it imposed prohibitive costs on employees. Id. at 300. The court of appeals approved the district court’s decision to sever and reform the fee-splitting provision, rather than invalidate the entire arbitration agreement. Id. Finally, the court concluded that the arbitration agreement was not unconscionable under Texas law. Id. at 301; see also Bailey v. Ameriquest Mtg. Co, 346 F.3d 821, 823 (8th Cir. 2003) (reversing district court’s denial of motion to compel arbitration based its declaration that the arbitration agreement was unenforceable “because some of its procedural terms and remedial limitations appear facially inconsistent with the FLSA,” and stating that this declaration “reflects an outmoded judicial hostility to arbitration”).

One question that is often raised in motions to compel arbitration of employment claims is whether the preclusion of class claims renders the arbitration agreement unconscionable. Recently, even a California court of appeals held that a employment arbitration contract waiving class actions was enforceable. König v. U-Haul Co. of Calif., 145 Cal. App. 4th
Konig brought an overtime wage action against U-Haul under California state law, claiming that he and other similarly-situated employees were wrongfully classified as exempt. *Id.* at 1246. U-Haul had in effect a policy requiring arbitration of all employment disputes, to which each employee, including plaintiff, was bound by their continued employment and acknowledgment thereof. *Id.* at 1247. The arbitration policy also expressly provided that the employer and employee would waive any right to bring class claims. *Id.* Applying the rule established by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the court affirmed the district court’s order compelling arbitration, concluding that the class action waiver was not unconscionable under California law. *Id.* at 1255. Under California law, for a contract to be unenforceable due to unconscionability, it must be both procedurally and substantively unconscionable. *Discover Bank* had held that a class action waiver in a consumer contract of adhesion in which disputes between the parties “predictably involve small amounts of damages” could be considered both procedurally and substantively unconscionable if the “party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Konig*, 145 Cal. App. 4th at 1253 (citing *Discovery Bank*, 36 Cal. 4th at 162-63). The *Konig* court reasoned that an arbitration agreement imposed as a condition of employment, like a consumer contract of adhesion, was procedurally unconscionable because of the inequality of bargaining power. *Id.* at 1252. However, the agreement in *Konig* was not substantively unconscionable because the plaintiff failed to meet its burden of proof that “predictably . . . small amounts” of damages would be payable to class members. *Id.* at 1253. Accordingly the court of appeals affirmed the district court’s order dismissing plaintiff’s class claims and compelling arbitration. *Id.*

Employers should be aware, however, that not every employment arbitration agreement covering FLSA claims will be enforced. See, e.g., *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005). In *Walker*, the Sixth Circuit affirmed the district court’s denial of a restaurant chain’s motion to compel arbitration of employees’ FLSA collective action claims because the arbitration agreement was unenforceable. 400 F.3d at 372. The employer, restaurant chain Ryan’s, had outsourced its private employment resolution dispute procedure, relying on a third-party arbitration service. *Id.* The evidence demonstrated that applicants for employment with Ryan’s were given a stack of paperwork to sign before hiring, which included an arbitration agreement and a description of the dispute resolution procedure. *Id.* These materials rarely were explained by the manager providing them to the applicant, and there was additional evidence that explanations given, if any, were misleading and did not fairly disclose that the employees were waiving their rights to have disputes heard in court. *Id.* at 382. The arbitration agreements signed by the employees were contracts with the third-party service, rather than the employer. *Id.* at 374. The employee’s agreements stated that Ryan’s had a separate contract with the third-party service. *Id.* at 375. In addition, the selection of arbitrators relied on a pool of employees selected from other employers who utilized the third-party’s arbitration management service. *Id.* at 375. The Sixth Circuit concluded that this arbitration mechanism was unenforceable under Tennessee contract law for a number of reasons. First, the court held that the employee’s agreement to arbitrate was not supported by sufficient consideration. The employer did not make a corresponding promise to employees to arbitrate any disputes; its agreement was with the third party service. *Walker*, 400 F.3d at 379. Nor was the employer’s promise to consider the employment application sufficient consideration for the arbitration agreement, especially given evidence that Ryan’s hired some applicants who had not signed the agreement, rendering this promise illusory. *Id.* In addition, the court concluded that
the employees’ waiver of their right to file suit in court was not knowing or voluntary, considering the low educational level of most applicants, the unskilled, low-wage nature of the jobs they were seeking, and the misleading comments by Ryan’s managers about the arbitration agreement. *Id.* at 381-82. Finally, the court concluded that the procedure for selection of arbitrators was not neutral. *Id.* at 386-88.

Similarly, in *Moran v. Ceiling Fans Direct, Inc.*, the Fifth Circuit affirmed the district court’s denial of an employer’s motion to compel arbitration of employees’ FLSA collective action claims because the arbitration agreement was unenforceable. 239 Fed. Appx. 931, 937 (5th Cir. 2007) (per curiam). When the employer, Ceiling Fan Direct, Inc. (“CFD”), first introduced its arbitration policy, a handout describing the policy was offered, but not actually handed out, to CFD employees. *Id.* at 937. The policy was not read aloud, explained, or discussed in any detail although CFD was aware that several employees did not obtain a copy of the program. *Id.* CFD also neglected to tell its employees that continued employment would constitute acceptance. *Id.* Later, when the policy was placed in the employee handbook with a place for employees to sign and acknowledge, CFD did not require its employees to sign. *Id.* Moreover, CFD’s general manager sent CFD employees mixed messages by telling them that the company would “take care of them” when they raised concerns about their compensation. *Id.* For these reasons, the Fifth Circuit concluded that CFD did not conclusively establish the unequivocal notification required under Texas contract law, and therefore, CFD’s arbitration policy was unenforceable. *Id.*

*Walker* and *Moran* teach employers to act carefully when implementing an arbitration program.

Courts also are less likely to enforce employment arbitration agreements contained in collective bargaining agreements than those made with individual employees. See, e.g., *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259 (5th Cir. 1998). As the Fifth Circuit noted in *Carter*:

Undaunted, the Carter Appellants cite [5th Circuit case law] for the proposition that FLSA claims are not subject to arbitration. However, [these cases do not] support the Carter Appellants. Significantly, *Barrentine [v. Arkansas-Best Freight System, Inc.], 450 U.S. 728 (1981)*] and *Bernard [v. IBP, Inc.], 154 F.3d 259 (5th Cir. 1998)*] involved arbitration agreements embedded in collective-bargaining agreements, not individually executed pre-dispute arbitration agreements like the ones at issue here. This difference is not insignificant; the Supreme Court explicitly distinguished between these two types of arbitration agreements in *Gilmer [v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)]* ultimately concluding that the former may not be subject to arbitration while the latter are.

*Carter*, 362 F.3d at 298.

Given that courts are likely to enforce individual employees’ agreements to arbitrate wage and hour claims, employers should consider whether they would prefer to litigate such claims in an arbitral forum, possibly without the potential for class claims. Such arbitration
agreements, as well as more comprehensive dispute resolution programs, should be carefully crafted to comply with applicable state contract law.

V. Recent Developments in Wage and Hour Law

A. The 2004 Changes in DOL Regulations for Exempt Classifications.

In 2004, the Department of Labor issued updated interpretive regulations regarding the overtime provisions of the FLSA and the tests for classifying employees as exempt. For years, employers and employees had voiced concerns about the complexity of the old regulations as well as their outdated reference to an economy based on production and administrative work rather than the service industry most dominant today. In drafting the new rules, the DOL relied heavily on a report issued by the General Accounting Office (GAO) in September 1999. According to the GAO, employers were concerned with violating the no-docking rule that form part of the old “salary basis” test and were unsatisfied with the outdated application of the “current duties” test. Employers also complained that the regulations were complex and unevenly applied. In contrast, employees were concerned that the old regulations and the judicial decisions interpreting them did not offer sufficient protection of the forty-hour workweek and the overtime premium pay required by the FLSA.

The new overtime rules increased salary levels attributable to exempt status positions to $425 per week. The DOL contends that this increase will guarantee overtime to 1.3 million additional low-wage workers. The regulations also create a new “standard duties” test to determine whether employees earning between $22,101 and $100,000 per year are entitled to overtime. The new rules focus on an employee’s “primary responsibilities.” Among other things, the new standard duties test imposes new requirements on the executive and administrative exemptions (e.g., requiring meaningful input into hiring, firing, promoting or similar employment decisions for an executive exemption) and offers more examples as to what jobs might qualify for an exemption. The DOL has suggested that the updated duties tests will entitle 10.7 million additional workers to overtime payments. Additionally, the “salary basis” test has been revised to permit full-day deductions for instances of discipline, workplace violence and sexual harassment without losing exempt status for the docked employee. However, the regulations still prevent partial-day deductions. The new regulations expand the “window of correction” and provide a “safe harbor” for employers who have a clearly-communicated policy with a complaint mechanism to remedy improper salary deductions. A side-by-side comparison of the pre-2004 and post-2004 requirements for certain exempt classifications can be found in Appendix A.

Although employers have lived with the new regulations for more than three years now, there still are relatively few judicial decisions regarding their application, principally because the wage and hour claims that have been decided to date mostly concern employment prior to the regulations’ effective date. See, e.g., In re Wal-Mart Stores, Inc., 395 F.3d 1177, 1180, n.2 (applying the regulations that existed from 1993 to 1998).

In Mims v. Starbucks Corp., 2007 WL 10369, 12 Wage & Hour Cas. 2d (BNA) 213 (S.D. Tex. Jan. 2, 2007), the court applied the new executive exemption regulations to the question whether two Starbucks store managers were properly classified as exempt. Id. at *1.
The Court recognized that the two individuals had worked as store managers both before and after the effective date of the new regulations. Id. at n.4. The court stated that the revised executive exemption regulation had increased the weekly salary requirement and added the requirement that the employee have “the authority to hire or fire other employees” or have his or her recommendations as to hiring, firing promotions, etc. be “given particular weight.” Id. The Court noted that “[t]he parties are agreed that, under both the former and current regulations, the only issue is whether Plaintiffs’ ‘primary duty’ is management.” Id. After examining a detailed factual record of the actual activities and duties of the two store managers, the court concluded that they were executive employees who were exempt from the FLSA’s overtime provisions as a matter of law, granting summary judgment to the employer. Id. at *8.

The Mims plaintiffs argued that their “primary duty” was not management because they spent more than half of their time on non-management tasks, such as making and serving coffee drinks. Id. at *4. The court applied 29 C.F.R. § 541.700(a), listing four factors to consider in deciding whether an employee’s primary duty is management, where the managerial employee spends less than 50% of his time on managerial tasks. Id. These four factors are: (1) the relative importance of managerial duties; (2) the frequency of discretionary decisions; (3) freedom from supervision; and (4) relative compensation. Id. The court noted that plaintiffs were the highest-ranking employees in their stores and that they received bonuses based on the success of their particular store. Id. The court relied on one plaintiff’s testimony that he was responsible “for anything that was to go wrong in [their] store[s] and anything that was done correctly.” Id. The court also noted plaintiffs’ testimony that, while performing the customer service tasks of hourly employees, they were acting as a “role model” to the employees they supervised. Id. at *6. Each plaintiff was ultimately responsible for the operations of his store, from hiring and training baristas, to controlling costs, ordering inventory and organizing promotions. Id. Although district managers visited the stores a number of times a week, the court concluded that the store managers were “vested with enough discretionary power and freedom from supervision to qualify for the executive exemption.” Id. at *7.

B. Recent Important Supreme Court FLSA Decisions.

1. IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005). The United States Supreme Court held that time spent by meat processing employees walking between their locker rooms and the production site (1) after donning specialized protective gear and (2) before doffing such safety gear was not excluded from FLSA coverage by Section 4(a) of the Portal-to-Portal Act. Id. at 525. The Court explained that donning and doffing gear that is “integral and indispensable” to the employee’s work, such as required safety gear, is a “principle activity” under Section 4(a) of the Portal-to-Portal Act and that “during a continuous workday, any walking time that occurs after the beginning of the employee’s first principle activity and before the end of the employee’s last principal activity is excluded from the scope of [Section 4(a) of the Portal-to-Portal Act], and as a result is covered by the FLSA.” Id. Accordingly, the employees’ post-donning and pre-doffing walking time was compensable under the FLSA. Id. The Court concluded, however, that time spent by employees waiting to don the first piece of protective gear is “preliminary” to the principal activity under Section 4(a)(2) of the Portal-to-Portal Act and is thus excluded from the scope of the FLSA. Id. at 528.
2. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007). The United States Supreme Court held that 29 C.F.R. § 552.109(a), which applies the Fair Labor Standard Act’s (“FLSA”) exemption for babysitting and companionship services to employees “who are employed by an employer or agency other than the family or household using their services,” was a valid regulation that fell within the scope of Congress’s delegation of authority to the Department of Labor to “fill in statutory gaps” and that the regulation was legally binding under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court explained that although the literal language of 29 C.F.R. § 552.109(a) directly conflicts with the language of 29 C.F.R. § 552.3, which limits the definition of “domestic service employment” to “services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed,” the language of § 552.109(a), which is specifically intended to apply to persons employed by third-party entities, governs. Moreover, the Court explained that “[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedure to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes the Congress intended it to defer to the agency’s determination.” *Id.* at 2350-51. Accordingly, the Court concluded that § 552.109(a) was entitled to binding *Chevron* deference and that the FLSA’s companionship exemption therefore includes domestic service employees who are employed by third party agencies, not just domestic service employees who are employed by the household in which they work. *Id.* at 2350.

C. Other Recent FLSA Decisions.

1. Preliminary and Postliminary Work versus Compensable Work.

*DeAsencio v. Tyson Foods*, Inc., 500 F.3d 361 (3d Cir. 2007). The Third Circuit Court of Appeals held that it was reversible error for a jury instruction to direct the jury to consider whether the donning, doffing, and washing of work gear by chicken processing employees involved a sufficiently laborious degree of exertion when determining whether such activities constituted “work” under the FLSA. At trial, the district court gave the following instruction to the jury:

The law states that that work is any physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued primarily for the benefit of the employer and its business . . . . I said it requires exertion, either physical or mental, but exertion is not, in fact, necessary for all activity to constitute work under the Fair Labor Standards Act. There—an employer, if he chooses, may hire a worker to do nothing or to do nothing but wait for something to happen. So that would be an exception of the usual situation where the definition of work requires exertion.

The plaintiffs claim that their donning, doffing, washing and rinsing activities are work. In deciding whether these activities are work under the law, you may consider the following factors. For each job position, if the donning, doffing, and washing at issue do not require physical or mental exertion, the activities are not work.
Therefore, you may ask yourself, is the clothing heavy or cumbersome, or is it lightweight and easy to put on or take off? Does an employee need to concentrate to wash their hands or gloves or put on or take off these clothes?

*Id.* at *3. In finding that this jury instruction was improper, the Third Circuit explained that the U.S. Supreme Court’s decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), which held that time spent walking and waiting after the start of the continuous workday was compensable under the FLSA, necessarily found that walking and waiting constituted “work” under the FLSA and thus “preclude[d] the consideration of cumbersomeness or difficulty on the question of whether activities are ‘work.’” *Id.* at *8. Rather, the court explained that *Alvarez* supports a broad definition of the term “work,” which can include walking, waiting, and other “non-exertional” acts, and that the relevant question becomes whether such “work,” if preliminary or postliminary, is nevertheless noncompensable under the Portal-to-Portal Act because it is not “indispensable and integral” to the principal activity for which the worker has been employed. *Id.* at *8-9. Accordingly, the Third Circuit concluded that the donning and doffing activity at issue constituted “work” under the FLSA as a matter of law and that it was error for the jury instruction to direct the jury to consider whether the workers “had demonstrated some laborious degree of exertion” in determining whether the workers had engaged in “work.” *Id.* at *10.

*Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007). The Eleventh Circuit held that time spent by airport construction workers traveling on employer-provided vehicles to construction sites within the airport and going through required airport security screening was not compensable time under the FLSA. Relying on the district court’s findings that the construction site was the actual place of performance of the workers’ principal activities and that that the workers did not perform any work while they were riding in the vehicles, the court explained that the time spent by the workers riding in the employer’s vehicles between the security check point and construction site was not part of the “continuous workday” and fell squarely within the exemption set forth in § 4(a)(1) of the Portal-to-Portal Act for “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,” even considering the fact that riding in the employer’s authorized vehicles was the only way for workers to access the construction site after passing through the airport security gate. *Id.* at 1342-43. The court also held that the time spent by the workers going through required airport security screening was not compensable under the FLSA because it constituted exempt “preliminary work” under § 4(a)(2) of the Portal-to-Portal Act. *Id.* at 1344-45. The court explained that although the airport security screening was required by the FAA, it was not required by the employer, and the employer did not particularly benefit from the screening. Accordingly, the court concluded that the time spent going through airport security screening was not “integral and indispensable” to the principal activities for which the workers were employed. *Id.*

*Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007). The Second Circuit Court of Appeals held that time spent by nuclear plant workers passing through multiple layers of security procedures while entering and exiting the plant and time spent donning and doffing protective gear, including metal-capped safety boots, safety glasses, and helmets, did not constitute compensable time under the FLSA. The court explained that although the activities for which the workers sought compensation were arguably “indispensable,” they were not
“integral” to the workers’ principal activities and were thus exempt from compensable work under § 4(a) of the Portal-to-Portal Act. Id. at 593. Interpreting the U.S. Supreme Court’s decision in Steiner v. Mitchell, 350 U.S. 247 (1956), in which it was held that time spent by battery plant workers changing clothes and showering was “integral” to the workers’ principal activities because, without taking such measures, the toxic environment of the battery plant could not sustain life, the court concluded that “when work is done in a lethal atmosphere, the measures that allow entry and immersion into the destructive element may be integral to all work done there.” Id. However, in a non-lethal atmosphere, such as work performed at a nuclear power plant outside of the nuclear containment area, time spent donning and doffing generic protective gear, including steel-toed boots, glasses, and helmets, while “indispensable,” was not “integral” to the workers’ principal activities and fell within the activities classified as preliminary and postliminary work under 29 C.F.R. § 790.7(g). Id. at 594. The court further explained that the security-related activities in which the workers were required to engage, including badge inspection at the plant entrance, a visual check of the interior of the car, passing through a radiation detector, x-ray machine, and explosive material detector, swiping an ID badge, and palming a sensor, were “modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.” Id. at 593. Finally, the court held that the appropriate method for calculating the workers’ regular rate for purposes of overtime pay was to use a weighted average by “adding all of the wages payable for the hours worked at the applicable shift rates and dividing by the total number of hours worked.” Id. at 596.

2. Exempt versus Nonexempt.

Renfro v. Indiana Michigan Power Co., 497 F.3d 573 (6th Cir. 2007). The Sixth Circuit Court of Appeals held that technical writers who were responsible for developing written procedures on how to maintain equipment at a nuclear power plant exercised sufficient discretion and independent judgment to fall within the administrative exemption of the FLSA, despite the fact that they were required to follow a detailed manual on procedure writing. The court explained that “[t]o determine whether an employee, constrained by guidelines and procedures, actually exercises any discretion or independent judgment, we consider whether those guidelines and procedure contemplate independent judgment calls or allow for deviations.” Id. at 577. The court observed that the manual at issue provided only a guideline of various items for the writer to consider when researching and drafting a procedure, recommended certain checks to ensure the feasibility of a procedure once written, and was intended to ensure uniformity of the style and format of the writers’ procedures. Id. It was “not an encyclopedia of strict requirements,” it did “not answer substantive questions that might arise during the research, analysis, and development of a procedure,” and it did not “restrict the technical content of the instructions that are formatted by the general template.” Id. Moreover, the court observed that the approach taken by one technical writer to create a complex procedure often differs from that of another technical writer creating a similar procedure, providing further evidence that the technical writers exercised independent judgment and discretion. Id. at 577-78.

Aguirre v. SBC Communications, Inc., No. H-05-3198, Slip Op. (Sept. 30, 2007). The Southern District of Texas granted summary judgment to Southwestern Bell Telephone (now AT&T) on claims asserted by eight current and former “coach leaders,” who were responsible for managing teams of hourly-paid service representatives staffing AT&T’s customer
service call centers. The plaintiffs alleged that they had been illegally classified as “exempt” employees in their positions as Coach Leaders and that AT&T owed them overtime wages under the FLSA for all hours worked in excess of forty hours per week. *Id.* at 1. In addition, one of the eight plaintiffs alleged that AT&T terminated her employment as a Coach Leader in retaliation for filing a claim for overtime wages under the FLSA. *Id.* In granting summary judgment for AT&T, the court held that the plaintiffs fell within the executive exemption of the FLSA, concluding that the plaintiffs’ “primary duty” was management. *Id.* at 48. The court found that the “overwhelming majority” of the duties performed by the plaintiffs constituted exempt, managerial work and that the plaintiffs exercised a significant amount of discretion, despite the fact that their discretion was circumscribed by detailed company policies. *Id.* at 42-46. The court rejected the plaintiffs’ primary argument that they did not exercise discretion for purposes of the executive exemption because they were subject to direct supervision from their immediate supervisor. *Id.* The Court concluded that “direct supervision” is simply a factor to be considered and that the evidence of direct supervision did “not weigh heavily for or against finding that the primary duty of the plaintiffs was managerial.” *Id.* at 46. The court also concluded that the retaliation claim failed as a matter of law because AT&T stated a legitimate, non-retaliatory reason for the plaintiff’s discharge (poor performance) and because the plaintiff failed to raise a fact issue as to a causal link between the filing of her overtime claims and her discharge. *Id.* at 60-61.

3. Calculating Overtime.

*Allen v. Board of Public Education for Bibb County,* 495 F.3d 1306 (11th Cir. 2007). The Eleventh Circuit Court of Appeals held that the defendant school board did not violate the FLSA when it paid a class of bus drivers and bus monitors different rates of pay depending on the type of route driven and when it paid overtime wages based on a “blended rate.” On a regular route, the school board paid a regular rate based on the employee’s years of service to the school; however, on an additional route, the school board paid a set regular rate of $6.00 per hour for field trips and a set regular rate of $7.00 per hour for all routes other than regular routes and field trips. *Id.* at 1310. To calculate overtime wages, the school board added the total straight time compensation earned by the employee during the week (including straight time for regular routes, field trips, and other additional routes) and divided by the total number of hours worked by the employee during the week to determine the blended (or weighted) rate of pay at which to pay the overtime. *Id.* at 1310-11. Affirming the lower court’s grant of summary judgment, the Eleventh Circuit concluded that the school board’s policy of paying different rates for different types of routes, and paying overtime based upon a blended rate, was in accordance with the requirements of the FLSA. *Id.* at 1311. The court explained that neither § 7 of the FLSA, which regulates hours worked, nor 29 C.F.R. § 778.115, which permits an employer to pay an employee different rates of pay and a blended overtime rate if the employee is engaged in two or more different types of work, requires that the employee be engaged in two or more different types of work in order to receive different rates of pay and overtime based on a blended rate. *Id.* at 1312-13.

4. Class Certification.

*Dominquez v. Minnesota Beef Indus., Inc.*, No. 06-1002 (RHK/AJB), 2007 WL 2422837 (D. Minn. Aug. 21, 2007). The United States District Court for the District of
Minnesota granted conditional certification of a class of hourly-paid workers at a beef processing plant who alleged that the defendant failed to pay them overtime wages for time spent donning and doffing protective clothing. The court explained that the employees presented sufficient evidence to establish that they were “similarly situated” under § 216(b) of the FLSA because their positions and job duties in the plant’s “boning room” and “kill floor” were substantially similar and because they donned and doffed substantially similar articles of protective clothing. \textit{Id.} at *3. The court specifically rejected the employer’s argument that the amount of time taken by each employee to don and doff his or her protective equipment would require an individualized inquiry that rendered the case inappropriate for collective action treatment and that the proposed class was overbroad because not all employees wore protective clothing. \textit{Id.} The court explained that arguments relating to individualized inquiries and the merits of the employees’ claims were inappropriate at the conditional certification stage and were more properly brought at the second “decertification” stage of the two-step collective action approach. \textit{Id.}

\textit{Smith v. T-Mobile USA, Inc.}, No. CV 05-5274 ABC (SSx), 2007 WL 2385131 (C.D. Cal. Aug. 15, 2007). The Central District of California denied conditional certification of a nationwide class of current and former hourly-paid employees of T-Mobile, concluding that the individualized nature of their overtime allegations precluded collective-action treatment. The court rejected the plaintiffs’ general contention that they were “similarly situated” because the defendant unlawfully required them to work off-the-clock. \textit{Id.} at 5. The court explained that while such an allegation was “ostensibly a common legal nexus giving rise to a common injury,” that commonality was illusory because the plaintiffs’ underlying allegations arose from different and individualized fact patterns. \textit{Id.} For example, some plaintiffs alleged that they were directed by their manager to not record overtime; some plaintiffs alleged that they were required to work overtime at outreach events and training sessions; some plaintiffs alleged that they were permitted to record overtime during some periods of employment but not others, and some plaintiffs alleged that their store managers changed their time entries. \textit{Id.} The court also found it significant that although the plaintiffs had sent notice of the lawsuit to 1,500 potential plaintiffs during class discovery, only 2.2% responded to the plaintiffs’ letter. \textit{Id.} at *6. The court concluded that the low percentage of prospective collective action members who responded to the letter was evidence that a “universal policy or practice” in violation of the FLSA did not exist. \textit{Id.} Moreover, the court applied the more rigorous “decertification” standard to the plaintiffs claims because class discovery had ended and concluded that the individualized circumstances surrounding the plaintiffs’ claims and the individualized nature of the asserted defenses rendered collective action treatment inappropriate. \textit{Id.} at *7-8.

\textit{Fast v. Applebee’s International, Inc.}, 243 F.R.D. 360 (W.D. Mo. 2007). The Western District of Missouri conditionally certified a class of current and former restaurant servers and bartenders who claimed that they were directed by their employer to perform non-tip producing work activities and that they performed such work activities for more than 20% of their total shift without being paid minimum wage for such work. The court explained that an employer may not claim a tip credit (and therefore pay a tipped employee less) for the tipped employee’s non-tip producing activities if the tipped employee spends more than 20% of this or her shift on non-tip producing activities. \textit{Id.} at 363. Although the defendant argued that its servers and bartenders were not “similarly situated” for purposes of a collective action under the FLSA because each restaurant’s manager scheduled its employees based on the needs of the
particular restaurant and assigned them varying job duties, the plaintiffs presented affidavits that they engaged in non-tip producing activities for more than 20% of their shift and a corporate document entitled “Labor Management Best Demonstrated Practices,” which stated that the defendant could achieve cost savings with respect to non-tipped employees by utilizing tipped employees to engage in certain non-tip producing activities, including dishwashing, prepping, and cleaning. *Id.* at 362-63. Based on the evidence presented, the court concluded that the plaintiffs had established that were “similarly situated” because they were all subject to a corporate practice by the defendant that resulted in tipped employees performing non-tip producing tasks for less than minimum wage. *Id.* at 364.

*Evancho v. Sanofi-Aventis U.S. Inc.*, No. CV 07-2266(MLC), 2007 WL 4546100 (D.N.J. Dec. 19, 2007). The District of New Jersey denied conditional certification of a class of thousands of Sanofi-Aventis pharmaceutical sales representatives in which Plaintiffs argued that they had been improperly classified as exempt. *Id.* at *3-4. The court determined that potential plaintiffs were not “similarly situated,” and thus, collective action treatment was inappropriate, because differences existed between various pharmaceutical sales representatives’ descriptions of their job responsibilities and duties. *Id.* For example, some representatives alleged that they sold products directly to physicians; others alleged that they only delivered product information. *Id.* at *3. Some representatives alleged that they exercised discretion and independent judgment in their duties; others alleged that they were required to adhere closely to company-provided written materials when visiting medical professionals. *Id.* at *4. Citing *Aguirre*, the court explained that if plaintiffs allege potential collective action members are similarly situated because they were improperly classified as exempt, a motion for conditional class certification may be denied under a less strict standard at the notice stage. *Id.*

5. **Dual-filed Actions.**

*De Leon-Granados v. Eller and Sons Trees, Inc.*, 497 F.3d 1214 (11th Cir. 2007). Migrant workers brought suit against their employer, alleging both collective action claims under the FLSA and class action claims under the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”). *Id.* at 1216-17. When the district court conditionally certified a collective action for the FLSA claims and also certified a class for Plaintiffs AWPA claims, the Defendant employer filed an interlocutory appeal. *Id.* at 1217-18. On appeal, appellants argued that the action was based on FLSA and therefore must be adjudicated as a collective action rather than a class action. *Id.* at 1218. The court reasoned that although the AWPA claims and FLSA claims both sought unpaid wages, they were not identical. *Id.* at 1219. Under AWPA, Plaintiffs could the prevailing wage; whereas, under FLSA Plaintiffs could only recover the minimum wage. *Id.* The court also noted other differences between the claims. *Id.* AWPA permitted the workers to make claims that could not be made under FLSA—that the employer failed to keep and provide accurate work records, failed to provide workers with the promised full-time employment, and knowingly provided them with false information regarding the terms of employment. *Id.* Because of the differences in the Plaintiffs asserted claims, and the propriety of a class action for the AWPA claims, the court affirmed the district court’s class certification. *Id.* at 1219-20.

*Klein v. Ryan Beck Holdings, Inc.*, No. 06 Civ. 3460 (WCC), 2007 WL 2059828 (S.D.N.Y. July 13, 2007). In an action in which the plaintiff asserted both state wage and hour
class action claims and FLSA collective action claims, the Southern District of New York denied the defendant’s motion to dismiss the plaintiff’s state law class action claims, holding that the Rules Enabling Act (“REA”), 28 U.S.C. § 2072 did not bar the application of Federal Rule of Civil Procedure 23 to the plaintiff’s state law claims. In so holding, the court specifically rejected the defendant’s argument that bringing state law claims as an opt-out class action under Rule 23 would abridge the substantive rights guaranteed to both employers and employees under the FLSA to have employment cases tried as an opt-in collective action. Id. at *5-6. The court explained that REA precludes the application of a rule of procedure if, under the circumstances of a particular case, it goes beyond procedure and practice and affects a substantive legal right of a party to the litigation. Id. at *6. The application of Rule 23 to the plaintiff’s state law claims, however, would not abridge any substantive right to have the action tried as a collective action because the FLSA’s collective action mandate only applies to claims brought under the FLSA and because Congress clearly intended to allow state wage and hour causes of action to coexist with the FLSA. Id. The court also rejected the defendant’s argument that adjudicating the state law claims of putative class members would have a preclusive effect on their FLSA claims, despite the fact that they had not opted into the collective action. Id. at *7. The court explained that adjudication of either the state law claims or the FLSA claims could have a preclusive effect on the other and that claim preclusion occurs not by application of Rule 23, but through wholly independent common law principles of res judicata that apply no matter what procedural rules govern the proceeding. Id.


Jacobs v. New York Foundling Hospital, 483 F. Supp. 2d 251 (E.D.N.Y. 2007). The Eastern District of New York granted summary judgment in favor of a non-profit organization providing foster care, adoption, and family services for abused and neglected children, holding in part that the organization was not subject to “enterprise” coverage under § 207(a)(1) of the FLSA. In their motion for summary judgment, the employees argued that the non-profit organization was an employer subject to “enterprise” coverage because it operated pursuant to extensive contracts with the New York City Administration of Child Services and thus engaged in “activities performed in connection with a public agency” under 29 U.S.C. § 203(r)(2)(C). Id. at 258. Rejecting this argument, the court explained that neither the language of § 203(r)(2), the relevant legislative history, nor analogous case law supporting a finding that the “in connection with a public agency” language of § 203(r)(2)(C) was intended to cover a non-profit institution providing care for abused and neglected children, even considering the fact that the institution operates under extensive contracts with a public agency and receives reimbursements from public agencies for costs associated with the services that it provides. Id. at 263.

7. Class Action Waiver.

Shirchak v. Dynamics Research Corporation, 508 F.3d 49 (1st Cir. 2007). In a lawsuit filed against Dynamics Research Corporation (“DRC”) for violations of the FLSA and the Massachusetts Minimum Fair Wage Law, the First Circuit affirmed the district court’s striking of a class action waiver because the waiver was unconscionable under Massachusetts law. Two days before the Thanksgiving holiday, DRC had sent the waiver out in an email as part of its new “Dispute Resolution Program.” Id. at 52. The email consisted of five lines asking
DRC employees to read attached documents, including a two-page memorandum introducing the program, a fifteen page description of the program, and a few appendices to the description. *Id.* at 53. Together, the attachments constituted a 33-page document. *Id.* No mention of the class action waiver appeared in the introductory memo or the program description. *Id.* The waiver itself was only noted twice—once in Appendix A on page 20 and once in Appendix B on page 28. *Id.* at 53-54. The court found that the waiver’s obscurity would result in oppression and unfair surprise. *Id.* at 60. The court noted that even if a reader did reach and read the language waiving employees’ rights to class action relief, the reader would “still be confused because of tension between the wording of several clauses and documents”—the 33-page document suggested in many places that an employee’s rights and ability to obtain relief would not change. *Id.* at 54. In addition, neither the program nor the waiver required any affirmative acknowledgment or acceptance by employees. *Id.* at 61. Only if an employee read the final page of the first Appendix would he or she discover that he or she had consented to the program and waiver by continuing to work for DRC. *Id.* at 54. Evidence also showed that the announcement of this program was less enthusiastic than DRC’s usual practice of implementing new employee programs, which included sending personalized letters to employees’ homes and holding training programs. *Id.* at 55. All of these circumstances led the court to conclude that DRC’s class action waiver was unconscionable, and thus, unenforceable. *Id.* at 60-61. Because the parties’ ultimately agreed to arbitrate, however, the court did not rule on the validity of the program’s arbitration agreement. *Id.* at 52.

VI. Practical Advice for the Employer’s Counsel.


The employer’s attorney has many options when defending an FLSA collective action, a state law wage and hour class action, or a dual-filed lawsuit containing both. There is no cookie-cutter approach to these cases because the right path to follow will depend on the facts of each case. The following, however, is a general checklist of things to do and items to consider when your client has been sued or otherwise may be aware of the potential for an FLSA collective action:

1. Prepare a summary assessment of the claims. Discuss the assessment with your client.

2. If the wage and hour claims were filed in state court, remove to federal court, if possible.

3. Check to see if there is an arbitration provision governing the employment relationship. If there is, collective action may be barred.

4. Evaluate the plaintiff’s firm. Do they have expertise in this area of law?

5. Conduct a thorough fact investigation. Knowing the facts is essential to determining the validity of the plaintiffs’ claims. Witness interviews also help you determine who may or may not be good witnesses. Discuss the fact investigation with your client.
6. If the plaintiffs have identified a problematic practice, the employer may want to fix it. If that is the case, the employer may want to research any relevant window of corrections and safe harbor provisions in the FLSA and/or consider mediation options, with changing the practice as part of the proposed settlement.

7. Prepare an exposure analysis. Run the calculations to determine what the employer could be liable for based on the worst-case scenario revealed by the fact investigation—determining the employer’s liability assuming the plaintiff’s allegations to be true. Discuss the exposure analyses with your client.

8. Consider whether to file immediate offers of judgment. This may make conditional certification moot and could significantly reduce attorneys’ fees, if there is any exposure.

9. If the employer is likely to be found to have engaged in a prohibited practice or if other practical considerations dictate, consider whether to work with the DOL to resolve the claims. If the DOL steps in and files a consent judgment in settlement of the claims, a collective action is barred. Getting the investigators off the worksite may be difficult, so consider this an extraordinary resolution.

10. Evaluate whether to stipulate to notice. Try to get as much information as possible before the court at the notice stage. While the plaintiff often has a low hurdle, it may be possible to present enough evidence that the court can see that the putative collective plaintiffs are not similarly situated and that resolution of the case depends on an individualized assessment of the plaintiffs’ claims. Moreover, if the court has a significant amount of evidence, it may go directly to the final certification process.

11. If notice is ordered, consider asking to send the notices out instead of providing a list of names and addresses to the plaintiffs’ attorney. (The court will probably make you turn over a list.) Ask that the notice include, among other things: (i) a statement from the court that it has not made a determination as to the merits of the case, and (ii) a statement indicating that the employer denies the allegations and does not believe that plaintiffs’ cause of action is valid.

12. If notice is ordered, consider whether and when to seek decertification. Make a strategy and plan discovery accordingly.

13. File an early summary judgment if the court permits more than one dispositive motion, if for no other reason than to have the court assess the issues of liquidated damages and willfulness.

14. If the case involves a violation that the employer has corrected, thus triggering the clock for the applicable statute of limitations, the employer
may want to evaluate all procedural options for the effect of delay, allowing limitations to run on other putative claimants claims. Delay may minimize incitement of additional litigation by the settlement.

B. Preventative Measures for Employers.

The best defense is a good offense: employers should be proactive in ensuring that their actions and policies comply with the FLSA and state wage and hour laws. The basic requirements of the FLSA are fairly straightforward. However, the nuances in the regulations and administrative interpretations, coupled with the case law that has developed over the past 67 years, make it easy for an employer to err unintentionally. What should an employer do to avoid costly state class actions and/or federal collective actions under the FLSA? Although not exhaustive, the following are some suggestions:

1. Assess compliance with the FLSA on a frequent basis. A lawyer or a compensation expert trained in the intricacies of the FLSA is in the best position to analyze an employee’s duties and responsibilities and evaluate the employer’s pay practices. Remember as well that DOL opinions are free. The employer should make the following primary assessments:

   - Salary-level test employees. Confirm that all employees who previously qualified as exempt still do—the minimum compensation level to invoke the salary-level employee exemption has risen to $100,000.

   - Salary-basis test employees. Look at each employee or category of employees who still meet the other non-salary requirements of the salary-basis test for exempt status. Does each employee earn $455 per week on a salary basis? If not, decide whether your company wants to pay the employee time-and-a-half for overtime or $455 on a salary basis per week.

   - Duties-test employees. Re-examine the job duties of the employees considered exempt prior to the 2004 reg changes to make sure they still qualify as exempt under the new “standard duties” test.

   - Tip credit: review the tip pool procedure to assure that only eligible employees are participating in the “tip pool” and to assure that no improper deductions are made.

   - Bonus payments: assess whether any payments other than regularly paid salary or hourly-paid compensation, including bonus payments of any sort, must be included in the regular hourly rate as nondiscretionary.
• Assess whether employees may be working off the clock, either with or without permission.

• Determine whether employees are performing any preliminary or postliminary work. If so, ascertain whether the work is non-compensable under the Portal-to-Portal Act or is de minimus as a matter of law.

• Make sure the same analyses are done for state law wage and hour requirements.

2. Revisit policies.

• An employer may deduct from an exempt person’s pay full-day suspensions for certain infractions. Consider implementing a policy that meets current guidelines, clearly spells out what will warrant a full-day suspension, and explains how a suspension will be deducted from pay; review policies to assure the current suspensions without pay are not on improper grounds.

• Is there a policy about improper deductions? If not, consider a policy that meets the “safe harbor” exception in the new regs—one that explains the employer’s position against improper deductions, explains how improper deductions will be addressed, and details the mechanism for complaining about improper deductions.

• Is there an arbitration agreement that governs FLSA disputes? If not, the employer might consider whether it wants to use arbitration as a means to handle its FLSA complaints. Remember, an arbitration agreement may bar an employee from opting-in to a collective action, but once in place, will affect many other types of claims, as well.

• Is there a policy that requires employees to accurately report all time worked and advises employees that they will be paid for all compensable time? Does the policy spell out the discipline for infractions, and have they been consistently implemented?

3. Train supervisors, especially front-line supervisors, on the requirements of FLSA and state law wage and hour requirements, and monitor them to make sure they are complying with polices and procedures with regard to payment practices.

4. Explain FLSA requirements, and any applicable state law requirements that go beyond the FLSA, to employees and establish an internal process for answering employee questions about wages and hours.
5. Keep accurate time records; get a contemporaneous sign off that records are accurate.

6. Evaluate grievance processes, and consider whether employees feel heard? Often, employees who file a collective action or opt-in to the collective action have other “issues.” They may feel that complaints and grievances go unresolved and that comments and suggestions go unheard.

7. Monitor FLSA litigation and investigations in the industry. An employer may learn what is being targeted in WHD investigations and by plaintiffs’ attorneys and may discover potential problems before they arise.

8. Become familiar with the WHD web site (http://www.dol.gov/esa/whd/), and particularly with the Fair Pay link and information, which pertains primarily to overtime pay issues subsequent to the adoption of the new regulations effective August 23, 2004 (http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm).
## APPENDIX A: SIDE-BY-SIDE COMPARISON OF EXEMPT CLASSIFICATION REGULATIONS

### Comparing the Tests for Executive Employees

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<tbody>
<tr>
<td><strong>Salary Level</strong></td>
<td>$250 per week</td>
<td>$455 per week</td>
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<tr>
<td><strong>Duties</strong></td>
<td>Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and Includes the customary and regular direction of the work of two or more other employees therein.</td>
<td>Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.</td>
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### Comparing the Tests for Administrative Employees

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<td><strong>Salary Level</strong></td>
<td>$250 per week</td>
<td>$455 per week</td>
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<tr>
<td><strong>Duties</strong></td>
<td>Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers; and Which includes work requiring the exercise of discretion and independent judgment.</td>
<td>Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</td>
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### Comparing the Tests for Professional Employees

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<td><strong>Salary Level</strong></td>
<td>$250 per week</td>
<td>$455 per week</td>
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<tr>
<td><strong>Duties</strong></td>
<td>Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and Which includes work requiring the consistent exercise of discretion and judgment; or</td>
<td>Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or Whose primary duty is the performance of work</td>
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Comparing the Tests for Computer Employees

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<td><strong>Duties</strong></td>
<td>Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</td>
<td>requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</td>
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<tr>
<td><strong>Salary Level</strong></td>
<td>Primary duty of performing work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in § 541.303, which includes work requiring the consistent exercise of discretion and judgment.</td>
<td>Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption, but only if the employee’s primary duty consists of:</td>
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\[\text{§ 541.303(b): Whose primary duty consists of one or more of the following:}
\]

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Comparing the Tests for Outside Sales Employees

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<td><strong>Duties</strong></td>
<td>Who is employed for the purpose of and who is customarily and regularly engaged away from the employer’s place or places of business in making sales; or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and</td>
<td>Whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and</td>
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<tr>
<td><strong>Salary Level</strong></td>
<td>No minimum salary required</td>
<td>No minimum salary required</td>
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facilities for which a consideration will be paid by the client or customer; and

Who does not devote more than 20 percent of the hours worked in the workweek by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee’s own outside sales or solicitations.

Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.