

What Organizations Need to Know When Facing Conditional Certification Under Section 216(B) of the FLSA

Kevin M. Cloutier, Jill S. Vorobiev, Courtney M. Ofosu, Mikela T. Sutrina*

Human resources professionals are often critical to formulating effective defense strategies to wage and hour lawsuits filed by employees for unpaid overtime. They have deep institutional knowledge of employees' duties and responsibilities, and the related practices of different locations within the employer organization. As a result, defense attorneys frequently rely on human resources professionals to serve as the "gateway" to the rest of the organization. Understanding the nature of these claims and the procedural mechanisms under the governing statutes will put human resources professionals in a better position to assist in defending these actions. This article explores the legal background and procedural nuances of collective actions brought under the Fair Labor Standards Act seeking unpaid overtime, how different federal judicial circuits across the country analyze these types of collective

action claims, and the steps human resources professionals may take if their organization's employees initiate one of these actions. In particular, this article focuses on the first stage of these actions—known as the "notice" or "conditional certification" stage—and the standard for conditional certification under the Fair Labor Standards Act, as well as how human resources professionals may help formulate a successful defense to conditional certification. Finally, this article touches on some steps that may be taken to proactively limit liability under the FLSA.

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act or "FLSA" (often referred to as "flissa") is the federal law that sets the national minimum wage; it guarantees certain employees the right to overtime pay and establishes regulations for minors in the workforce.¹

Private and public sector employees alike fall under FLSA's purview. Coverage under FLSA with respect to overtime pay is largely determined by an employee's exempt or non-exempt status. FLSA dictates that non-exempt workers must be paid at least one and one-half times their hourly rate of pay if they work more than 40 hours in a work week.² This directive does not apply to exempt workers, who commonly include administrative, executive, and professional employees, and certain computer and outside salespeople.³ The lion's share of American employees are considered "non-exempt", and therefore trigger the FLSA's requirements under Section 216(b).⁴

SECTION 216(b) OF THE FLSA AND COLLECTIVE ACTIONS

Section 216(b) of the FLSA provides the legal mechanism by which plaintiff employees

* KEVIN M. CLOUTIER and JILL S. VOROBIEV are Partners and COURTNEY M. OFOSU and MIKELA T. SUTRINA are Associates in the Labor and Employment Practice Group at Sheppard, Mullin, Richter & Hampton LLP in its Chicago office.

may bring a “collective action” against an employer on behalf of themselves and a group of “similarly situated” employees for violations of FLSA, such as unpaid overtime or misclassification of exempt status.⁵

A collective action is different from a class action, which is governed by Rule 23 of the Federal Rules of Civil Procedure. The most notable difference between a collective action and a class action is that in a 216(b) collective action, a plaintiff employee must opt in to the lawsuit by giving written consent.⁶ In contrast, a Rule 23 plaintiff must opt out of a Rule 23 class action. Thus, employees who opt in are actual party plaintiffs as opposed to the nameless class members they may be in a Rule 23 action.

Because both Rule 23 and Section 216(b) plaintiffs require certification to aggregate individual claims and proceed as a collective or class, a few courts have considered employing the same test used to certify Rule 23 plaintiffs to analyze the similarly situated requirement.⁷ Under Rule 23, plaintiffs are required to show, among other things, that (1) the proposed class is too numerous for individual plaintiffs to simply join the lawsuit; (2) there are common questions of law and fact to the class; (3) the claims and defenses of the representative par-

ties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.⁸

A Rule 23 analysis arguably makes conditional certification harder to achieve. It is for this reason that many courts have refused to employ a Rule 23 analysis when deciding whether certification of a collective action is appropriate. For example, *O'Brien v. Ed Donnelly Enters., Inc.*,⁹ held that “[w]hile Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA.”¹⁰ Similarly, *Lillehagen v. Alorica, Inc.* held that a Rule 23 definition of similarly situated “would be noxious for plaintiffs bringing collective action suits under the FLSA.”¹¹

In lieu of Rule 23 for FLSA claims, most courts split the certification process into two stages. The “conditional certification” or “notice” stage is the first, more lenient step in the certification process where a court determines “whether the putative class members’ claims are sufficiently similar to merit sending notice of the action to possible members of the class.”¹² Courts generally require plaintiffs only to make a “modest factual showing”—whether through the complaint allegations alone or through

declarations or some limited discovery—that plaintiffs and members of the proposed collective action are similarly situated.¹³ Assuming plaintiffs survive the conditional certification stage, the parties engage in more substantial fact-gathering or discovery. Stage two of certification comes after this fact-gathering or discovery phase, and it is here that the defendant can move to decertify the putative class and bar the plaintiffs from proceeding on their Section 216(b) claims as a collective. In considering a defendant’s motion for decertification, courts typically apply “a stricter standard” to determine if the evidence in fact shows that the plaintiffs are sufficiently similarly situated to each other.¹⁴ This article focuses on the first stage of the certification process.

HOW SIMILARLY SITUATED IS “SIMILARLY SITUATED”?

Collective actions under Section 216(b) may be conditionally certified (stage one) if the plaintiffs can establish the putative members are similarly situated. But, what does “similarly situated” actually mean? The FLSA does not define “similarly situated” and instead gives discretion to courts in deciding whether to conditionally certify a class of similarly situated employees, resulting in a patch-

work of case law across the country.¹⁵

A lack of clear direction from the FLSA gives rise to a number of questions. Do all of the employees in the putative collective need to have the same job duties, responsibilities, and work environment, and be subject to the same managerial practices? Or do they simply need to be subject to the same alleged unlawful policy or practice? The answer is, it depends. The answer also determines whether conditional certification is effectively presumed by a court or whether employer organizations have a reasonable chance of successfully defending against conditional certification under the first prong of Section 216(b).

The Judicial Circuits Employ Different Analyses

This article's similarly situated analysis is reviewed in the context of the various case law in the "judicial circuits" across the country, which exercise jurisdiction over the federal courts in each state. There are eleven (11) circuits, a separate circuit for the District of Columbia and the Federal Circuit where federally appealed patent cases are mainly heard. Each circuit is made up of federal district courts in each state and a circuit appellate court. For example, the First Circuit is

responsible for jurisdiction over the federal courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. The Eleventh Circuit, as another example, is responsible for jurisdiction over the federal courts in Alabama, Florida and Georgia.

Different judicial circuits across the country apply different standards in conducting the "similarly situated" analysis. Although there is no bright-line test for any court given that these cases often are addressed on a case-by-case basis, federal district courts generally apply one of the following three analyses:

1. Are the putative class members' day-to-day job duties, job location, and work environment similar enough to warrant conditional certification?
2. Is there an allegation of a widespread unlawful policy affecting the putative class members?
3. Or, does the "hybrid" combination of (1) and (2) indicate the putative class members are sufficiently similarly situated?

An example of the first analysis can be found in the Eleventh Circuit, where some courts take a nuanced look at what the putative class members actually

do day-to-day, where they work, and how various job sites or locations operate in determining whether these employees are "similarly situated."¹⁶

In contrast, courts in the Second Circuit largely focus on the policy at issue in a similarly situated analysis and rarely consider the potential differences between putative class members' job duties.¹⁷

Adding to this varied framework are the circuits that apply a "hybrid" analysis, or number (3) above. For example, courts in the First Circuit give equal weight to the job duties of the putative class members and the general policy at issue, which creates a more stringent similarly situated standard.¹⁸

Further increasing the complexity, courts in the Third Circuit are split on the threshold to which they hold plaintiffs in making the conditional certification determination. Some courts in the Third Circuit, particularly those in the districts of Pennsylvania, employ a more lenient standard and only require plaintiff employees to demonstrate the existence of a common plan or policy.¹⁹ In contrast, other courts in the Third Circuit, such as several district courts in New Jersey, require plaintiff employees to show a "modest factual nexus" between their allegations and those of the proposed class members.²⁰

The “trend” in a specific circuit or district court is important in evaluating Section 216(b) collective actions because whether a court applies a (1) “job duties,” (2) “policy,” or (3) “hybrid” analysis directly impacts the threshold of what plaintiffs must allege to meet the similarly situated test. At this time, there is no circuit that consistently applies solely a “job duties” analysis, whereas there are circuits that trend toward consistently applying either a “policy” or “hybrid” analysis, which are more fully discussed below.

Often, in circuits where plaintiff employees must only allege that the putative class is subject to a widespread unlawful policy, conditional certification is routinely granted. In circuits where courts take a closer look at employees’ job duties to determine whether there is a factual similarity or nexus between plaintiffs and putative collectives, plaintiffs may face a more difficult conditional certification showing. In such settings, employer organizations may have a better chance of formulating an initial strategy to defeat motions for conditional certification.

Policy Circuits

A number of courts have created low thresholds for conditional certification by merely

requiring the plaintiffs to show they and the putative collectives were subject to a common policy or plan that violated the FLSA, such as courts in the Second Circuit, as noted above in *Fasanelli v. Heartland Brewery, Inc.*²¹ Additionally, the Sixth Circuit in *Monroe v. FTS USA, LLC*,²² concluded that although the plaintiffs shared the same job responsibilities and worked in the same location as the named plaintiffs, key to conditional certification was the fact that “the record contains ample evidence of a company-wide policy of requiring technicians to underreport hours that originated with FTS executives.”²³

Butler v. DirectSAT USA, LLC,²⁴ a decision from the District Court of Maryland sitting in the Fourth Circuit, typifies another example of the low threshold required by policy-driven courts. In *Butler*, the court focused on “the same timekeeping policies and practices and same compensation plan”, more so than on whether putative class members worked the same shifts or at the same facility, in granting conditional certification.²⁵

Why do these courts use low thresholds to analyze conditional certification? Interestingly, the justifications that “policy” courts give for using these lower thresholds differ. For example, in *Hussein v. Capital*

Bldg. Servs. Grp., Inc.,²⁶ the District Court of Minnesota (sitting in the Eighth Circuit) reasoned that conditional certification is granted liberally “because the court has minimal evidence for analyzing the class.”²⁷ A lack of evidence, however, is not always the reason that courts are quick to grant conditional certification. In the Third Circuit, *Pereira v. Foot Locker, Inc.*,²⁸ for example, granted conditional certification based on the existence of a single plan or policy, despite the fact that the defendant proffered “volumes of evidence” to refute plaintiff’s claims regarding the policy at issue. In granting certification, the court found that the evidence presented was more appropriate for the decertification stage and improper at the “notice” stage.²⁹ Whatever their stated justifications, policy-driven courts seem to be of the view that the true analysis under the similarly situated test comes at the second “decertification stage”, and therefore only require a minimal showing of commonality to achieve conditional certification.

Hybrid Circuits

Courts in “hybrid” circuits often consider the job duties, work locations and work environments of the putative class members, as well as the alleged unlawful policy at issue in deciding whether to grant condi-

tional certification. Because of this arguably more nuanced analysis, conditional certification is not as presumptive in these circuits as it may be in others, and plaintiff employees may be held to a higher threshold for conditional certification.

In *Smith v. Tradesmen Int'l Inc.*, the Southern District of Florida (sitting in the Eleventh Circuit), set forth the following factors that “a district court should consider . . . in making the similarly situated determination”:

- 1) [W]hether the plaintiffs all held the same job title; 2) whether they worked in the same geographic location; 3) whether the alleged violations occurred during the same time period; 4) whether the plaintiffs were subjected to the same policies and practices, and whether these policies and practices were established in the same manner and by the same decision maker; [and] 5) the extent to which the actions which constitute the violations claimed by Plaintiffs are similar.³⁰

In *Tradesmen Int'l*, the court affirmatively reached beyond the alleged policy at issue to consider a variety of potential differentiators between the putative class members to determine whether they were similarly situated. This type of analysis puts a heavier burden on plaintiff employees to not only establish a common policy *but also* to demonstrate that the putative class members share job duties, work at locations

with similar practices, and were aggrieved in the same manner. Plaintiff employees before these courts cannot merely rely on bald assertions that they “worked off-the-clock” and hope to obtain conditional certification. The *Tradesman Int'l* court denied conditional certification because “the sole evidence of similarly situated employees submitted by Plaintiff consist[ed] of three (3) identical affidavits of employees with different job titles, different job responsibilities, and who work in different geographic locations than Plaintiff.”³¹

However, even in hybrid circuits, courts will still grant conditional certification if the named plaintiff(s) can establish the putative class members “have the same general job description and duties, have similar terms of employment, record and bill their time on an hourly basis, and receive similar training and directives from management,” which may not require more than affidavits submitted by the named plaintiff and one putative class member.³² The key takeaway is that hybrid analysis courts may be swayed by a defendant employer’s evidence that the putative class members are not similarly situated in their job duties, geographic location and work practices. In such cases, defendant employers stand a fighting chance to defeat conditional

certification at stage one. Human resources professionals are critical in assisting counsel in evaluating these potential differentiating factors.

WHAT TO DO WHEN FACING A SECTION 216(b) ACTION

First Things First

What happens when your organization is facing a recently filed motion for conditional certification under Section 216(b) of the FLSA? Human resources personnel are the first line of defense for these actions. They are the gatekeepers of information. They are critical in identifying the policies and practices at issue, gathering the relevant job descriptions of sets or subsets of employees, pinpointing the appropriate employees and supervisors to interview, and warning defense counsel of any “red flags” in defending the action. In addition to their responsibility for the implementation and dissemination of employee policies, human resource personnel often have an “ear to the ground” within the organization and know if there are certain job sites with potentially troubling practices, managers who tend to ignore policies, or “problem” employees. Often, human resources can identify the major issues at stake before the litigation heats up. Based on this

knowledge, employer organizations are better equipped to determine whether an aggressive defense to conditional certification, such as a “declaration blitz” (e.g., obtaining supporting declarations from employees throughout the organization), is appropriate.

You should consider asking the following questions when you receive notice of a Section 216(b) motion for conditional certification to frame next steps:

- 1) What exactly are the plaintiff employees alleging?
 - a. Are they seeking a collective action because they were not paid overtime for off-the-clock work? Because they were misclassified? Because they were subject to a practice which denied them overtime wages?
 - b. Are there state law claims at issue that may implicate overlapping concerns?
- 2) What is the size and composition of the putative class?
 - a. Is it only employees at a certain job site? In a certain position?
 - b. Are the plaintiff em-

ployees alleging the putative class includes former employees in addition to current employees?

- 3) Do the named plaintiff employees:
 - a. Share the same job position?
 - b. Work at the same job site or in a similar work environment?
 - c. For the same manager?
 - d. Perform the same or substantially similar duties and responsibilities?
 - e. Work similar hours and shifts?
- 4) Does the putative class:
 - a. Share the same job position?
 - b. Work at the same job site or in a similar work environment?
 - c. For the same manager or subject to similar managerial practices?
 - d. Perform the same or substantially similar duties and responsibilities?
 - e. Work similar hours and shifts?

- 5) Are there any potential issues in-house or outside counsel need to be aware of?

These questions will help identify the policy or practice at the center of the lawsuit, the class of employees potentially included, and the managers with whom to speak first to frame the litigation strategy.

What's Next?

When faced with a wage and hour class action claim, you should consider whether a declaration campaign (“blitz”) could help defeat conditional certification. Declaration campaigns are potentially expensive and disruptive, but they may be effective in defending against conditional certification in the right circumstances. While courts review claims on a case-by-case basis, it is important to know if the circuit in which the action was filed is a “policy” circuit or a “hybrid” circuit, or if any courts in the circuit apply a “job duties” analysis. Particularly if the action is filed in a “hybrid” circuit, a declaration campaign may help the defendant defeat conditional certification by highlighting to the court the myriad of ways in which employees in the proposed collective class differ with respect to job title and/or duties, geography, work environment, timekeeping methods, and/or the alleged practice at

issue. Declarations may prove less fruitful at the first stage of certification, however, if most courts within the circuit only require that the plaintiffs allege that they were subject to the same policy or practice that violated the FLSA.

PROACTIVE POLICIES TO IMPLEMENT IN THE FUTURE TO MINIMIZE COLLECTIVE ACTION LIABILITY

Even if your organization or your client is not facing a Section 216(b) action, there are steps you may take to proactively limit liability under the FLSA and minimize exposure for potential Section 216(b) actions.

Maintain And Enforce Compliant Policies

Having and enforcing a written policy that prohibits off-the-clock work may help rebut allegations that hundreds or thousands of employees were subject to a plan or policy violative of the FLSA. Employee handbooks and policies should also make clear that non-exempt employees working more than 40 hours in a given workweek are paid one and one-half times their hourly rate of pay. Companies should also consider posting these policies at job sites, including cafeterias, break or locker rooms, to ensure that workers are aware of

the rules, are abiding by those rules, and are reporting possible violations. Additionally, companies should consider issuing employee “reminders” or memorandums setting forth prohibitions on at least an annual basis.

Organizations should also consider implementing electronic timekeeping systems to ensure that employees’ time is automatically, objectively and accurately recorded.

Consider Regular Training For Managers And Supervisors

Sometimes, no matter how strong an organization’s policies, if managers and supervisors do not consistently follow these policies, employers may still face liability. Regular training helps to minimize these risks. Training may include education about “off-the-clock” work, proper timekeeping procedures, recording and calculating overtime, and ensuring individual employees comply with all policies.

If your organization has separate locations with different practices, ensure you take those varying practices and job locations into account to tailor training for managers. It is important to conduct regular training on not only a global or national level, but also at each

individual location to account for varying local practices.

An organization’s managers and supervisors may themselves help minimize liability under the FLSA by ensuring employees also comply with all policies. Managers and supervisors are on the “front lines” and can help ensure employees are not working off-the-clock. In particular, managers and supervisors should ensure that employees are not working before clocking in, are leaving after they clock out, and are recording all hours worked accurately. Diligent training and education for your workforce can go a long way in minimizing risk and liability under the FLSA.

Final Thoughts

Though Section 216(b) actions continue to rise for both misclassification and off-the-clock claims, understanding the business and nature of the employee’s work may help provide an early strategy for the effective defense of such claims. Human resources professionals are key to understanding this background.

NOTES:

¹See, e.g., 29 U.S.C. §§ 207(a)(1), 212(c)-(d), 219(a)(1).

²29 U.S.C. § 207(a)(1).

³See 29 U.S.C. § 213(a)(1), (17).

⁴See the Department of Labor’s website, last visited April 28, 2016, at:

http://www.dol.gov/whd/overtime/fs17d_professional.htm ("The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.").

⁵See 29 U.S.C. § 216(b).

⁶See 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought").

⁷See, e.g., *Shushan v. University of Colorado at Boulder*, 132 F.R.D. 263, 267, 63 Ed. Law Rep. 230, 53 Fair Empl. Prac. Cas. (BNA) 1347, 55 Empl. Prac. Dec. (CCH) P 40383 (D. Colo. 1990) (plaintiffs must meet all requirements of Rule 23 in order to proceed as a collective action under Section 216(b)).

⁸Fed. R. Civ. P. 23(a)(1).

⁹*O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 15 Wage & Hour Cas. 2d (BNA) 225, 158 Lab. Cas. (CCH) P 35610 (6th Cir. 2009).

¹⁰*O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584, 15 Wage & Hour Cas. 2d (BNA) 225, 158 Lab. Cas. (CCH) P 35610 (6th Cir. 2009).

¹¹*Lillehagen v. Alorica, Inc.*, 2014 WL 2009031 *4 (C.D. Cal. 2014).

¹²*Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 519, 15 Wage & Hour Cas. 2d (BNA) 1801, 159 Lab. Cas. (CCH) P 35727 (5th Cir. 2010).

¹³See, e.g., *Myers v. Hertz Corp.*, 624 F.3d 537, 544-55, 16 Wage & Hour Cas. 2d (BNA) 1441, 160 Lab. Cas. (CCH) P 35832, 77 Fed. R. Serv. 3d 1078 (2d Cir. 2010); *Harris v. Vector Marketing Corp.*, 716 F. Supp. 2d 835, 837 (N.D. Cal. 2010).

¹⁴*Lewis v. Wells Fargo & Co.*, 669

F. Supp. 2d 1124, 1127, 15 Wage & Hour Cas. 2d (BNA) 847 (N.D. Cal. 2009).

¹⁵See *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097, 70 Fair Empl. Prac. Cas. (BNA) 770 (11th Cir. 1996); *Hussein v. Capital Building Services Group, Inc.*, 2015 Wage & Hour Cas. 2d (BNA) 384762, 2015 WL 7313858 *5 (D. Minn. 2015) ("Courts have discretion, in 'appropriate cases,' to facilitate the opt-in process by conditionally certifying a class and authorizing court-supervised notice to potential opt-in plaintiffs.").

¹⁶See, e.g., *Smith v. Tradesmen Intern., Inc.*, 289 F. Supp. 2d 1369, 1372, 9 Wage & Hour Cas. 2d (BNA) 319 (S.D. Fla. 2003) (arguing that a district court should consider a number of factors in the similarly situated analysis, including job titles, geographic location, time period, and the policies and practices to which the putative class members were subjected).

¹⁷See, e.g., *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 321 (S.D. N.Y. 2007) (the primary inquiry in the first stage of conditional certification is whether the plaintiffs and "other putative collective action members were victims of a common policy or plan that violated the law") (internal citations omitted).

¹⁸See *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 367 (D. Me. 2010) (where the court analyzed both the alleged policy at issue and the putative class members' job duties in granting conditional certification); *Kane v. Gage Merchandising Services, Inc.*, 138 F. Supp. 2d 212, 215, 143 Lab. Cas. (CCH) P 34305 (D. Mass. 2001) (where the court considered the putative class members' job location, individual managers, and explicit policy at issue in determining whether to grant conditional certification).

¹⁹See *Pereira v. Foot Locker, Inc.*, 261 F.R.D. 60, 67-68 (E.D. Pa. 2009) (where the court granted conditional certification based on the existence of a single plan or policy despite "volumes of evidence" provided by the defendant

to refute plaintiffs' allegations).

²⁰See *White v. Rick Bus Co.*, 743 F. Supp. 2d 380, 389 (D.N.J. 2010) (where the court denied certification because plaintiff employees only provided blanket assertions instead of facts regarding similar job duties or other factors).

²¹*Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 321 (S.D. N.Y. 2007).

²²*Monroe v. FTS USA, LLC*, 815 F.3d 1000, 26 Wage & Hour Cas. 2d (BNA) 137 (6th Cir. 2016).

²³*Monroe v. FTS USA, LLC*, 815 F.3d 1000, 1011, 26 Wage & Hour Cas. 2d (BNA) 137 (6th Cir. 2016).

²⁴*Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 21 Wage & Hour Cas. 2d (BNA) 1298, 162 Lab. Cas. (CCH) P 36012 (D. Md. 2012).

²⁵*Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 566, 21 Wage & Hour Cas. 2d (BNA) 1298, 162 Lab. Cas. (CCH) P 36012 (D. Md. 2012).

²⁶*Hussein v. Capital Building Services Group, Inc.*, 2015 Wage & Hour Cas. 2d (BNA) 384762, 2015 WL 7313858 (D. Minn. 2015).

²⁷*Hussein v. Capital Building Services Group, Inc.*, 2015 Wage & Hour Cas. 2d (BNA) 384762, 2015 WL 7313858 *6 (D. Minn. 2015).

²⁸*Pereira v. Foot Locker, Inc.*, 261 F.R.D. 60 (E.D. Pa. 2009).

²⁹*Pereira v. Foot Locker, Inc.*, 261 F.R.D. 60, 67-68 (E.D. Pa. 2009).

³⁰*Smith v. Tradesmen Intern., Inc.*, 289 F. Supp. 2d 1369, 1372, 9 Wage & Hour Cas. 2d (BNA) 319 (S.D. Fla. 2003) (internal citations omitted).

³¹*Smith v. Tradesmen Intern., Inc.*, 289 F. Supp. 2d 1369, 1372, 9 Wage & Hour Cas. 2d (BNA) 319 (S.D. Fla. 2003) (internal citations omitted).

³²*Litz v. Saint Consulting Group, Inc.*, 2012 WL 549057 *2 (D. Mass. 2012), appeal considered moot, 772 F.3d 1, 23 Wage & Hour Cas. 2d (BNA) 1186, 165 Lab. Cas. (CCH) P 36277 (1st Cir. 2014).