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WAGE AND HOUR JEOPARDY**

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**ADVANCED LITIGATION OF WAGE AND HOUR CLASS CASES:
REPRESENTATIVE EVIDENCE AND SETTling
HYBRID CASES**

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I. INTRODUCTION

This paper addresses two important issues in litigating FLSA collective actions (1) the use of representative evidence in discovery and trial and (2) how to settle a hybrid FLSA collective action and a Rule 23 opt out class action.

II. REPRESENTATIVE EVIDENCE

A. The Use of Representative Evidence in FLSA Collective Actions Is Well Established.

In the context of FLSA collective actions, plaintiff-by-plaintiff discovery and testimony is rarely required. Instead, most courts to face the issue have opted instead to allow for representative evidence and testimony. In *Hoffman-La Roche, Inc. v. Sperling*, the Supreme Court explained that Congress had created the 216(b) collective action with the purpose of lowering individual litigation costs and benefiting the judicial system by allowing for “efficient resolution in one proceeding of common issues of law and fact.” 493 U.S. 165, 170 (1989). Plaintiff-by-plaintiff discovery would directly undermine that purpose, and would instead “only serve to obfuscate the issues and drastically enhance the costs of litigation. Such a result cannot be countenanced.” *McGrath v. City of Philadelphia*, 1994 WL 45162, at *3 (E.D. Pa. 1994). By contrast, the use of representative evidence can prevent judicial inefficiencies, permit plaintiffs with low dollar value claims to assert their rights, and make trials of collective actions manageable.

In cases where a challenged policy or practice is enforced on a company-wide basis, representative evidence is particularly appropriate:

Defendant’s argument [requiring individualized inquiry into each employee’s duties and hours] is unpersuasive because Defendant itself classifies all reporters and account executives as exempt. Defendant cannot, on the one hand, argue that all reporters and account executives are exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job duties of each reporter and account executive in order to determine whether that individual is “exempt.”

Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 613 (C.D. Cal. 2005).

Similarly, another district court confirmed that where defendant “always categorically classified all Store Managers as exempt employees without exception and without regard to store size, location, sales levels, staffing levels or customer base, and without making any individualized assessments to account for potential variation between individual Store Managers,” defendant’s claim “that each Store Manager position must now be individually assessed to determine whether the position can be categorized as exempt or non-exempt rings hollow.” *Tierno v. Rite Aid Corp.*, 2006 WL 2535056, at *9 (N.D. Cal. Aug. 31, 2006). *See also* *Wiegele v. FedEx Ground Package System, Inc.*, 2008 WL 410691, *8-9 (S.D. Cal. Feb. 12, 2008); *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 5296, at *104-05, 2008 WL 892989 (C.D. Cal 2008) (“The court will not allow [Defendants] to treat information technology workers uniformly [as exempt], and simultaneously contend that individualized inquiries preclude certification.”); *Krzesniak v. Cendant Corp.*, 2007 U.S. Dist. LEXIS 47518, at *46- 48, 2007 WL 640594 (N.D. Cal. 2007) (same); *Kurihara v. Best Buy Co., Inc.*, 2007 U.S. Dist.

LEXIS 64224, at *28-31, 2007 WL 2501698 (N.D. Cal. 2007) (same); *Whiteway v. FedEx Kinko's Office & Print Servs.*, 2006 U.S. Dist. LEXIS 69193, at *4, 2006 WL 2642528 (N.D. Cal. 2006) (same); *Alba v. Papa John's USA, Inc.*, 2007 U.S. Dist. LEXIS 28079, at *39-41, 2007 WL 953849 (C.D. Cal. 2007) (“[T]he question of whether store managers are ‘exempt’ is a common defense for Defendants in this case, which supports class adjudication.”); *Accord Ruggles v. WellPoint, Inc.*, --- F.Supp.2d ----, 2008 WL 4866053, *7 (N.D. N.Y. 2008) (“Plaintiffs are not required to submit evidence implicating every office and to show how they have identical characteristics; instead, only a representative sample will suffice [at the conditional certification stage.]”).

B. Representative Evidence Must Actually be Representative

Many courts have used representative evidence to address various liability issues, including misclassification, on a classwide basis. *Proctor v. Allsup's Convenience Stores, Inc.*, 2008 WL 1836359, *6 (N.D. Tex. 2008) (representative sample of employees can provide the proof of a prima facie case of a FLSA violation); *Hoffman v. Securitas Sec. Services*, 2008 WL 5054684 (D. Idaho 2008) (adopting magistrate Report and Recommendation for conditional certification based on declarations from Plaintiffs and an opt-in); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 2008 WL 5263750, *4 (E.D. Wis. 2008) (granting conditional certification based on seven affidavits, out of an opt-in plaintiff class of 4,000, because the affidavits described “how hundreds of [similarly situated employees] begin and end the work day”); *Schaefer-LaRose v. Eli Lilly & Co.*, 2008 WL 5384340 (S.D. Ind. 2008) (in Order allowing for late filing of consent to join forms, approving the use of representative evidence); *Mendoza v. Casa de Cambio Delgado, Inc.*, 2008 WL 3399067 (S.D. N.Y. 2008) (granting conditional certification on renewed motion based on testimony from nine employees who relayed similar situations from between twenty-five and seventy other employees); *Lockhart v. County of Los Angeles*, 2008 WL 2757080 (C.D. Cal. 2008) (granting conditional certification based on testimony from two named plaintiffs plus performance evaluations from opt-ins indicating that they stayed late and came to work early); *Austin v. CUNA Mut. Ins. Soc.*, 232 F.R.D. 601 (W.D. Wis. 2006) (conditionally certifying collective action, based on complaint plus one plaintiff’s affidavit); *Whalen v. U.S.*, 85 Fed.Cl. 380 (Fed.Cl. 2009) (granting conditional certification based on declarations from two plaintiffs and four opt-ins); *Bishop v. AT & T Corp.*, 2009 WL 424360 (W.D. Pa. 2009) (granting conditional certification based on declarations from plaintiff and forty-five out of 183 opt-ins). Further examples of this line of cases are collected in Appendix A.

Courts weigh a defendant’s rights against the competing due process interests of individual plaintiffs. See *Wilks v. Pep Boys*, 2006 WL 2821700 *7 (M.D. Tenn. Sept. 26, 2006); *Glass v. IDS Fin. Servs, Inc.*, 778 F.Supp. 1029, 1082 (D. Minn. 1991). After performing this balancing, many courts have concluded that use of representative evidence protects the interests of plaintiffs without infringing on the due process rights of defendants. See *Wilks*, 2006 WL 2821700 at *8 (certifying class action and holding that the due process rights of the plaintiffs, “many of whom likely would be unable to bear the costs of an individual trial,” outweighed the defendant’s interest in individualized defenses); *Glass*, 778 F.Supp. at 1081-82 (rejecting defendant’s argument that collective treatment would violate its due process rights and holding that a collective action was necessary to protect the due process rights of plaintiffs, who were “less able to bear the cost of separate trials because they ha[d] fewer resources than [the

defendant]”); *Jordan v. IBP, Inc.*, 542 F.Supp.2d 790 813-814 (M.D. Tenn. 2008) (same); *Crawford v. Lexington-Fayette Urban County Government*, 2008 WL 2885230, *11 (E.D. Ky. 2008) (same); *Kautsch v. Premier Communications*, 2008 WL 294271, *4 (W.D. Mo. 2008) (same); *Roussell v. Brinker Intern., Inc.*, 2008 WL 2714079, *24 (S.D. Tex. 2008) (approving use of representative evidence with respect to one issue but asking Plaintiffs to submit “an alternative trial plan that renders the use of representative testimony regarding [another issue] more workable.”).

In other cases, however, courts have refused to grant conditional certification, or have decertified collective actions, on the grounds that the evidence presented was insufficiently representative, or because of due process concerns. *Johnson v. Big Lots Stores, Inc.*, 2008 WL 2520415, *18 (E.D. La. 2008) (“[Defendant] cannot be expected to come up with “representative” proof when the plaintiffs cannot reasonably be said to be representative of each other.”); *Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951-952 (4th Cir. 1995) (overturning a liability finding based on a 1.6% sample of opt-in plaintiffs); *Proctor v. Allsup's Convenience Stores, Inc.*, 250 F.R.D. 278, 283-84 (N.D. Tex. 2008) (decertifying a collective action on the grounds that a 3% sample was insufficiently representative in that case); *Myers v. Hertz Corp.*, 2007 WL 2126264, *5-6 (E.D. N.Y. 2007) (evidence of common policies insufficient where testifying Plaintiffs all worked at the same one location out of Defendant's sixty locations in the state); *Colozzi v. St. Joseph's Hospital Health Center*, --- F.Supp.2d ----, 2009 WL 211401 (N.D. N.Y. 2009) (conditional certification partially denied; testimony provided only from one group of employees could not be shown to reflect the realities of all hourly employees), *Hamelin v. Faxton-St. Luke's Healthcare*, 2009 WL 211512 (N.D. N.Y. 2009) (same), and *Fengler v. Crouse Health Foundation, Inc.*, --- F.Supp.2d ----, 2009 WL 211535 (N.D. N.Y. 2009) (same); *Thompson v. Speedway SuperAmerica LLC*, 2009 WL 130069 (D. Minn. 2009) (denial of certification based on a sample of less than one percent of the proposed class and no identification by plaintiff of an overarching corporate policy). Further examples of this line of cases are collected in Appendix B.

C. Representative Evidence Impacts Discovery Battle

Because of the acceptance of representative evidence at the certification, decertification, and trial stages of FLSA collective actions, individualized discovery is generally not appropriate as to all opt ins. Many courts limit discovery on opt-in plaintiffs in FLSA collective actions. *See, e.g., Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010, 1024 (M.D. Tenn. 1998) (concluding that there was no due process violation in limiting discovery to a representative sample of opt-in plaintiffs); *Geer v. Challenge Fin. Investors Corp.*, 2007 WL 1341774 (D. Kan. May 4, 2007) (refusing to allow defendant to take depositions from all 272 opt-in plaintiffs); *Barrus v. Dick's Sporting Goods, Inc.*, 465 F.Supp. 2d 224, 231-32 (W.D.N.Y. 2006) (limiting discovery to representative sample); *Smith v. Lowes Home Ctrs.*, 236 F.R.D. 354, 356 (S.D. Ohio 2006) (limiting discovery to a representative sample); *Bradford v. Bed Bath & Beyond*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002) 184 F. Supp. 2d 1342 (discovery from twenty-five of 300 plaintiffs); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 354 (D.N.J. 1987) (parties used fifty-one-person sample of class of over 1,300 plaintiffs); *Prentice v. Fund for Pub. Interest Research, Inc.*, WL 2729187, at *5 (N.D. Cal. Sept. 18, 2007) (“Individualized discovery is rarely appropriate in FLSA collective actions”); *Wren, et al. v. RGIS Inventory Specialists*, Case No. C 06-5778 JCS, Minute Order re: Discovery Disputes, March 31, 2008 (allowing discovery on 390 out of 5,684 class

members, or 6.86%, in a case involving 270,000 potential opt-ins); *Cranney v. Carriage Services, Inc.*, 2008 WL 2457912, *3, *5 (D. Nev. 2008) (limiting individualized discovery to 10% of a relevant combination of workers and work sites); *Doornbos v. Pilot Travel Centers, LLC*, 2008 WL 4764334 (E.D. Tenn. 2008) (after parties agreed that Defendants would depose eighty-eight randomly selected opt-in class members, dismissing twenty-eight opt-in plaintiffs who did not appear for deposition); *Simpkins v. Pulte Home Corp.*, Case No. 6:08-cv-130-Orl-19DAB, Order granting in part and denying in part Motion to stay discovery; granting in part and denying in part Request for expedited discovery; granting in part Motion for Extension of Time to File Response/Reply, May 2, 2008 (permitting ninety-minute depositions of three out of twenty-five opt-in plaintiffs). As one court noted,

[L]imited discovery from opt-in Plaintiffs may be appropriate. However, given the remedial nature of FLSA actions and the hybrid status of opt-in Plaintiffs, any such discovery must satisfy the following requirements: 1) The discovery is not being sought for the purpose of depriving the opt-in plaintiff of his or her class status; 2) the discovery is simple enough that it does not require the assistance of counsel to answer; 3) the discovery meets the standards of Federal Rule of Civil Procedure 26; and 4) the information is not otherwise available to the defendant. These limitations are imposed to insure that discovery is not used as a tool to limit or discourage participation in the opt-in class and to advance the efficiency and cost containment objectives of a FLSA actions.

Fast v. Applebee's Intern., Inc., 2008 WL 5432288, *1-2 (W.D. Mo. 2008) (ultimately denying defendant's motion to compel responses to interrogatories from each opt-in plaintiff as well as an initial 300 responses "to allow defendant to evaluate the nature of the responses and determine whether to seek discovery from the remaining opt-in plaintiffs"). Further examples of this line of cases are collected in Appendix C.

Other courts, however, have permitted individual discovery of all opt-in plaintiffs in a collective action, particularly where the class at issue is smaller. *Kaas v. Pratt & Whitney*, 1991 WL 158943, *3 (S.D. Fla. 1991) (because the defendant in that case could challenge the joinder of any party as to whether the parties are in fact similarly situated, meaningful discovery is not only permissible, but "essential"); *Krueger v. New York Telephone Company*, 163 F.R.D. 446, 449-52 (S.D. N.Y. 1995); *Coldiron v. Pizza Hut, Inc.*, 2004 WL 2601180, *2 (C.D. Cal. 2004) (permitting individualized discovery on all 306 opt-in plaintiffs); *Abubakar v. City of Solano*, 2008 WL 508911, *2 (E.D. Cal. 2008) (allowing individualized discovery on all 160 opt-in plaintiffs); *Brooks v. Farm Fresh, Inc.*, 759 F.Supp. 1185, (E.D. Va. 1991) (defendant had the right to depose all 127 opt-in plaintiffs), *rev'd on other grounds sub nom Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992); *Kaas v. Pratt & Whitney, a Consol. Subsidiary of United Technologies Corp.*, 1991 WL 158943, *5 (S.D. Fla. 1991) (authorizing discovery on the approximately 100 opt-in plaintiffs); *Rosen v. Reckitt & Colman, Inc.*, 1994 WL 652534, *5 (S.D. N.Y. 1994) (allowing depositions of all forty-eight opt-in plaintiffs in an ADEA collective action); *Watkins v. City of South Bend*, 128 F.R.D. 102, 103 (N.D. Ind. 1989) (permitting defendant to issue three requests for admissions and ninety-two interrogatories on fifty-two opt-in plaintiffs and filed eighty-eight interrogatories on the remaining 105 plaintiffs, and dismissing the case for failure to respond to the foregoing discovery requests); *Russell v. Illinois Bell Telephone Co.*, 575 F.Supp.2d 930 (N.D. Ill. 2008) (noting that Defendant would have "ample

opportunity to depose the opt-in plaintiffs as the case progresses” without specifying whether this referred to all opt-in plaintiffs or only a subset).

D. Uses for Representative Evidence

When an employer has failed to keep accurate records of an employee’s work time, an employee need only establish “as a matter of just and reasonable inference” that work was performed for which the employee was improperly compensated. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (eight out of 300 employees testified). Employees are only required to provide a reasonable approximation of the number of hours worked for which overtime compensation is owed. *Id.* Once an employee has provided that reasonable estimate, the burden switches to the employer to “pinpoint evidence of the precise amount of work performed or to negate the reasonableness of the inferences to be drawn from the [employees’] evidence.” *Dove v. Coupe*, 759 F.2d 167, 173-175 (D.C. Cir. 1985). The burden of disproving an employee’s approximation is “a significant one[.]” *Blake v. CMB Construction*, Civ. No. 90-388-M, 1993 WL 840278 at *5 (D.N.H. Mar. 30, 1993).

“[T]here is no minimum number of statements that must be compiled in relation to the total number of similarly-situated employees. Rather the question is whether the statements submitted, in light of their persuasiveness and whether the incidents they describe appear to be isolated or generalized,” support the inference of the class-wide conduct alleged by plaintiffs. *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243, 266 (S.D.N.Y. 2007). The quantity of trial witnesses will vary according to the quality of their testimony, and the testimony of a relatively small subset of the class will sometimes be enough to find liability. In *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982), the Court upheld an award of damages to 207 FLSA plaintiffs that followed a trial in which only twenty-three plaintiffs testified. Similarly, in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21, 126 S.Ct. 514 (2005), the Ninth Circuit upheld a verdict for over 800 FLSA plaintiffs that was based on testimony from fewer than fifty of those plaintiffs. The First Circuit affirmed an FLSA judgment in favor of plaintiffs where six out of 246 class members testified at trial. *Burger King Corp.*, 672 F.2d at 224-25.

Representative evidence may be used to establish a pattern and practice among class members of working uncompensated overtime. *McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988) (five out of twenty-eight employees testified); *Donovan v. Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) (nineteen out of thirty-four employees testified); *Martin v. Selker Bros. Inc.*, 949 F.2d at 1286, 1296-98 (3d Cir. 1991); *McLaughlin v. DialAmerica Marketing, Inc.*, 716 F.Supp. 812 (D. N.J. 1989) (forty-three out of 393 employees testified); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d at 825, 826-29 (5th Cir. 1973) (sixteen out of twenty-six employees testified); *Marshall v. Brunner*, 500 F.Supp. 116 (W.D. Pa. 1980) (forty-eight out of ninety-three employees), *aff’d in part, rev’d in part*, 668 F.2d 748 (3d Cir. 1982); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 746-50 (2004); *Falcon v. Starbucks Corp.*, 2008 WL 155313, *7, *9-10 (S.D. Tex. 2008); *Longcrier v. HL-A Co., Inc.*, --- F.Supp.2d ---, 2008 WL 5210692, *11-13 (S.D. Ala. 2008); *Guidry v. Chenega Integrated Systems, L.L.C.*, 2009 WL 312069 (W.D. Okla. 2009).

Representative testimony is also frequently admitted on damages issues. *See e.g., Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1296-98 (3d Cir. 1991) (plaintiffs could use representative testimony to make prima facie case that non-testifying employees performed some work for which they were not properly compensated); *Murray v. Stuckey's Inc.*, 939 F.2d 614 (8th Cir. 1991) (each side presented testimony regarding common issue of exempt/nonexempt status of store managers working at different stores; court decided issue on classwide basis); *Donavan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985) (district court properly made classwide determinations regarding whether employees received uninterrupted thirty-minute breaks based on representative testimony; approximately thirty out of ninety-eight employees testified); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 826-29 (5th Cir. 1973) (no error in permitting representative evidence to establish prima facie case that non-testifying employees worked overtime for which they were not compensated); *Maynor v. Dow Chemical Co.*, 2008 WL 2220394, *9 (S.D. Tex. 2008); *Reich v. Brenaman Elec. Service*, 1997 WL 164235 (E.D. Pa. 1997) (“The testimony of the nine employees presented at trial supports an award to all thirty-nine employees who worked for Defendants during the time period at issue.”).

Additional cases endorsing representative testimony at trial include: *Grochowski*, 318 F.3d at 88; *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 309-10 (4th Cir. 2006); *Smith*, 236 F.R.D. at 356; *Jankowski v. Castaldi*, 2006 WL 118973, *5 (E.D.N.Y. Jan. 13, 2006); *Torres v. Gristedes Operating Corp.*, 2006 WL 2819730 at *11 (S.D.N.Y. Sept. 29, 2006); *Thiebes v. Wal-Mart Stores, Inc.*, 2004 WL 1688544, at *1 (D. Or. July 26, 2006); *Alvarez*, 2001 WL 34897841, *6, *rev'd in part on other grounds*, 339 F.3d 894 (9th Cir. 2003); *Takacs*, 1999 WL 33127976, *1; *Dole v. Haulaway Inc.*, 723 F. Supp. 274, 286 (D. N.J. 1989); *Herman v. Hector I. Nieves Transport, Inc.*, 91 F.Supp.2d 435, 446 (D. P.R. 2000) (“It is well established that not all employees need testify in order to prove the violations or to recoup back wages”); *cf. Summers v. Howard Univ.*, 374 F.3d 1188, 1195 (D.C. Cir. 2004) (in context of damages setoff issue arising out of a settlement in an FLSA case: special master permissibly used a random sample of 20% of the payroll data as the basis for the damages calculation).

E. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008)

In December 2008, the Eleventh Circuit decided *Morgan v. Family Dollar Stores, Inc.*, a case in which the plaintiffs won over \$30 million after a jury trial. In this case, managers of Family Dollar stores alleged that defendant had misclassified them as exempt, and sought unpaid overtime wages under the FLSA. The Northern District of Alabama granted conditional certification, and denied a later motion from defendant to decertify the case as a collective action. *Morgan v. Family Dollar Stores, Inc.*, No. 7:01-cv-0303-UWC, slip op. (N.D. Ala. Jan. 13, 2005). The district court also entered judgment as matter of law against the defendant as to a portion of store managers regarding whom the defendant asserted its executive employee defense, entered judgment on a jury verdict in plaintiffs' favor as to the remaining employees, and denied defendant's motion for judgment notwithstanding the verdict. *Id.* Family Dollar appealed.

On appeal, the Eleventh Circuit upheld all of the rulings of the district court. The opinion is definitely worth reading as the Eleventh Circuit wrote a long and detailed opinion addressing several important FLSA issues. The court also provided a detailed background on using representative evidence in FLSA cases. The appeals court rejected Family Dollar's argument

that testimony from seven plaintiffs (out of an opt-in plaintiff group of 1,424 plaintiffs) represented too small of a sample size and caused an unreliable jury verdict. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1276-79 (11th Cir. 2008). The Eleventh Circuit reaffirmed “the general rule that not all employees have to testify to prove overtime violations,” *id.* at 1279, and noted that in addition to these seven testifying witnesses, the plaintiffs had also presented “a volume of good old-fashioned direct evidence.” *Id.* at 1279. This evidence included “(1) a vast array of corporate manuals; (2) testimony from 39 witnesses including Family Dollar executives, district managers who ran the operations of 134 stores, and store managers who worked at a total of 50 different stores; (3) detailed charts summarizing wages and hours; and (4) a wealth of exhibits including emails, internal Family Dollar correspondence, payroll budgets, and in-store schematics.”

In sum, the Eleventh Circuit made clear that representative evidence can be used in FLSA cases, but that the ultimate question for courts and practitioners to consider is whether there is “legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict.”

III. SETTLING HYBRID 216(B) AND RULE 23 CASES

As one district Court recently remarked,

The “explosion” of hybrid lawsuits involving both state and FLSA claims is a much more recent phenomenon. (citations omitted) Indeed, between 2000 and 2003 the number of collective action suits on wage and hour claims under the FLSA “rose by 70 percent,” while the “number of employment discrimination class actions filed in 2003 was 8 percent lower than in 2000.” (citation omitted) In fact, in 2003 the number of FLSA collective actions filed in federal court outnumbered federally-filed class actions for employment discrimination. (citation omitted)

Ellis v. Edward D. Jones & Co, L.P., 527 F.Supp.2d 439, 459 n. 19 (W.D.Pa. 2007). Because section 216(b) of the FLSA and Fed. R. Civ. Proc. 23 differ substantially with respect to settlement procedures, attorneys trying to settle hybrid cases must be aware of how these differences will affect their settlements.

A. Key Differences in Settlement Procedures

1. FLSA

The Secretary of Labor may supervise payment to employees of unpaid wages owed. 29 U.S.C. § 216(c). In private collective actions pursuant to § 216(b), however, when employees present the Court with a proposed settlement, the Court may enter a stipulated judgment. Courts evaluate proposed settlements for fairness, and must determine whether a proposed settlement “is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching.” *Lynn's Food, Inc. v. U.S.*, 679 F.2d 1350, 1354 (11th Cir. 1982); *Thornton v. Solutionone Cleaning Concepts, Inc.*, 2007 WL 210586 *3 (E.D. Cal. 2007) (same); *Mannino v. Anderson-Collins, Inc.*, 2008 WL 2857061, *1 (M.D. Fla. 2008) (same); *Prater v. Commerce Equities Management Co., Inc.*, 2008 WL 5140045 (S.D.

Tex. 2008) (same); *Grassick v. Avatar Properties, Inc.*, 2008 WL 5099942, *2 (M.D. Fla. 2008) (same); *Crawford v. Lexington-Fayette Urban County Government*, 2008 WL 4724499, *2 (E.D. Ky. 2008) (same). *But see Perez v. Avatar Properties, Inc.*, 2008 WL 4853642, *1 (M.D. Fla. 2008) (rejecting proposed settlement “purporting to bind [named plaintiff and defendant] and all future parties to this action prior to any certification of the case as a collective action (or motion for same) and, indeed, prior to any notification by any person of a desire to opt-in as an additional plaintiff”). Further examples of this line of cases are collected in Appendix D.

FLSA settlements do not require a formalized notice and opt-out process, because the only individuals eligible for recovery are those who have affirmatively opted in to the case. These opt-ins can only be bound by the settlement if they affirmatively enter into the settlement.

2. FRCP 23

Courts approve settlements pursuant to Fed. R. Civ. Proc. 23 after a series of steps has been completed. At the first stage, the parties must seek preliminary approval of their settlement. Preliminary approval will be granted if (1) the settlement is found to be *potentially* fair, adequate, and reasonable (*Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007)); and (2) the class satisfies the requirements of Fed. R. Civ. Proc. 23(a) and 23(b)(3) (*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)).

After a settlement is preliminarily approved, the court will order that notice be sent to absent class members. Notice must be reasonably calculated to inform class members of the existence of the settlement and their associated rights (class members may remain in the settlement, opt out of the settlement, or object to the settlement). *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 943-45 (10th Cir. 2005). Notice to class members must be adequate, and must meet the “best notice practicable” standard (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)), rather than actual notice. *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994). First class mail will usually meet the “best notice practicable” standard. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974); *Moore v. R.E. Staite Engineering, Inc.*, 2008 WL 5412423, *4 (S.D. Cal. 2008) (final approval of settlement of wage and hour class action, noting that first-class mail “complies with the Notice requirements set forth in F.R.C.P. 23(e)”); *Wade v. Kroger Co.*, 2008 WL 4999171 (W.D. Ky. 2008) (final approval of class action settlement in Title VII lawsuit where notice was sent via first-class mail); *Alberto v. GMRI, Inc.*, 2008 WL 4891201 (E.D. Cal. 2008) (final approval of class action settlement in wage and hour case where notice was sent via first-class mail); *Lewis v. Starbucks Corp.*, 2008 WL 4196690 (E.D. Cal. 2008) (preliminary approval of class action settlement in wage and hour case, approving individual notice via first-class mail); *Woo v. Home Loan Group, L.P.*, 2008 WL 3925854 (S.D. Cal. 2008) (final approval of class action settlement in wage and hour case where notice was sent via first-class mail). Further examples of this line of cases are collected in Appendix E.

Once the notice period has expired, the court must determine whether the settlement is fair, adequate, and reasonable for a final time. In reaching a conclusion at this stage, the court should consider: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range at which settlement is fair; (4) the complexity, expense, and duration of litigation; (5) the substance of and opposition to settlement; and (6) the stage of the

proceedings at time of settlement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985); *Bennett v. Behring*, 737 F.2d 982, 986 (11th Cir. 1984); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (“Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.”). In the wage-and-hour context, factors for consideration will also include the state where class members worked and the experience of class counsel.

Finally, under the Class Action Fairness Act (“CAFA”), a defendant must provide notice to state and U.S. attorneys general within ten days of filing any proposed settlement with the court. This notice must include: copies of the complaints; a notice of scheduled hearings; any proposed class notice; any proposed or final settlement; any other contemporaneous agreements between class counsel and defense counsel; any final judgment or notice of dismissal; the names of the class members (or a reasonable estimate of the number of class members) in each state; the proportionate share of the entire settlement for such members; and any written judicial opinion relating to settlement. 28 U.S.C. § 1715(b). If the defendant does not follow these notification requirements, the settlement will not be granted final approval, and class plaintiffs may elect not to be bound by the settlement. 28 U.S.C. § 1715(e).

B. Options for Settling Hybrid Cases

In addition to being cognizant of the different procedural requirements for settling 216(b) and Rule 23 cases, counsel should consider whether and how to value the different claims. The following are three examples of ways in which hybrid cases can be resolved.

1. *Mousai v. E-Loan* – Settlement of state law and federal law claims in one case.

This case was filed as a class and collective action on behalf a group of mortgage loan consultants employed by E-Loan in California, alleging that they had been misclassified as exempt from the California and federal overtime laws and had not received required overtime payments, legally required meal periods, accurate final paychecks, and accurate and timely wage statements showing accurate hours worked. The Plaintiff also alleged on a class basis that the foregoing violated California’s Unfair Competition Law, Business and Professions Code § 17200, et seq.

Under the settlement, which received final approval, class members were bound by the Settlement Agreement if they had opted into the case prior to November 10, 2006, or if they returned a signed, timely, and valid Claim Form/Consent to Join Form, pursuant to the terms of the Settlement. The class fund was distributed on a pro rata basis to those who submitted claim forms, based on length of employment. Those who had opted in prior to November 10, 2006, received an additional amount, however, in recognition of the fact that they had actively tolled their statute of limitations on their federal claims by filing a consent to join form. Class members who did not timely submit a valid consent to join form through the settlement process were not bound by the resolution of their federal FLSA claims. With respect to claims under

California state law, class members wishing to exclude themselves from the Settlement Agreement were required to submit a written statement requesting exclusion from, or opting out of, the Settlement Class by a set deadline. Class members who did not timely opt out of the proposed settlement were bound by the resolution of their California law claims, including for attorneys' fees and costs.

2. *Tokar v. GEICO* – Settling state and federal claims in three separate cases.

This Settlement was reached as part of a global settlement with GEICO of three similar cases. The first filed case was a federal collective action under the federal FLSA, which was filed in federal district court in Texas, *Owens v. GEICO*, No. 3-03CV0620-M (N.D. Tex. filed March 25, 2003). *Owens* was initially brought on a nationwide basis. However, recognizing that California law provided procedural advantages and additional substantive rights, our firm was brought on as co-counsel to bring this putative class action under California state law. Plaintiffs filed a class action complaint in the San Diego County Superior Court on behalf of themselves and all other employees similarly situated, seeking back pay for non-payment of wages and alleging causes of action for violations of the California Labor Code, IWC Wage Orders, and California Business and Professions Code. Similarly, another putative class action was filed in New York state court pursuant to New York state law, *Tillman v. GEICO*, No. 0011538-03 (N.Y. S. Ct. filed July 25, 2003). All three cases raised the same allegations that GEICO failed to pay putative Class Members and opt-in Class Members for work performed before and after their scheduled shifts (“pre and post shift work”). The parties engaged in a global mediation, which resulted in separate settlement agreements for each of the three cases. Each settlement agreement was submitted separately to each respective court for approval.

Participants in the California Settlement released all claims against GEICO arising from alleged violations of the California Labor Code or Business and Professions Code in connection with GEICO's alleged failure to pay for pre and post shift work, failure to include non-discretionary bonuses in the regular rate for purposes of calculating overtime compensation, and failure to furnish wage statements and keep payroll records as required by law. They further released all claims, whether known or unknown, that were alleged or could have been alleged in the above-captioned case, including but not limited to all claims of unpaid wages, waiting time penalties, damages, liquidated damages, civil penalties, interest, costs, attorneys fees and other claims for unpaid wages or penalties under federal and state law. If the individuals in the certified class wished not to be bound by the settlement, they were required to submit a written notice stating that they wanted to opt out of the settlement.

3. Cautionary Tales in California

Federal and state courts in California, where a lot of wage and hour litigation takes place, have recently reiterated the Court's independent role in approving class action settlements as fair and reasonable.

a. *Kakani v. Oracle*

This case alleged, on behalf of current and former sales consultant employees, violations of the federal FLSA (as a collective action) and California state labor laws (as a class action

under Fed. R. Civ. Proc. 23). The parties presented the Court with a settlement under which every employee covered by the class definition, except those who affirmatively opted out of the settlement, released “any and all claims that were asserted or could have been asserted in the Complaint [in this action], including various California Labor Code Sections and Business & Professions Code Sections” (§ 2(s)). Additionally, the settlement stated, “In addition, Oracle contends that this settlement will act to release claims under the [150] other state statutes, regulations and orders [...] under which” the claims could have been brought. Settlement class members also released all claims under the FLSA. Those wishing not to be bound by the settlement were required to submit opt-out forms. This settlement was rejected in a strongly-worded opinion. *Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D. Cal. 2007).

After further negotiations, the parties presented the Court with a revised settlement agreement, which the Court ultimately approved. *Kakani v. Oracle Corp.*, 2007 WL 2221073 (N.D. Cal. 2007). This settlement called for certification of a settlement class with three subclasses: (1) a California class for unpaid overtime and waiting time penalties (violations of Cal. Labor Code §§ 201-203); (2) a California class for missed meal and rest periods, record-keeping violations, and other wage and hour penalties; and (3) a FLSA class for all non-California class members. The class members received a notice letter that described the proposed settlement and the claims procedure. The class members also received a document titled “Claim, Waiver, Release, and Consent to Join Form.” *Kakani v. Oracle*, Case No. C-06-6493 WHA (N.D. Cal. June 27, 2007), Attachment B to First Amended Joint Stipulation of Class Action Settlement between Plaintiffs and Defendant; Settlement Agreement and Release. To participate in the settlement, each class member (regardless of whether she was a member of subclass 1, 2, and/or 3), was required to fill out this form.

The relevant language of the Claim, Waiver, Release, and Consent to Join form reads as follows:

1. I understand that this *Kakani* Lawsuit is being brought under the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. (“FLSA”), the California Labor Code, the California Business & Professions Code, and the Industrial Welfare Commission Wage Orders.

2. I hereby consent and agree to pursue all Settled Claims under the FLSA against Oracle and Oracle USA, Inc. for alleged unpaid wages, overtime, liquidated damages and interest resulting from my employment in any of the job codes listed in Section III of the Notice to Class of Proposed Settlement of Class Action by joining in the above-referenced *Kakani* Lawsuit, and I hereby opt in to become a plaintiff in the *Kakani* Lawsuit. I consent and agree to be bound by any adjudication of the *Kakani* Lawsuit by the Court. I further agree to be bound by the collective action settlement of all Settled Claims herein approved by my attorneys and approved by this Court in the *Kakani* Lawsuit as fair, adequate, and reasonable.

3. I consent and agree to pursue my claims against Oracle, Oracle USA, Inc. and the other Released Parties for alleged unpaid wages, overtime, interest and penalties resulting from my employment with Oracle or Oracle USA, Inc. in any of the job codes listed in Section III of the Notice to Class of Proposed Settlement of Class Action in connection with the *Kakani* Lawsuit.

4. I hereby designate the law firm of Schneider & Wallace and the Law Office of Christina Djernaes to represent me in the *Kakani* Lawsuit.

b. *Kullar v. Foot Locker*

In *Kullar v. Foot Locker* (2008) 168 Cal.App.4th 116, California's First District Court of Appeal overturned a grant of final approval for a class action settlement. The underlying case alleged violations of California labor law relating to reimbursement for work-related expenses and payment of wages due upon termination of employment. *Id.* at 121-22. The parties reached a class action settlement of these claims and presented it to the trial court for approval. *Id.* at 122-24.

Before the trial court held a hearing on the parties' motion for preliminary approval, another Foot Locker employee filed a class action complaint against Foot Locker alleging violations of California labor law regarding meal periods and payment of wages due upon termination of employment. *Kullar*, 168 Cal.App.4th at 124. The objector appeared at the preliminary approval hearing and objected to the settlement, "contending, among other things, that the settlement is not fair, adequate and reasonable in that it does not provide compensation reasonably related to the actual loss sustained by class members, and that class counsel had not conducted sufficient discovery or investigation to determine the extent of the class loss." *Id.* at 124-25. The objector thereafter sought to take discovery regarding the materials and information exchanged throughout the mediation process. *Id.* at 125.

The trial court rejected the objector's arguments, and ruled that the objector could not review mediation documents because of the confidentiality provisions of California Evidence Code § 1119 and because some of the information went to liability and was therefore irrelevant to settlement. *Kullar*, 168 Cal.App.4th at 125-26. The trial court went on to grant preliminary approval, and the objectors appealed. *Id.* at 127

The First District Court of Appeal reversed the trial court's grant of preliminary approval, finding that insufficient data and information had been made available in the approval process. Addressing California Evidence Code § 1119, the Court of Appeal stated, "If some relevant information is subject to a privilege ... other data must be provided that will enable the court to make an independent assessment of the adequacy of the settlement terms." *Kullar*, 168 Cal.App.4th at 132. The Court of Appeal further noted that data underlying confidential, mediation communications and writings were not themselves immune from production, and should be disclosed to the trial court to evaluate the settlement's fairness. *Id.* Finally, the Court of Appeal reopened the issue of the objector's discovery requests, stating that the objectors' requests "should not be denied simply because the requested information was disclosed during the mediation leading to the proposed settlement." *Id.*

The complex departments of the trial courts in California have begun issuing standing orders regarding class action settlements with provisions based on the ruling in *Kullar*.

APPENDIX A

- *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 828 (11th Cir. 1988) (“The fact that several employees do not testify does not penalize their claim; ‘it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of just and reasonable inference.’”)
- *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982) (court determined on classwide basis that 246 assistant managers working in forty-four different restaurants were not exempt “executive” employees based on limited testimony from witnesses from six stores; court also limited number of witnesses after hearing substantially the same testimony from six witnesses)
- *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (“[T]he plaintiffs correctly point out that not all employees need testify in order to prove FLSA violations or recoup back-wages, [but] the plaintiffs must present sufficient evidence for the jury to make reasonable inference as to the number of hours worked by non-testifying employees.”)
- *Janowski v. Castaldi*, 2006 WL 118973, *5 (E.D.N.Y. Jan. 13, 2006) (Plaintiffs “need not present testimony from each underpaid employee; rather, it is well established that [they] may present the testimony of a representative sample of employees as part of [their] proof of the prima facie case under FLSA.” (quoting *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)) (alterations in original))
- *Theibes v. Wal-Mart Stores*, 2004 WL 1688544 at *1 (D. Or. July 26, 2004) (“I decided to bifurcate the case for separate trials on liability and damages. I ruled that plaintiffs would be allowed to present ‘representative’ testimony regarding Wal-Mart’s alleged pattern or practice of suffering or permitting off-the-clock work.”)
- *Alvarez v. IBP, Inc.*, 2001 WL 34897841, *6 (E.D. Wash. Sept. 14, 2001), *rev’d in part on other grounds* (“The use of representative evidence is well accepted for determining liability in FLSA cases.”)
- *Takacs v. Hahn Auto. Corp.*, 1999 WL 33127976, *1 (S.D. Ohio Jan. 25, 1999) (“Based upon [*Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946)] courts including the Sixth Circuit, have uniformly held that damages in an FLSA overtime case can be proved with testimony from a representative group of plaintiffs and, thus, without requiring each plaintiff seeking same to testify.”)
- *Morgan v. Family Dollar Stores, Inc.*, No. 7:01-cv-0303-UWC, slip op. at 6-7 (N.D. Ala. Jan. 13, 2005) (denying motion to decertify) (“Because of the substantial similarities of their job duties, and because of Family Dollar’s company-wide policies and procedures relating to its store managers, the

plaintiffs may rely on representative testimony to establish liability and obtain relief, if such is warranted under the FLSA. This scenario is similar to that in the trial of certified class actions under Rule 23(b)(3), where the testimony and evidence put forth by class representatives binds unnamed class members. . . . Thus, notions of due process and fairness are not offended by a collective trial in these circumstances.”)

- *In re Farmers Ins. Exch. Claims Representatives’ Overtime Pay Litig.*, 336 F. Supp. 2d 1077 (D. Or. 2004), *rev’d in part on other grounds*, 481 F.3d 1119 (9th Cir. 2007) (court determined exempt/nonexempt status of insurance claims employees on classwide basis based on representative evidence)
- *Robinson-Smith v. Gov’t Employees Ins. Co.*, 323 F. Supp. 2d 12 (D.D.C. 2004) (granting summary judgment for a plaintiffs on a collective action basis to FLSA collective action members comprised of two types of GEICO Auto Adjusters based on common evidence of job duties)
- *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805 (2001) (court granted summary judgment under California law on classwide basis to class comprised of auto, property and liability claims employees based on common evidence of job duties)
- *Pegasus Consulting Group v. Administrative Review Bd. for the Dept. of Labor, Wage and Hour Div., Employment Standards Admin.*, 2008 WL 920072, *18 (D. N.J. 2008) (“It is well established that representative testimony may be used to establish a class-wide right to back pay.”)
- *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 697-701 (3d Cir. 1994) (court determined on classwide basis that reporters were misclassified as exempt professional employees; twenty-two out of seventy employees testified)
- *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Circ. 1997) (upholding judgment against Defendant based on testimony from a sample of 2.5% of workers)
- *Chao v. Self Pride, Inc.*, 2006 WL 469954, *8-9 (D. Md. 2006) (granting summary judgment based on a 7% sample of opt-in plaintiffs)

APPENDIX B

- *Herman v. Hogar Praderas de Amor, Inc.*, 130 F.Supp.2d 257, 264-265 (D. P.R. 2001) (where representative evidence was presented for two out of four job categories, evidence sufficiently representative only for those two groups)
- *Trinh v. JP Morgan Chase & Co.*, 2008 WL 1860161, *4-5 (S.D. Cal. 2008) (denying conditional certification because Plaintiffs failed to show the extent to which proposed class members would rely on common evidence)
- *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253 & fn. 13 (C.D. Cal. 2006) (“Representative testimony also raises potential due process problems with regards to class members whose circumstances may not be adequately represented.”)
- *Campbell v. PricewaterhouseCoopers, LLP*, 2008 WL 818617, *17 (E.D. Cal. 2008) (approving use of common proof only for the subset of employees within Plaintiffs’ department, but not for the entire class)
- *Castle v. Wells Fargo Financial, Inc.*, 2008 WL 495705, * (N.D. Cal. 2008) (denying conditional certification where testimony from opt-in Plaintiffs – in the form of twenty-four declarations out of a pool of 14,000 employees, working in twenty-eight of the 1,000 nationwide locations, and in eight of the forty-eight states – varied significantly)
- *Secretary of Labor v. DeSisto*, 929 F.2d 789, 793-794 (1st Cir. 1991) (finding a sample size of one opt-in employee and one compliance manager, out of 244 employees at different locations, insufficient)
- *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-702 (3d Cir. 1994) (where representative evidence regarding back pay was presented, remanding for further review to determine sufficiency)
- *Holt v. Rite Aid Corp.*, 333 F.Supp.2d 1265, 1272-1273 (M.D. Ala. 2004) (rejecting Plaintiffs’ reliance only on representative proof of hours worked and not company-wide policies to establish class members’ job duties)

APPENDIX C

- *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1187-88 (E.D. Va. 1991), *rev'd on other grounds sub nom. Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992) (discovery of opt-ins permitted but only until either side felt the record sufficiently developed to answer the “similarly situated” question)
- *McGrath, supra*, 1994 WL 45162 at *2 (E.D. Pa. 1994) (no discovery from opt-in plaintiffs)
- *Adkins v. Mid-Am. Growers, Inc.*, 143 F.R.D. 171, 174 (N.D. Ill. 1992) (depositions and interrogatories on a representative basis)
- *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992) (rejecting magistrate judge’s order for individualized discovery; “Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level.”)

APPENDIX D

- *Manning v. New York Univ.*, 2001 WL 963982, at *11 (S.D.N.Y. 2001), *aff'd* 299 F.3d 156 (2d Cir. 2002) (Courts evaluate proposed settlements for fairness, and must determine whether a proposed settlement “is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching”)
- *Vandiver v. Meridian I.Q. Services, Inc.*, 2008 WL 508442, *1 (M.D. Ala. 2008) (same)
- *Kuczmaski v. US Foodservice*, 2007 WL 3049538, *1 (M.D. Ala. 2007) (same)
- *Hand v. Dionex Corp.*, 2007 WL 3383601, *1 (D. Ariz. 2007) (same)
- *Yue Zhou v. Wang's Restaurant*, 2007 WL 2298046, *1 (N.D. Cal. 2007) (same)
- *Burton v. Utility Design, Inc.*, 2008 WL 2856983, *1 (M.D. Fla. 2008) (same);

APPENDIX E

- *Alberto v. GMRI, Inc.*, 2008 WL 2561106, *10 (E.D. Cal. 2008) (preliminary approval of class action settlement calling for, *inter alia*, notice via first-class mail, in a wage-and-hour case)
- *Smith v. Ajax Magnethermic Corp.*, 2007 WL 3355080, *7 (N.D. Ohio 2007) (notice via certified mail)
- *Tucker v. Walgreen Co.*, 2007 WL 2915578, *4 (S.D. Ill. 2007) (notice via first-class mail in Title VII case)
- *Aguayo v. Oldenkamp Trucking*, 2006 WL 3020943, *1, *13 (E.D. Cal. 2006) (final approval of class action settlement calling for, *inter alia*, notice via first-class mail, in a wage-and-hour case)
- *West v. Circle K Stores, Inc.*, 2006 WL 1652598, *13 (E.D. Cal. 2006) (preliminary approval of class action settlement calling for, *inter alia*, notice via first-class mail, in a wage-and-hour case)
- *Morales v. Five J's Trucking, Inc.*, 2006 WL 1409733, *2, *7 (E.D. Cal. 2006) (preliminary approval of class action settlement calling for, *inter alia*, notice via first-class mail, in a wage-and-hour case)
- *Hernandez v. Kovacevich*, 2005 WL 2435906, *7 (E.D. Cal. 2005) (final approval of class action settlement calling for, *inter alia*, notice via first-class mail, in a wage-and-hour case)
- *Gonzalez v. City of New York*, 396 F.Supp.2d 411, 417-418 (S.D. N.Y. 2005) (notice via first-class mail in employment discrimination case)
- *Hartman v. Wick*, 678 F.Supp. 312, 329 (D. D.C. 1988) (notice via first-class mail and, because many class members were unidentifiable, by newspaper publication in employment discrimination case)
- *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492-493 (E.D. Cal. 2006) (notice via first-class mail and posting at employer's workplace in FLSA collective action)
- *Barone v. Safeway Steel Products, Inc.*, 2005 WL 2009882, *6 (E.D. N.Y. 2005) (ordering notice via individual, first-class mail in wage-and-hour case)
- *Latino Officers Ass'n City of New York, Inc. v. City of New York*, 2004 WL 2066605, *2 (S.D. N.Y. 2004) (final approval of class action settlement in Title VII lawsuit where notice was sent via first-class mail and published in five news papers)