

EMERGING TARGETS FOR WAGE AND HOUR CLASS ACTION LITIGATION: IS YOUR ORGANIZATION AMONG THEM?

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I. INTRODUCTION

In 1938, Congress enacted the Fair Labor Standards Act (“FLSA” or the “Act”) to establish federal wage and hour standards for covered employees in the public and private sectors. In recent years, there has been a surge in FLSA litigation and enforcement by the government and the private sector. The Wage and Hour Division of the Department of Labor (“DOL”) is the government agency responsible for FLSA enforcement. The Wage and Hour Division reports that back wage collections have increased steadily since 2001. In fiscal year 2004, the Wage and Hour Division concluded 31,448 FLSA cases, of which a staggering 22,300 had monetary violations. These actions collected more than \$165 million in back wages for approximately 266,000 employees. *See* U.S. Department of Labor Wage and Hour Division, “2004 Statistics Fact Sheet,” available at <http://www.dol.gov/esa/whd/statistics/200411.htm>. The amount collected was an increase of 48 percent over the \$111 million collected in fiscal year 2001, although it was slightly less than the amount collected in 2003. *Id.* The 2004 settlements included 17 in which the department obtained between \$1 million and \$5 million for employees. “FLSA: Enforcement Efforts Extend to Call Centers, Other ‘New Economy’ Jobs, DOL Official Says,” *Daily Lab. Rep. (BNA)* (Feb. 18, 2005), available at <http://pubs.bna.com/ip/bna/dlr.nsf>.

In addition to increased enforcement by the government, there also has been an explosion in wage and hour suits and in collective actions under the FLSA and state laws. A collective action is the FLSA’s version of a class action and typically concerns one of the four main types of FLSA violations: the misclassification of a nonexempt employee as exempt; improperly “docking” an exempt employee’s wages; not paying nonexempt employees for all hours worked; or miscalculating overtime for nonexempt employees. A long-neglected area of employment law, FLSA collective actions have grown in usage to the point that the number filed has tripled since 1997. There are now more of these lawsuits filed in federal court than employment discrimination class actions. *See* “Wage-Hour Actions Surpassed EEO in Federal Courts Last Year, Survey Shows,” *Daily Lab. Rep. (BNA)* (Mar. 22, 2002), at C-1; Richard T. Seymour, “Trends in Employment Discrimination Law,” Address before the American Bar Association Section of Labor and Employment Law (Mar. 24, 2004), available at <http://www.lieffcabraser.com/articles.htm>.

The rise in FLSA collective action litigation is attributable in part to the fact that the complexities of the Act have caused many employers to misinterpret its provisions or to make overly broad assumptions, which in turn makes them susceptible to lawsuits. *See* Victoria Roberts, “Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies,” *Daily Lab. Rep. (BNA)* (Dec. 12, 2002), at C-1. Large private settlements, including a large financial services company’s \$37 million settlement with its stockbrokers; Farmers Insurance

Exchange's \$200 million settlement for not paying overtime to claims agents; Starbuck's \$18 million settlement for improperly classifying store managers as exempt; Eckerd's \$8 million settlement for improperly docking the pay of "exempt" employees; and a \$5.1 million settlement between Cingular Wireless and its call center customer service representatives, also have added to the rise in collective actions by causing employees to question whether they too should be paid overtime. Furthermore, the growth wage and hour litigation likely will continue, as the publicity surrounding the revisions to the FLSA regulations that went into effect on August 23, 2004 has caused both employers and employees to reevaluate how employees are classified and paid.

II. EMPLOYERS OF BOTH HIGH AND LOW WAGE WORKERS ARE IN THE CROSS HAIRS

A. The Department of Labor's Focus on Low-Wage Industries

In recent years the DOL has continued to focus on FLSA compliance in low-wage industries and those industries with a history of wage and hour violations. In fiscal year 2004, the DOL's Wage and Hour Division spent a third of its enforcement resources on investigations concerning nine low-wage industries, which include day care, restaurants, janitorial services, garment manufacturing, and temporary help. *See* U.S. Department of Labor Wage and Hour Division, "2004 Statistics Fact Sheet," available at <http://www.dol.gov/esa/whd/statistics/200411.htm>. The Wage and Hour Division's enforcement efforts in such low-wage industries contributed to a 33 percent increase in the amount of wages collected for low-wage workers over the past four fiscal years. Furthermore, in a recent statement before the U.S. House of Representatives' Subcommittee on Labor, Health and Human Services, and Education, Secretary of Labor Elaine Chao explained that in fiscal year 2006, the DOL's Wage and Hour Division ("WHD") will focus on its Overtime Security Task Force and its "Off-the-Clock" Initiative to promote compliance through education and enforcement efforts in low-wage industries. *See* U.S. Department of Labor, "Statement of Elaine L. Chao Secretary of Labor Before the Subcommittee on Labor, Health and Human Services, and Education Committee on Appropriations United States House of Representatives" (Mar. 17, 2005), available at http://www.dol.gov/_sec/media/speeches/20050317_house_appropriations.htm.

B. Collective Actions Against the Financial Industry

The FLSA was originally enacted in 1938 to place a floor under wages and a ceiling over hours of employment during a time extraordinary unemployment and depressed wages. *See Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246 (3d Cir. 1980) (internal citations omitted); *see also Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004) (the FLSA was designed to "aid the unprotected, and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage"). Despite this stated purpose, and although low-wage industries continue to be a focus of DOL enforcement, employers in industries with relatively high-end wage earners are far from immune to investigation and FLSA collective actions. In fact, high wage earners are the newest breed to wage and hour plaintiffs. For example, in financial services industry, approximately 3,250 stockbrokers of a well-known company received a \$37 million settlement in August 2005. The brokers alleged the company had violated the FLSA and the California Labor

Code in misclassifying them as administratively exempt employees. To qualify for this exemption, an employee's primary duty must be related directly to the company's policies or business operations and the employee must use discretion and independent judgment in his or her work. The dispute centered on whether the brokers primarily performed nonexempt sales work or whether their primary duty was to counsel and advise clients. A host of other financial services industry companies have been sued in similar cases.

The trend of workers in the financial services industry filing collective actions is further illustrated by the spate of lawsuits filed by loan officers. Bank of America recently reached a \$15 million settlement in an action where the company allegedly failed to pay overtime to loan account executives. Loan officers employed by companies including CTX Mortgage and Quicken Loan are currently involved in collective actions claiming that they are entitled to overtime and that they do not qualify for the outside sales exemption. *See* <http://www.overtime.com> and <http://overtime/cases.com>. To qualify for the outside salesman exemption, a salesperson must be customarily and regularly engaged away from his or her employer's place of business making sales or obtaining orders or contracts for services. Additionally, 80 percent or more of the outside salesperson's hours worked must be spent on outside sales work or work incidental to and in conjunction with such work. Typically, the dispute in the loan officer cases focuses not on whether the officers were engaged in sales, but whether they were regularly engaged in "outside" sales, as opposed to "inside," telephone-driven sales.

C. Collective Actions Brought by Store Managers and Assistant Managers

There has also been a rise in litigation concerning the classification of employees labeled store managers and assistant store managers. In May of this year, Hertz reached a settlement agreement with 884 assistant managers for \$320,000. PETCO reached a \$2.5 million settlement with California managers who claimed they should have been classified as exempt. Companies such as Blockbuster Video, Sears, Jiffy Lube, and Radio Shack are currently or have been involved in litigation concerning their classification of store managers. Such litigation typically centers on whether the managers qualify for the executive exemption. To qualify for such an exemption, a manager must supervise two or more other employees or the equivalent, and this supervision must be customary and regular. In cases concerning managers and assistant managers, there is often a factual dispute over what the manager's job really entails. The managers in such cases often state that they rarely exercise true discretion or have power in significant matters. Likewise, the managers often claim that their primary duty is not management work but rather performing duties similar to those of, and alongside of, hourly workers. Such allegations are at the heart of a class action in California brought on behalf of approximately 1,400 Sav-On Drug Store managers and assistant managers. The store managers and assistant managers claim that the bulk of their day was spent stocking shelves and running cash registers and not on managerial duties. *See* "State Supreme Court Revives Overtime Suit by Sav-On Employees," *San Diego Union-Tribune*, (Aug. 27, 2004), available at www.signonsandiego.com/uniontrib/20040827/news_1b27savon.html.

D. Off-the-Clock Issues in Customer Service Delivery

Employers who allegedly do not compensate workers for “off-the-clock” activities also are often targeted for wage and hour collective and class actions. “Off-the-clock” is the term used to refer to work that an employee performs for which he or she does not receive payment from his or her employer. Employees generally allege that employers either knew or reasonably should have known that such work was being performed without compensation.

Off-the-clock has been the subject of litigation for many years in the meat and poultry industries with disputes over whether employees should be compensated for time spent “donning and doffing” protective clothing. In February 2005, speaking at an American Bar Association meeting, DOL Associate Solicitor Steven Mandel noted that the DOL had identified that the practice of the “off-the-clock” work was now visible in “new economy” jobs such as those in call and contact centers. *See* “FLSA: Enforcement Efforts Extend to Call Centers, Other ‘New Economy’ Jobs, DOL Official Says,” *Daily Lab. Rep. (BNA)* (Feb. 18, 2005), *available at* <http://pubs.bna.com/ip/bna/dlr.nsf>.

In off-the-clock call center cases, employees typically make the following allegations:

- The call center required employees to arrive at work prior to the start of a shift (without compensating them) to start up a computer, complete necessary paperwork, and perform other preparatory activities.
- The call center emphasizes employees’ being on the phone to answer calls and does not provide employees sufficient amount of time during the shift to perform related paperwork; as a result, such paperwork is performed after logging off of the phones, which often are the timekeeping mechanism.
- The call center does not provide employees sufficient time during the shift to review materials necessary to answer customer phone calls, and as a result, such work is performed off the clock.
- The call center requires employees to take calls or perform work during paid breaks and lunches.
- The call center requires employees to stay past the end of their shift to attend to a customer call or perform other related work.

Plaintiffs pursuing a class or collective action further allege that the call center maintained a policy or practice of requiring employees to perform the type of off-the-clock work described above.

Recent off-the-clock litigation includes a \$1.6 million settlement reached in August 2005 between Group Health and approximately 1000 employees who alleged that the health maintenance organization failed to pay overtime and keep proper records of time worked. In July 2005, Humana Inc. reached a settlement of approximately \$1 million with 2,510 call center workers. The workers alleged that Humana failed to pay them for time spent logging on to the network and waiting for their computers to power up. In January 2005, the DOL announced that Cingular Wireless had agreed to pay \$5.1 million in back wages to more than 25,000 customer service representatives who allegedly worked off the clock without compensation. According to the DOL, its investigation found that customer service representatives would begin work prior to

logging into their timekeeping systems at the start of their scheduled shift, and sometimes continue to work after their shift ended. None of the time worked off the clock was recorded, so employees did not receive compensation for it. The boom in litigation against call center operators making similar allegations also includes workers at Intel and GEICO. Finally, the trend in suits against the financial services industry is further evidenced by the collective action brought by Citigroup bank tellers in California who claim that they were not properly compensated for “off-the-clock” work.

Off-the-clock cases have the potential to expose businesses to massive liabilities. Although, for example, five minutes of time per day may not seem significant in and of itself, when the business has a 600-seat customer service center that operates three shifts per day, it is easy to see how the exposure can grow exponentially. Multiply these amounts over the years of a statute of limitations (such as New York’s six-year statute) and it is obvious why plaintiffs’ attorneys are so aggressively pursuing these matters. Although there are a variety of different timekeeping mechanisms that make any single “fix” impossible, some steps can be taken to reduce your business’s exposure. First, all managers and supervisors should be trained that no employee should be required to start working before entering into the timekeeping system. Second, all employees should be trained that they are not required – and indeed, are not permitted to – start working without being logged into the timekeeping system. Third, employees, including managers and supervisors, who violate this policy should be disciplined. Fourth, employees should be asked, presumably on their computer screens, whether they have logged in to the timekeeping system and warned that they must not start working prior thereto.

E. Wage and Hour Cases Against the Insurance Industry

The insurance industry has also been hard hit by wage and hour collective actions. The risks the industry faces is best reflected by the by the \$210 million judgment against Farmers Insurance Exchange for failing to pay overtime to California insurance adjusters from 1993 through June 2001. *See Bell v. Farmers Insurance Exchange* Case No. 774013-0 (Cal.). This suit was followed by another action filed by Farmers’ adjusters in the District Court for Oregon where judgments totaling approximately \$52.5 million were entered against Farmers. In entering the judgments, the District Court held that the adjusters who handled auto and low level property claims did not qualify for the administrative exemption. The court held that these adjusters were entitled to overtime under the FLSA and seven state laws because they failed to exercise discretion and independent judgment as part of their duties. The court focused on the employees’ ability to compare, evaluate and choose between possible courses of conduct and whether they have the power to make independent choices, free from immediate supervision and with respect to matters of significance. As such, the court held adjusters who “handled uncomplicated and routine losses of less than \$3,000 and who relied on computer software to estimate damages were not exempt while adjusters who addressed more complicated claims involving credibility of witness determinations and complex coverage issues were considered exempt from overtime.” *See Elizabeth M. Marsh, “Overtime Pay: The Insurance Industry Continues the Battle Over “White Collar” Exemptions,”* Thompson Coe Cousins & Irons LLP white paper, *available at* <http://library.findlaw.com/2004/Jun/28/133488.html>.

F. Retail Industry Mandatory Apparel Purchase Cases

A spate of wage and hour collective and class actions also have been brought against the retail industry these actions challenge the requirement that employees purchase certain apparel to wear to work. Under the FLSA, if required clothing purchases cause an employee to earn below the minimum wage, the employee must be reimbursed up to the minimum wage. Similarly, various state laws have minimum wage rules and, in fact, impose a greater burden to fully reimburse employees without regard to whether the purchases take employees below the minimum wage. Accordingly, in June 2003, Abercrombie & Fitch reached a \$2.2 million settlement with California workers alleging that they were forced to buy and wear Abercrombie clothes while on the job. Likewise, in 2005, Gap Inc. employees in California received nearly \$1.8 million worth of clothing vouchers as compensation for apparel they bought to satisfy workplace dress codes. The Gap employees claimed that the company forced them to buy its clothes.

Gap denied the claim, asserting that it only told employees to look “brand appropriate” and avoid obvious labels belonging to competitors. Similar actions are also pending against other national retailers like Polo Ralph Lauren. *See* “Gap close to settling clothes voucher handout proposed in dress-code suit,” *available at* <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/01/28/BUG46B1PJQ1.DTL&type=business>.

The above cases and settlements illustrate that a wide variety of industries face wage and hour collective and class actions. Accordingly, whether you employ employees at the low end of the wage scale, at the top, or anywhere in between, you can be a target if there are a multitude of employees who can fit within a putative class definition.

III. GENERAL DISCUSSION OF WAGE AND HOUR LITIGATION

A. The FLSA and State Laws Covering Wages

1. The FLSA

The FLSA establishes federal wage and hour standards for covered employees in the public and private sectors. In addition to setting a minimum wage, the FLSA requires premium compensation (i.e., overtime) of one and one-half the rate of pay for hours worked in excess of 40 hours per week.

The overtime provisions of the FLSA do not apply to persons who are not employees or who are expressly exempted from coverage – “exempt” employees. Effective August 23, 2004, new DOL regulations revised the overtime exemptions for employees who earn certain levels of compensation and who are employed in a bona fide executive, administrative, or professional capacity – these are the so-called “white collar” exemptions. In addition, the regulations also create exemptions for, among others, persons employed as outside salespersons or computer systems analysts or programmers and for highly compensated employees who earn at least \$100,000 annually. Regulations established under the FLSA set forth the specific requirements for these exemptions. *See* 29 C.F.R. pt. 541.

The FLSA imposes no limitations on the number of hours that an employee may work in any workweek, as long as the employer pays the required overtime compensation to an employee for hours worked in excess of the maximum 40-hour workweek prescribed by the FLSA. Failure to comply with the FLSA's requirements can result in extensive administrative investigations, civil lawsuits, awards of double damages to aggrieved employees for lost wages (such as unpaid overtime), injunctive relief and awards of attorneys' fees. *See* 29 U.S.C. § 216. Willful violations of the FLSA may result in civil fines up to \$1,000 per violation, criminal fines of up to \$10,000, and even imprisonment for up to six months for repeat offenders. *Id.*

Either the aggrieved employee or the DOL can bring an action under the FLSA. An FLSA pay claim is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended, 29 C.F.R. § 255(a), which imposes a two-year statute of limitations, except in cases of a willful violation, where the statute of limitations is three years.

Under the FLSA, an employer "includes any *person* acting directly or indirectly in the interest of an employer in relation to an employee." *See* 29 U.S.C. § 203(d) (emphasis added). The term "person" means "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." *Id.* at § 203(a). There is also support in the case law for the proposition that individuals supervisors or managers may be subject to liability under the FLSA.

2. State Laws Covering Wages

The FLSA sets only the minimum standards employers must meet. If an applicable state law provides for a higher minimum wage, more generous overtime compensation, or more restrictive standards for child labor, those state law standards, rather than the FLSA standards, must be met.

Awareness of state statutes is essential because state wage and hour laws often differ from the FLSA, and when this is the case, an employer must follow whichever rules would be more favorable to the employee in each instance. Further, while the federal law is primarily concerned with the computation of overtime compensation for hours in excess of 40 per week, state law may deal more specifically with employer obligations to compensate employees for all work performed, regardless of whether or not the overtime threshold is met. For example, some states require employers to pay employees for all hours worked without regard to whether the employee had worked in excess of 40 hours in a workweek. Similarly, many states have laws that mandate break times and, if these break times are not granted, employees are entitled to double pay for those breaks.

States also vary with regard to whether or not they have overtime statutes and, when they do, with regard to the content of such statutes. While some states have passed laws that provide for selective application of the FLSA, other states interpret their own overtime pay provisions in a manner similar to the FLSA, though the overtime tests for exempt employee status may differ. The following is a summary of the general differences in state wage and hour laws and a sampling of the states that fall under each category:

<p>No overtime statute (all qualified employers apply provisions of FLSA)</p>	<p><i>Alabama, Arizona, Delaware, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia</i></p>
<p>State overtime statute only applies to state employees (other qualified employers apply provisions of FLSA)</p>	<p><i>Florida, Idaho, Wyoming</i></p>
<p>State overtime statute does not apply to employers and/or employees subject to the FLSA</p>	<p><i>Arkansas, Indiana, Kansas, Michigan, Missouri, New Hampshire</i></p>
<p>State overtime statute exempts employees who are exempt under FLSA</p>	<p><i>New York</i></p>
<p>State overtime statute relies on FLSA definitions for exempt employees</p>	<p><i>Maine, Massachusetts, North Carolina, Ohio, Rhode Island, Vermont, Washington, D.C.</i></p>
<p>State overtime statute adopts independent overtime tests for determining exempt employees</p>	<p><i>Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Maryland, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Washington, West Virginia, Wisconsin</i></p>
<p>Examples of states with overtime statutes that stipulate requirements according to hours worked per day (in addition to hours worked per week)</p>	<p><i>California</i> (requires daily overtime for hours worked in excess of eight in a day by nonexempt employees, as well as mandatory overtime compensation for work in excess of 40 hours in a week and work on the seventh day in any workweek).</p> <p><i>Colorado</i> (mandates overtime pay for hours in excess of 40 in a workweek or over 12 hours in a workday; requires overtime pay when a nonexempt employee works over 12 consecutive hours, even if the work spans two workdays).</p> <p><i>Nevada</i> (requires overtime in most instances when an individual works over eight hours in a day or over 40 hours in a workweek).</p> <p><i>Kentucky</i> (mandates overtime pay for certain employees who work seven days in a workweek).</p>

IV. THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT

The FLSA authorizes representatives of the DOL to investigate and gather data from employers concerning wages, hours, and other employment practices. If the DOL decides to investigate an employer, DOL investigators are permitted to enter and inspect the company's premises and records (e.g., records of dollar volume of business transactions, payroll and time records), as well as interview employees to determine whether any person has violated any provision of the FLSA. These visits are sometimes made with very little notice. The DOL will advise the employer of any violations, and then ask the employer to pay aggrieved employees for any back pay and other damages as a means of settling the employees' claims. If an agreement is not reached, the Secretary of Labor may bring an action on behalf of the aggrieved employees, or an individual employee or group of employees may file a lawsuit on their own. Under the FLSA, employees may recover lost wages and liquidated damages, as well as interest, attorneys' fees and costs.

V. HOW DO PLAINTIFFS PURSUE FLSA CLAIMS?

In addition to DOL investigations, employers who violate the FLSA also face the risk of civil litigation. An action to recover relief under the FLSA can be brought in any federal or state court of competent jurisdiction, by one or more employees. *See* 29 U.S.C. § 216(b). An action can also be brought by an individual, or by a group, on behalf of other employees who are "similarly situated." *Id.* Unlike a class action under Rule 23 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), however, or a comparable state law class action equivalent, group actions brought under the FLSA, known as "collective actions," are governed by 29 U.S.C. § 216 and the case law that has developed under that section. While there are some similarities between class and collective actions, there are also significant differences. Those differences, and other issues unique to collective litigation under the FLSA, are discussed below.

A. Class Actions Under Rule 23

Class actions governed by Fed.R.Civ.P. Rule 23(a) provide that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties 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.

Fed.R.Civ.P. 23 (a).

All of these prerequisites, commonly known as numerosity, commonality, typicality, and adequacy of representation, must be satisfied. Rule 23 further requires that there be a showing that: (1) the prosecution of separate actions would prejudice nonparties or create incompatible

adjudications; or (2) the defendant has taken action in some way generally applicable to the class as a whole; or (3) common questions of law or fact predominate. Fed.R.Civ.P. 23(b).

B. Collective Actions Under 29 U.S.C. § 216(b)

Collective actions under the FLSA are not governed by Rule 23, but are instead governed by 29 U.S.C. § 216(b), which provides that such claims:

may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall 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.

See 29 U.S.C. §216(b).

C. The Inapplicability of Rule 23 to Collective Actions

As noted above, FLSA Section 216(b) authorizes plaintiffs to proceed collectively on behalf of others who are “similarly situated.” A majority of the courts have held that the conjunctive requirements of Rule 23 need *not* be met in establishing that a class of similarly situated individuals exists for the purposes of a Section 216(b) action. *See, e.g., Garner v. G.D. Searle & Co.*, 802 F. Supp. 418, 421 (M.D. Ala. 1991) (characterizing the requirements under Rule 23 and Section 216(b) as “irreconcilable”); *see also LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (“There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § [216](b).”); *Foster v. Food Emporium*, No. 99 Civ. 3860, 2000 WL 1737858, at *1 (S.D.N.Y. Apr. 26, 2000) (“The strict requirements of Rule 23 . . . do not apply to FLSA collective actions”); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) (adopting the rationale of *LaChapelle*); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 358 (D.N.J. 1987) (citation omitted) (“The requirements for pursuing a section 216(b) class action are independent of and unrelated to the requirements of a class action filed pursuant to Rule 23, Fed. R. Civ. P.”); *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1315 (M.D. Ala. 2002) (“[T]he strict requirements of F.R.C.P. 23 are inapplicable to an opt-in collective action under the FLSA.”). Instead, as discussed below, an arguably much easier standard applies. *See, e.g., Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 n.2 (E.D.N.Y. 1988) (noting that the “similarly situated” requirement of collective actions under Section 216(b) is less stringent than the Rule 23(b)(3) requirement that common questions predominate); *Thiebes v. Wal-Mart Stores, Inc.*, No. Civ. 98-802, 1999 WL 1081357, at *3 (D. Or. Dec. 1, 1999) (same); *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 412 (D. Or. 2002) (stating that the standard for certifying a collective action under Section 216(b) is more liberal than under Rule 23).

D. The Legal Differences Between Rule 23 Class Actions and Section 216(b) Collective Actions

1. Opt-in/Opt-out Requirement

The principal difference between an action under Section 216(b) and a Rule 23 class action is that an individual who wants to be a part of the Section 216(b) “class” must “opt in” to participate and be bound by a judgment. In contrast, Rule 23 class members are generally bound by the judgment in an action unless they affirmatively “opt out.” *See Garner*, 802 F. Supp. at 421; *see also Heagney*, 122 F.R.D. at 130 (noting that Section 216(b), in contrast to Rule 23 class actions, “does not fix the rights of absent parties”); *Vazquez v. Tri-State Mgmt. Co.*, No. 01C5926, 2002 WL 58718, at *2 (N.D. Ill. Jan. 14, 2002) (“[C]lass actions under the FLSA can only be maintained when and if potential claimants opt in. In contrast, class actions under Rule 23 bind all members of the class unless they opt out.”). An individual “opts in” simply by filing with the court a written document consenting to become a party in the action. *See* 29 U.S.C. § 216(b).

Consent to opt in to a collective action must be in writing and be filed in the court where the suit is filed. *See Sperling v. Hoffman-La Roche, Inc.*, 862 F.2d 439, 444 (3d Cir. 1988); *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1217 n.7 (11th Cir. 2001); *In re Food Lion, Inc.*, 151 F.3d 1029 (unpub. op.), *available at* 1998 WL 322682, at **12-13 (4th Cir. June 4, 1998). “A consent meeting these requirements is valid regardless of its form.” 48A Am. Jur. 2d, *Labor & Labor Relations* § 4504 (1994); *see also UFCW Local 1529 v. Delta Catfish Processors, Inc.*, No. GC 86-298-D-O, 1987 WL 48301, at *1 (N.D. Miss. July 10, 1987) (finding valid consents that provided: “I hereby consent to be included as a plaintiff in a lawsuit against my employer alleging violations of the Fair Labor Standards Act I consent to become a plaintiff in the suit on behalf of myself and all other employees similarly situated”).

2. Notice of Dismissal of Claims

Notice is another area in which an action under Section 216(b) and a Rule 23 class action may differ. Fed.R.Civ.P. 23(e) generally requires a court to give notice to all putative class members if an action is dismissed. This may also be true in the context of a settlement. Moreover, notice may be required regardless of whether a class is ever certified, on the theory that putative class members may have relied upon the filing of the action in not bringing their own claims. *See Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978) (“holding that prior to certification a class action cannot be dismissed . . . unless there is notice to the putative class . . . as required by Rule 23(e)”); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 687-90 (N.D. Ga. 1997) (notice to putative class members may be appropriate, even in instances of dismissal prior to certification, when there is evidence of collusion between the parties or reliance on the part of absent class members). In that regard, Fed.R.Civ.P. 23(e) expressly provides:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or

compromise shall be given to all members of the class in such manner as the court directs.

Fed.R.Civ.P. 23(e).

However, courts have refused to adopt an absolute rule requiring notice to every potential class member in every case in which class allegations are voluntarily amended or dismissed. *See, e.g., In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, 2000 WL 33180833, at *6 (E.D. Mich. Sept. 21, 2000) (“Courts have adopted a functional approach to Rule 23(e)’s application.”). Where a court determines that putative class members have not developed a reliance interest in the lawsuit and where prejudice to absent class members would not result, a court may determine that notice to all potential class members is unnecessary. *Id.*

While individual courts have “inherent powers” to impose their own protections, including notice requirements, no such notice of dismissal, even to members of the collective action who have already opted in, is required under Section 216(b). *See Bayles v. Am. Med. Response, Inc.*, 962 F. Supp. 1346, 1348 (D. Colo. 1997) (addressing arguments made by plaintiffs’ counsel after a decertification of the case, and noting that Section 216(b) does not require any notice of dismissal, even for the opt-in plaintiffs in the action). *See also Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995) (stating that if a conditional certification is not continued and the “class” is decertified, the opt-in plaintiffs are dismissed without prejudice).

3. Tolling the Statute of Limitations

Under Rule 23, the statute of limitations may be tolled pending a determination as to whether the plaintiffs can maintain a proper class. *American Pipe Constr. Co. v. Utah*, 414 U.S. 538, 561 (1974) (statute of limitations for the claims of all putative class members is tolled until class certification is denied); *Crown, Cork & Seal, Inc. v. Parker*, 462 U.S. 345 (1983). Moreover, in many actions brought in the Rule 23 context (e.g., Title VII actions), the statute of limitations is tolled as to all participants upon the filing of the complaint by even a single named plaintiff. *See Salazar v. Brown*, No. G87-961, 1996 WL 302673, at *10 (W.D. Mich. Apr. 9, 1996); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, 2000 WL 33180833, at *5 (E.D. Mich. Sept. 21, 2000) (stating that when a class action complaint is filed, the statute of limitations is tolled for absent class members, and begins to run again if the court refuses to certify the class).

Filing suit under the FLSA, on the other hand, does *not* toll the statute of limitations. *Salazar*, 1996 WL 302673, at *10. Only filing a consent to participate, or “opt in,” with the court will toll the statute of limitations. *See Redman v. U.S. West Bus. Res., Inc.*, 153 F.3d 691, 695 (8th Cir. 1998) (“In the case of a collective action under the FLSA, the action is commenced when a party files his or her written consent to become part of the action.”); *Grayson v. Kmart Corp.*, 79 F.3d 1086, 1105 (11th Cir. 1996) (“ADEA opt-in plaintiffs are deemed to commence their civil action only when they file their written consent to opt into the class action.”); *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1130 n.5 (5th Cir. 1983) (same); *Lee v. Vance Exec. Protection, Inc.*, 243 F.3d 538, 2001 WL 108760, at *5 (4th Cir. Feb. 8, 2001) (unpub. op.)

(recognizing that consents filed after the complaint do not relate back to the filing date of the complaint for purposes of the statute of limitations). Indeed, there is a basis for arguing that even the named plaintiffs in an FLSA action must file their own consents, and that simply filing the complaint is not enough. *See, e.g., Whalen v. W.R. Grace Co.*, 56 F.3d 504, 506 (3d Cir. 1995) (“Unlike a class action under Fed. R. Civ. P. 23, under § 216(b), no person can become a party plaintiff . . . unless he or she has affirmatively ‘opted into’ the class by filing a written consent with the court.”).

E. The Legal Similarities Between Rule 23 Class Actions and Section 216(b) Collective Actions

“Although [§ 216(b)] nowhere mentions ‘class,’ ‘class actions,’ or ‘certifications,’ courts have repeatedly employed Rule 23 terminology when determining issues relating to § 216(b).” *See Wyatt v. Pride Offshore, Inc.*, Civ. A. No. 96-1998, 1996 WL 509654, at *1 (E.D. La. Sept. 6, 1996) (citations omitted). Courts often refer to the Section 216(b) plaintiffs as a “class,” and concerns of effective and efficient case management, and conservation of judicial resources, apply to both class and collective actions.

Class and collective actions also have some procedural similarities. For example,

[l]ike a member of a plaintiff class under rule 23 . . . the section 216 plaintiff does not formally appear before the court or file a pleading; he simply files his written consent. He is therefore not named in the caption and he would not ordinarily be served with papers filed after he files the written consent.

Shushan v. Univ. Colo. at Boulder, 132 F.R.D 263, 264 (D. Colo. 1990) (citations omitted).

VI. CONCLUSION

Both large and small employers face potential liability of hundreds of thousands, or even millions, of dollars when wage and hour violations occur. In a weak economy, with pressure to maintain and grow profit margins and to do more with less, claims of off-the-clock work and misclassification of employees to avoid overtime have become commonplace. In light of the increasing number of lawsuits involving overtime claims in a variety of industries and the announced intention of the DOL to continue aggressively investigating reported violations, employers should take proactive steps to ensure that they are in compliance with federal and state wage and hour laws. Such steps may include a clearly defined and publicized policy prohibiting off-the-clock work and associated training of both supervisors and employees. Some employers are conducting self-audits and even self-reporting to the DOL to minimize the risks and prospects of collective and class action lawsuits. Such self-audits appear wise, especially considering that in an August 2005 address DOL Solicitor Howard Radzely commented that the DOL looks favorably on such audits and “won’t second-guess” employers who follow the DOL’s recommended audit procedures. “DOL Solicitor Reports Increase in Number of Supervised Settlements in Wage Cases,” *Daily Lab. Rep. (BNA)* (Aug. 10, 2005), *available at* <http://pubs.bna.com/nwsstnd/ip/bna/dlr.nsf>. At a minimum, an employer should make an active

effort to examine how it classifies employees and to prevent off-the-clock work by enforcing policies and adopting a structured reporting system for violations. Successful suits and large settlements by workers in the financial industry, managers in the retail sector, and workers in call centers make such industries especially vulnerable to lawsuits. As settlement trends move up into multimillion-dollar numbers with no sign of slackening, it may be time for such industries to actively address these issues.