

# Summary Judgment Motions in Wage and Hour Class and Collective Actions: Pre- and Post-Certification Strategies

Disposing of or Limiting Claims, Improving Settlement Posture, Eliminating Class Members

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AND HOUR CLASS AND COLLECTIVE  
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STRATEGIES

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Wage and Hour Class and  
Collective Actions:  
*Pre-Certification Strategies*

September 28, 2022

# Initial Considerations

- If you intend to move for summary judgment, either before or after class or collective action certification, you should first check the local rules of the court as well as the judge's individual practices to ascertain the complete procedural landscape.
- Under the Federal Rules of Civil Procedure, you will need to inform the court of your intentions at the initial case management conference. See FRCP 16(c)(2)(E).
- It is also good practice to apprise the court of your anticipated grounds for seeking summary judgment and the reasons you believe summary judgment should precede or follow class certification, as courts will often form their own opinions about the order in which the case should proceed.

## Initial Considerations (Cont'd)

In practice, defendants—even those with very strong cases on the merits—often do not wait to bring summary judgment motions until after certification.

Typically, defendants are loathe to engage in unnecessary certification briefing or, even more undesirable, stipulate to a certified class. Thus, many defendants who anticipate bringing a summary judgment motion choose to do so before the court rules on class certification.

# Purpose: Summary Judgment Before Class Certification

- Exeditiously and effectively ward off future class claims
- Save the cost of class certification briefing and often class-wide discovery, as courts will generally limit class-wide merits discovery until after certification; and
- Generate good ammunition for your eventual opposition to class certification

# Purpose: Summary Judgment Before Class Certification (Cont'd)

A successful motion for summary judgment against a particular named plaintiff may effectively ward off future class claims by:

- forcing plaintiff's counsel to either abandon the case or find a new named plaintiff, which can be quite difficult, especially if discovery has not revealed the identities and contact information of putative class members;
- sending a strong message to plaintiff's counsel that you will fight such claims (and have good evidence and/or arguments to do so); and
- demonstrating to the court overseeing this or any future putative class action that it should not certify a class because at least one such putative class member's claims were not viable and/or that the claims are riddled with individualized issues.

## Purpose: Summary Judgment Before Class Certification (Cont'd)

A successful early summary judgment motion may also save the cost of class certification briefing and often class-wide discovery, as courts will generally limit class-wide merits discovery until after certification.

*See, e.g., Stewart v. Winter*, 669 F.2d 328, 332 (5th Cir. 1982) (extensive discovery into the merits of the putative class's claims before certification improperly "impose[s] on defendants one of the major burdens of defending [an] omnibus class action prior to any determination that the action [is] maintainable as such").

## Purpose: Summary Judgment Before Class Certification (Cont'd)

- Even if the motion ultimately does not succeed, moving for summary judgment before class certification may generate good ammunition for your eventual opposition to class certification.
- In an effort to generate triable issues of material facts to overcome your motion, the plaintiff will often be forced to rely on individualized evidence relating to the specific employment issues of the individual plaintiff. You may later be able to exploit such evidence to argue that class treatment is inappropriate.

# Class Action Standards

“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate **common answers** apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”

*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011)

# Rule 23 Wage and Hour Class Actions

While Rule 23 provides that the court should “determine by order whether to certify the action as a class action” at “an early practicable time after a person sues or is sued as a class representative” (Fed. R. Civ. P. 23, subd. (c)(1)(A)), federal courts will generally entertain summary judgment motions by a defendant before motions for class certification.

*See, e.g., Kehoe v. Fid. Fed. Bank & Tr.*, 421 F.3d 1209, 1211 n.1 (11th Cir. 2005) (“[I]t is within the court’s discretion to consider the merits of the claims before their amenability to class certification.”); *Evans v. Taco Bell Corp.*, No. CIV. 04CV103JD, 2005 WL 2333841, at \*4 n.6 (D.N.H. Sept. 23, 2005) (“It is well-settled that, absent prejudice to the plaintiff, a court may decide a defendant’s motion for summary judgment in a putative class action before taking up the issue of class certification.”).

## Rule 23 Wage and Hour Class Actions (Cont'd)

Because courts adjudicate such pre-certification summary judgment motions separately from any motion for class certification, they do not run afoul of the so-called “*Eisen* Rule,” which requires that a court separately analyze Rule 23 certification and the merits of a case.

“*Eisen* makes clear that the determination of whether a class meets the requirements of Rule 23 must be performed separately from the determination of the merits, but it does not require that class certification be addressed first.”

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998)

# Strategic Considerations: Summary Judgment Before Rule 23 Certification

- However, a defendant's successful summary judgment motion brought before Rule 23 class certification ***will generally only resolve the claims as to the named plaintiffs***. Thus, at best, it will serve as stare decisis in the litigation of similar claims alleged by later plaintiffs.
- *See, e.g., Schwarzschild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995) (“By obtaining summary judgment before notice had been sent to the class, the defendants waived their right to have such notice given and to obtain a judgment that was binding upon the class.”); *Mendez v. The Radec Corp.*, 260 F.R.D. 38, 47 (W.D.N.Y. 2009) (“[A]n individual’s claims will not be barred by a judgment in favor of the defendant in an action brought under Rule 23, if no class was ever certified.”)

# Drafting Tips: Summary Judgment Before Rule 23 Certification

- Defendants often benefit from taking the named plaintiff's deposition early in the case to determine what, if any, admissions they can use to support a dispositive motion. This is especially true in cases containing "off the clock" and misclassification claims, where the factual inquiry centers on how the plaintiff spends his or her time.
- For those cases where the primary issue is a legal one (e.g., whether a vacation pay policy complies with state law), the defendant should focus the briefing on the legal questions and distill the factual inquiries to as few as possible, leaving little room for the plaintiff to create disputed issues of fact.

## Drafting Tips: Summary Judgment Before Rule 23 Certification (Cont'd)

- On the other hand, where the defendant only brings a summary judgment motion as to an individual plaintiff's *claims—especially before certification*—it may benefit from a fully developed factual analysis, which may show the court how individualized and complicated (and thus not suitable for class treatment) the issues are.

# Strategic Considerations: Discovery Prior to Rule 23 Certification

- Discovery permitted after Rule 26(f) conference
- No per se limitation on discovery prior to certification
- Consider:
  - Purpose of deposition: *e.g.*, summary judgment motion vs. class certification motion
  - Timing of deposition: What other evidence is anticipated from the named plaintiff and opt-in plaintiffs (declarations, written discovery, Rule 26 damages analysis, expert reports, etc.)

# Collective Action Standards

An action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees **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 . . . .

29 U.S.C. § 216(b)

## Collective Action Standards (Cont'd)

The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

*Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)

# FLSA Section 216(b) Collective Actions

- A defendant may also file for summary judgment against a named plaintiff or named plaintiffs prior to conditional certification in an FLSA collective action.
- *See, e.g., Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1207 (10th Cir. 2015) (“[The plaintiff] has presented no convincing argument that the district court was somehow constrained to rule on the class-certification motion before the summary-judgment motion. We submit that she cannot make this showing because no such obligation existed.”); *Scott v. SSP Am., Inc.*, No. 09-CV-4399 RRM VVP, 2011 WL 1204406 (E.D.N.Y. Mar. 29, 2011) (granting summary judgment against named plaintiff alleging FLSA misclassification claims on behalf of herself and others similarly situated).

# Strategic Considerations: Summary Judgment Before Collective Action Conditional Certification

As with a summary judgment motion brought before Rule 23 class certification, a summary judgment motion brought in an FLSA section 216(b) collective action before conditional certification will only ensure resolution of the individual plaintiff's claim.

*See Scott v. SSP Am., Inc.*, No. 09-CV-4399 RRM VVP, 2011 WL 1204406, at \*15 (E.D.N.Y. Mar. 29, 2011) (finding that “[n]o reasonable fact-finder could find that Plaintiff was not an exempt employee under the FLSA” and granting summary judgment on named defendant’s individual claims).

# Strategic Considerations: Summary Judgment Before Collective Action Conditional Certification (Cont'd)

- For this reason, the strategic timing considerations for summary judgment motions in the collective action context align closely with the Rule 23 class action context.
- Specifically, early summary judgment may be an appropriate strategy where the defendant believes that other individuals will not likely bring subsequent actions.
- It may even be an appropriate strategy where the defendant expects follow-up actions, if the defendant wants to send a message to would-be plaintiffs that it will strongly defend.

# Drafting Tips: Summary Judgment Before Collective Action Conditional Certification

The considerations in drafting a summary judgment motion in a Rule 23 class action also apply in an FLSA 216(b) collective action. In addition, in some instances, the FLSA may provide unique opportunities to focus the court on mostly legal issues, thereby reducing the possibility that the plaintiff can create triable issues of material facts.

## Drafting Tips: Summary Judgment Before Collective Action Conditional Certification (Cont'd)

For example, the mere fact that the employer failed to compensate the employee for an hour here or there will not establish an FLSA violation; instead, the employee must prove that “the total wage paid to [the] employee in any given work week divided by the total hours worked that week equals or exceeds the applicable minimum wage.” *Sullivan v. Riviera Holdings Corp.*, No. 2:14-CV-00165-APG, 2014 WL 2960303, at \*1 (D. Nev. June 30, 2014).

Because this “averaging” test is an easier hurdle to overcome than many state minimum wage and overtime counterparts, it allows the employer to put forth minimal evidence.

# Strategic Considerations: Discovery Prior to Collective Action Conditional Certification

- Some courts allow discovery prior to first stage collective action certification:
- *See, e.g., Silva v. Gordon Gaming Corp.*, No. 2:06CV00696JCOMPAL, 2006 WL 3542716 (D. Nev. Sept. 27, 2006) (denying motion for conditional certification, without prejudice, and agreeing with defendant’s argument that the parties should conduct preliminary discovery prior to the court deciding a motion for conditional certification).
- *See, e.g., Kim v. Sheraton Operating Corp.*, No. CV 17-9247 FMO (EX), 2020 WL 3124306 (C.D. Cal. Apr. 2, 2020) (holding “the Court believes it would benefit from cross-motions for summary judgment to determine the remaining issues . . . . However, the court is reluctant to rule on a motion for summary judgment unless the parties are willing to stipulate that the court’s ruling will bind the class in the event a class is certified”).

# Strategic Considerations: Discovery Prior to Collective Action Conditional Certification (Cont'd)

- Some courts do not permit discovery prior to first stage collective action certification
- *See, e.g., Randolph v. Centene Mgmt. Co.*, No. C14-5730 BHS, 2015 WL 1884216, at \*2–4 (W.D. Wash. Apr. 24, 2015) (granting protective order to prevent defendant from conducting discovery re opt-in plaintiffs before court's ruling on plaintiff's motion for conditional certification); *Anderson v. Perdue Farms, Inc.*, No. 106-CV-01000-MEF-WC, 2007 WL 4554002, at \*2 (M.D. Ala. Dec. 20, 2007) (denying defendant's request to take depositions prior to ruling on whether to conditionally certify a collective action).

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# Summary Judgment Motions in Wage and Hour Class and Collective Actions: Post-Certification Strategies

Special thanks to Jeff Barnes, CLO UTHealth

# Considerations for Plaintiffs: One-Way Intervention

- The rule exists because it is “unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.” *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).
- If an individual plaintiff were to get a favorable ruling on the merits prior to certification—and its corresponding notice and opportunity to opt out—then class members are incentivized to remain in the lawsuit to take advantage of the favorable ruling.
- If an individual plaintiff got an unfavorable ruling on the merits prior to class certification, class members are incentivized to opt out of the class to avoid the unfavorable ruling.

# Considerations for Plaintiffs: One-Way Intervention

- If plaintiffs seek SJ and class certification at the same time, if court decides class certification first (even in same order) one-way intervention doctrine does not apply. *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7<sup>o</sup> Cir. 2016).
- Courts differ on whether doctrine applies to Rule 23(b)(2) class actions (does not allow class members to opt out).
- Preliminary injunction not pre-class merits ruling sufficient to bar class certification under doctrine. *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402 (6<sup>th</sup> Cir. 2012)

## Considerations for Defendants: One-Way Intervention

- Defendants are not limited in moving for summary judgment before class certification by one-way intervention
- Some courts hold that seeking summary judgment can waive objection to plaintiff seeking summary judgment
- Failing to object to plaintiff seeking summary judgment or court's order of decision can waive one-way intervention doctrine. *Taha v. County of Bucks*, 862 F.3d 292 (3d Cir. 2017).

## WHY POSTPONE MSJ UNTIL AFTER CONDITIONAL OR CLASS CERTIFICATION?

- Necessity – we don't have the required evidence prior to plaintiff's motion for conditional certification
- Delay – we don't want to instigate opposing counsel to file a motion for conditional certification; we want limitations to continue to run for absent class members
- Best foot forward – we want to wait for better evidence from opt-in plaintiffs with weaker claims
- Go for the bigger win – we want to bind opt-in plaintiffs and/or Rule 23 class

## PURPOSE OF POST-CERTIFICATION MSJ'S

- Obtain binding judgment against class members
- Set up motion for decertification
- Pick off plaintiffs, narrow class
- Limit damages
- Obtain settlement leverage

# HYPOTHETICAL

- FLSA collective action nationwide class of call center workers who allege (1) off-the-clock work and (2) compensation plans paid below minimum wage and not pay for all hours worked.
- All plans should be found legal under workweek measure but judge has particular concerns about plan used by named plaintiff's facility
- Pre-cert – no good argument for SJ of highly factual off-the-clock claims and comp plans from 100s of different facilities different enough to make argument for SJ of all nearly impossible.
- The court denies certification for off-the-clock claims but conditionally certifies a nationwide class for comp claim.
- The opt-in class contains 3000 call center workers serving 100 different facilities using different compensation plans.

## CONSIDERATIONS

- File MSJ as to named plaintiffs only, or only comp plan used at their facility?
- File MSJ as to entire class, followed by motion to decertify class?
- File motion to decertify class first?

## BINDING JUDGMENT AGAINST CLASS MEMBERS

- Res judicata, also known as claim preclusion, applies only where there is
  - (1) an identity of claims
  - (2) a final judgment on the merits, and
  - (3) privity between parties
- Privity is the issue with class/collective actions
  - Rule 23 – no privity with absent class members without certification – notice – no opt-out
  - FLSA – notice to collective class – class members must opt-in – become parties to the case
- Res judicata affirmative defense – raised years later – in different court

# MSJ'S TO SET UP DECERTIFICATION

- Goals
  - The case cannot be decided on representative evidence
  - Some opt-in plaintiffs may prevail, but others cannot as a matter of law
  - Force plaintiffs to present evidence that ultimately undermines class certification
- Counter-intuitive drafting strategy
  - Create very detailed factual record
  - The more facts, the more fact issues, but more individualized inquiries

## CASE STUDY

- *Lipnicki v. Meritage Homes* (S.D. Tex.)
- New home sales representatives
- Outside sales exemption
  - Employee's primary duty is making sales
  - Employee is customarily and regularly engaged away from the employer's place or places of business in performing his/her primary duty

## ***LIPNICKI V. MERITAGE HOMES***

- Court granted plaintiffs' motion for conditional certification
- Following class discovery, Meritage filed an MSJ
  - On outside sales exemption as applied to class
  - On 2-year limitations period
  - On good faith defense
  - On release defense for California plaintiffs
- Plaintiffs filed cross-MSJ on outside sales exemption

## **LIPNICKI MSJ ORDER**

- Fact issues on outside sales exemption
  - “Plaintiffs and Meritage management paint starkly contrasting pictures of where the primary sales activity takes place.”
- Summary judgment granted on 2-year limitations period, denied on good faith defense
- Summary judgment granted on California Plaintiffs’ release
- Defendant’s motion for decertification followed denial of MSJ

## LIPNICKI DECERTIFICATION ORDER

- “Many of the relevant facts are discussed in the Court’s order denying cross motions for summary judgment on liability.”
- “As the Court observed in denying summary judgment, the evidence reveals ‘tension between what Meritage claims it trained Plaintiffs to do and how Plaintiffs claim they actually performed their jobs.’ This benefitted Plaintiffs at the summary judgment stage, but has adverse consequences for them when it comes to certification.”

## **LIPNICKI DECERTIFICATION ORDER (CONT'D)**

- “Plaintiffs’ testimony regarding what actually occurred ‘on the ground’ varies significantly . . . . These disparities convince the Court that all of the opt-ins are not similarly situated.”
- “[T]he Court concludes that there is a fair probability that a jury would find that some of the opt-ins conduct most of the indispensable components of the sales process in ‘outside’ areas, while others do not.”

## MSJ'S TO TEE UP DECERTIFICATION

- File MSJ as to whole class or select opt-in plaintiffs?
  - MSJ as to select plaintiffs is more likely to be granted
  - But summary judgment dismissing select opt-in plaintiffs may backfire and make the remaining class members more cohesive
- If greater purpose is decertification, generally file MSJ as to the whole class
- If greater purpose is narrowing class, generally file MSJ as to select opt-in plaintiffs or subclass

## POST-CERTIFICATION MSJ TIMING

- Depends on the purpose of the MSJ
  - If seeking binding judgment against class members, before motion for decertification
  - If setting up decertification, before or with motion for decertification
  - If narrowing class, after motion for decertification

# HYPOTHETICAL

- The court conditionally certified a class of store managers who allege they were misclassified as exempt. The store managers are paid the same way and subject to the same job description. Although all store managers supervise at least two FT employees, their actual job duties differ based on the size of the store. Managers at larger stores are responsible for hiring and firing. At the smaller stores, Regional Managers actually handle the hiring and firing and there is a fact dispute about whether small store managers' recommendations are given particular weight. The extent to which small store managers' recommendations are given particular weight depends on his/her tenure with the company and relationship with his/her Regional Manager.
- The opt-in class contains 400 managers at large stores and 100 managers at small stores.

## CONSIDERATIONS

- File MSJ as to large store managers, then motion to decertify remaining class after summary judgment granted?
- File MSJ as to entire class, followed by motion to decertify class?
- Add on willfulness argument to MSJ?
- File motion to decertify class first?

# HYPOTHETICAL

- The court conditionally certified a class of garage door installers who allege they were misclassified as independent contractors.
- All installers must follow the company's SOP's for installing garage doors.
- Some installers are scheduled by the company's dispatcher, while other installers directly schedule the work with the customer.
- A few installers have their own business and pay helpers to do the work.
- Some installers do jobs for the company's competitors, even though the company informally discourages this practice.
- About 1/3 of the installers drive company trucks with GPS that accurately recorded all hours worked. GPS records for half of these installers prove they never worked more than 40 hours a week according to (and were paid minimum wage).

## CONSIDERATIONS

- File MSJ as to GPS drivers under 40 hours, followed by motion to decertify remaining class?
- Forego MSJ and file motion to decertify?
- Depends on whether dismissal of GPS drivers undermines motion to decertify?

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