3 Ways Courts Should Improve FLSA Collective Actions

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In many Fair Labor Standards Act, or FLSA, cases, the plaintiff files an early motion asking the court to help invite individuals to join the suit.

Misleadingly called motions for conditional certification of a collective action, these motions are usually granted.

The practical result of a conditional certification order is that many employees receive a court-captioned notice describing the lawsuit and how to opt in.

In most cases, however, the court later applies a tougher standard and decides that a collective action is improper after all. By then, much time and money have been wasted.

And large numbers of individuals who had no intention of asserting FLSA claims before receiving a court-captioned notice are before the court.

We offer three suggestions for more fair and efficient court management of would-be FLSA collective actions.

First, we urge judges to treat court-supervised notice to potential FLSA opt-ins as a discretionary case management measure, proper only when it would promote fairness and efficiency.

It would often be fairer and more efficient to forego court-supervised notice, establish an opt-in deadline and resolve opt-in disputes like other joinder disputes.

Second, plaintiffs and their counsel can usually locate and communicate efficiently with potential opt-ins without court assistance. The availability of targeted social media and internet advertising often diminishes any need for court-supervised notice.

That was not the case decades ago, when court-supervised notice began developing into the norm.

Finally, courts should stop authorizing notice via a court-captioned document.

Such a notice implies falsely that the invitation to join is from the court — not from plaintiffs and their counsel.

Instead, FLSA opt-in notices, if appropriate at all, should be on plaintiffs counsel's letterhead so they look like what they are: invitations from plaintiffs and their counsel.

Court-supervised notice to potential opt-ins is a discretionary case management tool, proper when it would promote fair and efficient joinder.

The FLSA allows a plaintiff to maintain an action on behalf of herself and on behalf of "other

employees similarly situated."[1] Each employee who wishes to become a party to the action must file a written consent with the court.[2]

The FLSA is silent on how that should or may happen.

A judge's general case management authority includes the power to "oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way."[3]

Thus, a district court has discretion, in an appropriate FLSA case, to require a defendant to provide plaintiffs with the names and contact information of employees who may be similarly situated, so that plaintiffs' counsel can invite them to "opt in" to the case.[4]

In 1989, the U.S. Supreme Court in Hoffmann-La Roche Inc. v. Sperling ruled only that court-facilitated notice was a permissible case management tool, not that it was obligatory.[5]

Indeed, in Sperling, the district court regulated the plaintiffs' counsel's efforts to contact potential opt-in plaintiffs only after the parties' independent efforts created a mess, with the defendant accusing the plaintiffs' counsel of misleading communications and challenging the validity of 400 consent forms.[6]

The Supreme Court held that the district court had authority to manage the opt-in process by virtue of its general authority "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases."[7]

Nor does precedent in any circuit require court-facilitated notice to potential opt-ins. Four circuits have held that notice to potential opt-ins is not required, including the U.S. Courts of Appeals for the Second, Third, Fifth and Eleventh Circuits.[8]

While several other circuits have approved of district courts sending notice, none has required it.[9] To our knowledge, no district court has been reversed for denying a motion for court-authorized notice to potential FLSA opt-ins.

Plaintiffs counsel sometimes contend that court-authorized notice furthers the FLSA's remedial purposes, and some district courts have agreed.[10]

But a statute's remedial purpose does not authorize a court to use case management power to enhance public awareness of the statute or to ensure that parties not before the court are compensated for statutory violations.

In our constitutional system, those tasks are not for judges.[11]

Indeed, the Supreme Court in Sperling warned courts that they have authority to manage joinder but not to encourage individuals to sue.[12]

Also, the FLSA's remedial purposes are a weak basis for asking a court to send notice when, as noted below, plaintiffs often make that request before the court has assessed the merits.

Of course, individuals who do not opt in retain their rights under the FLSA.[13]

And an individual's ability to pursue an FLSA claim would seldom depend on the individual

receiving an opt-in notice. FLSA claims are rarely so small that they cannot be litigated individually, given that the statute allows plaintiffs to recover double damages and attorney fees.[14]

Indeed, a search of the Lex Machina database for all employment cases filed in federal district courts in 2019 with an "FLSA" tag, excluding those tagged as FLSA collective or class actions, yields approximately 3,800 individual FLSA cases.

The numbers suggest that sending court-authorized notice at the outset of a case is usually inefficient. Courts granted "conditional certification" more than 70% of the time in 2017, 2018 and 2019, using a lenient standard before a deep-dive into the merits.[15]

But courts granted motions for decertification, decided later in the case using a more rigorous standard, more than 50% of the time during the same time period.[16]

Many have experienced the following: large numbers of individuals are invited to opt in; years of expensive discovery ensue; and the court later rules that the case cannot proceed as a collective action after all.

Many such cases would have proceeded more efficiently if the court had established a joinder deadline and allowed the parties to resolve whether opt-ins were similarly situated through normal joinder motions.

Plaintiffs often urge courts to supervise notice to potential opt ins because, they claim, the alternative would be piecemeal litigation. But sending court-facilitated notice does not prevent multiple suits.

Even after an opt-in deadline passes, the same plaintiffs counsel may file a new suit in a different jurisdiction on behalf of an individual who chose not to join the first suit.[17]

Forcing employers to assist in sending notice is often unfair, too.

Even in weak cases, expanding a suit increases an employer's litigation costs.

It also creates settlement pressure because even a small risk of losing a large case amounts to significant exposure.[18] And, sending an opt-in notice can harm an employer's reputation in the eyes of its employees — an unfair result in cases that lack merit.[19]

In short, district courts could better manage FLSA cases by treating conditional certification like any other case management tool: allowing it only when persuaded that it would contribute to the just, speedy and efficient resolution of the action before it.

Social media and internet advertising have further reduced any justification for court-supervised notice.

Thirty years ago, when courts began facilitating FLSA notice, neither Google LLC nor Facebook Inc. existed.

Requiring an employer to cooperate in mailing notice to employees was likely a plaintiffs lawyer's only practical way to contact large numbers of potential FLSA opt-ins.

Today, many Americans are connected to their co-workers through social media.[20]

Targeted social media advertising and internet browser advertising allow plaintiffs and their lawyers to find and communicate with individuals who may wish to assert FLSA claims — without court assistance.[21]

One law firm, Keller Lenkner LLC, has asserted FLSA claims on behalf of thousands of individuals against at least three different companies.[22]

While the firm has not publicized how it mobilized so many individuals, court-assisted notice played no role. The firm's approach in other cases has been to use social media to send targeted solicitations to individuals with potential claims against specific companies.[23]

The likelihood of plaintiffs and their counsel soliciting potential opt-ins diminishes the justification for court-supervised notice, at least in all but the rare case in which employees do not use the internet or social media.

Indeed, commentators have recognized that some plaintiffs and their counsel might prefer to contact potential FLSA opt-ins independently and pursue a so-called party-managed collective action, rather than ask the court to supervise notice.[24]

It is possible that counsel for either side in an FLSA case might engage in unethical communication with potential opt-ins about joining or not joining a suit. But that risk is not unique to FLSA cases. All attorneys are subject to ethical restrictions when communicating with nonclients about pursuing litigation.

If accusations of unethical communications arise, as in Sperling, courts can intervene.

But the mere possibility of abuses in communications with potential class members does not empower a court to preemptively script communications.[25]

Plus, if an employer is concerned that plaintiffs or their lawyers will mislead potential opt ins, the employer can join or not oppose a motion for court-supervised notice.

The theoretical risk of unethical communications with opt-ins, though, is no reason to grant the motion.

Opt-in notices should be on plaintiffs counsel's letterhead.

Plaintiffs who wish to pursue FLSA claims may do so alone or through proposed collective actions.

Plaintiffs may choose to pursue a collective action for a variety of reasons — to share costs, obtain better counsel, increase settlement leverage, help fellow employees, or for some other reason.

Only a plaintiff — not the court or the defendant — can make that decision.

If a plaintiff decides to pursue a collective action, it is also the plaintiff who decides which individuals to invite to join the case.

A plaintiff could try to include every current and former employee of an employer for the maximum statute of limitations period, or only a small number of colleagues who worked the same shift in a small department.

It follows that when a plaintiff sends notice to a potential opt-in, the plaintiff and the plaintiffs counsel — not the court — are inviting the individual to join the suit. Indeed, when notices are normally sent, the court typically has considered only preliminarily whether the case can proceed on a collective basis, without assessing whether the plaintiffs claims have merit.

In short, FLSA opt-in notices are invitations from plaintiffs and their counsel.

And, if that is what they are, that is what they should look like.

Accordingly, FLSA opt-in notices should be on the plaintiffs' counsel's letterhead.

Undeniably, the prevailing practice is to authorize opt-in notices with prominent court captions.[26]

The practice appears to have been adopted from Rule 23 of the Federal Rules of Civil Procedure. But it is a misfit.

When notice is sent to members of a Rule 23 class, the court is communicating with plaintiffs whose legal rights are in the court's hands.[27]

The court has conducted a rigorous analysis, deciding that class members and the named plaintiffs are similarly situated, and all of them have claims pending before the court.[28]

Under those circumstances, the court has a duty under Rule 23 to communicate with class members because, although they are generally absent from court proceedings, their legal rights will be adjudicated in the case.[29]

By contrast, as explained above, an invitation to join an FLSA collective action is from plaintiffs and their counsel only, and it is sent to nonparties with no pending claims.

Sending court-captioned FLSA opt-in notices is misleading because many recipients are likely to believe that the notice is from the court. The first words the recipient are likely to read are "United States District Court."[30]

A number of courts have overruled objections to court-captioned notices, relying on inclusion of a disclaimer that the court is taking no position on the merits of plaintiffs' claims.[31]

But such a disclaimer does not address who is inviting recipients to opt-in. If potential opt-ins believe that a judge is inviting them to opt in, that misinformation is likely to influence their decision, regardless of any disclaimer.[32] Reasonable notice recipients are likely to ask: Why would a judge notify me about a lawsuit if the case lacks merit?

In Shipes v. Amurcon Corp., the U.S. District Court for the Eastern District of Michigan in 2012 ordered that an FLSA notice bear a court caption to signal that the notice was more attention-worthy than a mere letter from a plaintiffs lawyer.[33]

This reasoning only highlights the unfairness to defendants: When courts authorize notice, they often have little or no basis to assess whether the notice deserves more or less attention than any other letter from a lawyer.

Conclusion

Many FLSA actions would proceed more efficiently and fairly if courts: (1) used the discretionary case management tool of court-supervised notice only when persuaded that notice would be more fair and efficient than setting a joinder deadline; (2) considered whether, in a social media age, court assistance to notify potential opt-ins is necessary; and (3) required court-supervised notice, if appropriate at all, be sent on the plaintiffs counsel's letterhead so that it will look like what it is: an invitation to join an FLSA lawsuit of unknown merit from a plaintiff and a plaintiffs lawyer.

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[1] 29 U.S.C. § 216(b).

[2] Id.

[3] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170-73 (1989).

[4] Id. at 169-73.

[5] Id. at 169.

[6] Id. at 172.

[7] Id. at 173 (internal quotations and citation omitted).

[8] See Myers v. Hertz Corp., 624 F.3d 537, 554 (2d Cir. 2010) ("[a]lthough they are not required to do so by FLSA, district courts have discretion, in appropriate cases, to implement [§ 216(b)] ... by facilitating notice to potential plaintiffs of the pendency of the action") (citation and quotation marks omitted); Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 224 (3d Cir. 2016) ("conditional certification is discretionary"); Swales v. KLLM Transp. Servs., L.L.C., No. 19-60847, 2021 WL 98229, at *2-*3 (5th Cir. Jan. 12, 2021) (issuance of notice is discretionary with the district court, and is only appropriate after court has "rigorously scrutinize[d] the realm of 'similarly situated' workers"); Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) ("Nothing in our circuit precedent … requires district courts to utilize [the two-tiered] approach.").

[9] See Campbell v. City of Los Angeles, 903 F.3d 1090, 1110 (9th Cir. 2018) (stating that court issuance of notice is "a subject of substantial judicial discretion" and endorsing two-step approach); Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 536 (3d Cir. 2012) ("[w]e [have] implicitly embraced this two-step approach, and we affirm its use here"); White v. Baptist Mem'l Health Care Corp., 699 F.3d 869, 877 (6th Cir. 2012) (describing the two-step process for managing collective actions under the FLSA with apparent approval); Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010) ("the district courts of this Circuit appear to have coalesced around a two-step method, a method

which, while [] not required by the terms of FLSA or the Supreme Court's cases, we think is sensible"); Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008) ("[w]hile not requiring a rigid process for determining similarity, we have sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase"); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (stating that the two-tier process including early issuance of notice was "arguably … the best" approach).

[10] See, e.g., Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 262 (S.D.N.Y. 1997) ("courts have endorsed the sending of notice early in the proceeding, as a means of facilitating the FLSA's broad remedial purpose"); Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43, 73 (D. Mass. 2018) (in allowing issuance of notice, invoking the "FLSA's broad remedial purpose") (internal quotations and citation omitted). We respectfully suggest that this reasoning is flawed. Certainly, a court may consider the purposes of a statute in deciding how best to interpret it. See Cty. of Maui, Hawaii v. Hawaii Wildlife Fund, ___ U.S. ___, 140 S.Ct. 1462, 1474 (2020) (considering "the statutory provision's basic purposes" in interpreting provision of the Clean Water Act).

[11] See United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("[C]ourts are essentially passive instruments of government … [t]hey do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.") (unanimous decision; some internal alterations, citation, and quotation marks omitted); see also The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment") (emphasis in original).

[12] Sperling, 493 U.S. at 174.

[13] Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 77 (2013) ("unjoined claimants … remain free to vindicate their rights in their own suits" after disposition of a FLSA collective action).

[14] 29 U.S.C. § 216(b).

[15] Seyfarth Shaw LLP, 16th Annual Workplace Class Action Litigation Report, 97 (2020 Edition); Id. at 111 (2019 Edition); Id. at 127 (2018 Edition).

[16] Id. at 97 (2020 Edition); Id. at 111 (2019 Edition); Id. at 127 (2018 Edition).

[17] See, e.g., Brown v. Jacob Transportation, LLC, No. 216CV02436JADNJK, 2017 WL 7725268, at *2 (D. Nev. Sept. 28, 2017) (denying defendant's motion to dismiss FLSA claims brought by two plaintiffs who did not opt in to previously-filed FLSA collective action filed by the same counsel based on same allegations); Schucker v. Flowers Foods, Inc., No. 16-CV-3439 (KMK), 2017 WL 3668847, at *4 (S.D.N.Y. Aug. 24, 2017) (allowing plaintiffs who had already received notice of pending FLSA collective actions in two other jurisdictions to pursue their own suit because "[n]othing in the FLSA requires a party with a claim under the FLSA to join an opt-in collective action in order to vindicate his or her rights"); Greene v. H & R Block E. Enterprises, Inc., 727 F. Supp. 2d 1363, 1368 (S.D. Fla. 2010) (plaintiffs who did not opt in to pending FLSA collective action would "retain the ability to pursue individual action if they are so inclined" in subsequent action).

[18] See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("courts have noted the risk of 'in terrorem' settlements that class actions entail").

[19] Cf. Levitt v. S.C. Food Serv., Inc., 820 F. Supp. 366, 367 (N.D. Ill. 1993) (explaining that employee's allegation that employer treated its employees unlawfully harmed employer's reputation because it "impugns the [employer's] method of doing business and denigrates its integrity and lawfulness").

[20] https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/.

[21] https://www.facebook.com/business/ads/ad-targeting.

[22] See Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785, at *1 (N.D. Cal. Feb. 10, 2020) (granting motion to compel arbitration as to 5,010 petitioners); Postmates, Inc. v. 10,356 Individuals, No. 2:20-cv-02783, ECF No. 1, ¶¶6-7 (bringing challenge to attempted mass arbitration by 10,356 individuals); Abadilla, et al. v. Uber Techs., Inc., No. 3:18-cv-07343, ECF No. 53, at 5 (law firm sought to initiate 12,501 arbitrations).

[23] See In re CenturyLink Sales Practices & Sec. Litig., No. CV 17-2832, 2020 WL 869980, at *2 (D. Minn. Feb. 21, 2020) (noting that law firm used "advertising through Facebook and other websites to recruit arbitration claimants against [defendant]", resulting in the firm sending demand letters on behalf of approximately 12,000 individuals).

[24] Scott A. Moss & Nantiya Ruan, No Longer A Second-Class Class Action? Finding Common Ground in the Debate Over Wage Collective Actions With Best Practices for Litigation and Adjudication, 11 Fed. Cts. L. Rev. 27, 64-65 (2019).

[25] Gulf Oil v. Bernard, 452 U.S. 89, 94 n.5, 103-104 (1981) (holding it was an abuse of discretion, absent a "clear record and finding of need", to require the parties and their counsel to obtain approval from the district court before communicating with potential class members).

[26] See, e.g., Adams v. Inter-Con Sec. Sys., Inc., 242 F.R.D. 530, 540 (N.D. Cal. 2007) (authorizing notice with court caption at top; stating that notices in FLSA cases "typically contain a court caption"); Putman v. Galaxy 1 Mktg., Inc., 276 F.R.D. 264, 277 (S.D. Iowa 2011) (authorizing issuance of notice including case caption); Barrera v. US Airways Grp., Inc., No. CV-2012-02278-PHX, 2013 WL 4654567, at *8 (D. Ariz. Aug. 30, 2013) (same).

[27] See Woods v. N.Y. Life Ins. Co., 686 F.2d 578, 579 (7th Cir. 1982) ("Because the judgment in a Rule 23 class action binds all members of the class unless they have expressly opted out of the class action, serious due process questions would be raised if the court did not try to make sure that the members knew about the action and about their right to opt out of it so as not to be bound by the final judgment.").

[28] Comcast Corp. v. Behrand, 569 U.S. 27, 33 (2013) (internal quotations and citation omitted).

[29] Woods, supra at 582 ("[p]otential class members really are parties to a Rule 23 class action until they opt out, so that the judge who communicates with them is communicating

with parties"); Sosna v. Iowa, 419 U.S. 393, 399 & n.8 (1975) (observing that, after class certification, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by" the named plaintiff, resulting in "important consequences for the unnamed members of the class"); Faber v. Ciox Health, LLC, 944 F.3d 593, 603 (6th Cir. 2019) ("Rule 23(b)(3) class certification cannot bind a class without providing adequate notice as required by the Due Process Clause.").

[30] See Flores v. Lifeway Foods, Inc., 289 F. Supp. 2d 1042, 1047 (N.D. Ill. 2003) (rejecting inclusion of caption in FLSA collective notice because "judicial imprimatur is likely to be misunderstood"); see also Woods, 686 F.2d at 581; Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989) ("Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims.").

[31] See, e.g., Russell v. Illinois Bell Telephone Co., 575 F. Supp.2d 930, 938-39 (N.D. Ill. 2008); Will v. Panjwani, No. 1:13-CV-1055-JMS-MJD, 2013 WL 5503727, at *4-*5 (S.D. Ind. Oct. 1, 2013).

[32] See Moss & Ruan, supra at 64 (acknowledging that court-approved notice is likely be more persuasive than notice sent independently by plaintiffs' counsel).

[33] Shipes v. Amurcon Corp., No. 10-14943, 2012 WL 1720615, at *1 (E.D. Mich. May 16, 2012) ("The case caption does not give the false impression that the Court endorses the litigation; rather, it serves the important purpose of indicating that the Notice is not junk mail.").