Employment: Navigating the "collective action" in Federal court

The similarities and differences between traditional class actions and collective actions under the FLSA or ADEA

By Brian J. Malloy

"Collective actions" are a species of class actions and encompass elements of both traditional class actions due to their representative nature and mass tort/group actions due to the requirement of individual joinder. This article highlights the similarities and differences between traditional class actions and collective actions.

A class action under the Fair Labor Standards Act ("FLSA") must proceed under the collective action procedures of 29 U.S.C. § 216(b). Class actions under the Age Discrimination in Employment Act ("ADEA") borrow the procedure set forth in 29 U.S.C. § 216(b). (See 29 U.S.C. § 626(b).) In other words, if you are bringing a class action under the FLSA or ADEA, it will proceed under the collective-action procedures.

While the Ninth Circuit has approved state-law class actions and FLSA/ADEA collective actions proceeding simultaneously, (See *Busk v. Integrity Staffing Solutions, Inc.* (9th Cir. 2013) 713 F.3d 525), this article will focus as if the class claim is only under the FLSA or ADEA. This is ideal for cases where employees are working throughout the country rather than being concentrated in California.

Certification procedure

An employee may bring a group action on behalf of himself and other "similarly situated" employees based on an employer's violation of the FLSA or ADEA. (See 29 U.S.C. § 216(b).) The United States Supreme Court has recognized that judicial economy is served through this collective action procedure by "the efficient resolution in one proceeding of common issues of law and fact" while lowering the affected individuals' litigation costs. (See *Hoffmann-LaRoche, Inc. v. Sperling* (1989) 493 U.S. 165, 170.)

To maintain a collective action, a plaintiff need only show that the putative class members are "similarly situated." *(Adams v. Inter-Con Sec. Sys.* (N.D.Cal. 2007) 242 F.R.D. 530, 535-36; *Leuthold v. Destination Am., Inc.* (N.D.Cal. 2004) 224 F.R.D. 462, 466.) The FLSA does not define what constitutes "similarly situated" nor has the Supreme Court or Ninth Circuit. While the Ninth Circuit has not ruled on the standard for "conditionally certifying" or "certifying" a collective action, the standard which has developed in the district courts in this and other circuits involves a two-stage process. (*Leuthold,* 224 F.R.D. at 466-67; *Luque v. AT & T Corp.* (N.D.Cal. Nov. 19, 2010) No. C 09-05885 CRB, 2010 WL 4807088, *3).[1]

Stage One

The standard for determining if the employees are "similarly situated" at the first stage, also called the "notice stage," has been described as a "fairly lenient standard and typically results in conditional class certification." (*Leuthold,* 224 F.R.D. at 467 (citations omitted); see also *Wynn v. National Broadcasting Co., Inc.* (C.D.Cal. 2002) 234 F.Supp.2d 1067, 1082).) In the first stage, the district court determines whether potential class members ought to receive notice of the collective action and opportunity to join. (*Romero v. Producers Dairy Foods, Inc.* (E.D.Cal. 2006) 235 F.R.D. 474, 482 (citations omitted).)

The showing a plaintiff must make is to "simply provide 'substantial allegations, supported by declarations or discovery.'" (*Luque*, 2010 WL 4807088, *3 (quoting *Kress v. PricewaterhouseCoopers, LLP* (E.D.Cal. 2009) 263 F.R.D. 623, 627).) The plaintiff must show that "'the putative class members were together the victims of a single decision, policy, or plan.'" (*Gerlach v. Wells Fargo & Co.* (N.D.Cal. Mar. 28, 2006) No. 05-0585, 2006 WL 824652, *2-3) (quoting *Thiessen v. General Electric Capital Corp.* (10th Cir. 2001) 267 F.3d 1095, 1120).) Courts do not need to even consider evidence provided by defendants at this stage. (*Kress*, 263 F.R.D. at 628.) Importantly, a court's analysis in determining whether to conditionally certify the class is less exacting than it would be under Federal Rule of Civil Procedure ("Rule") 23 for class actions or Rule 20 for permissive joinder. (*Hipp v. Liberty Nat. Life Ins. Co.* (11th Cir. 2001) 252 F.3d 1208, 1219 (citations omitted); *Harris v. Vector Marketing Corp.* (N.D. Cal. 2010) 753 F.Supp.2d 996, 1003; *Romero,* 235 F.R.D. at 482.)

District courts in the Ninth Circuit have concluded the first-stage standard is met, for example, on the complaint's allegations coupled with a couple declarations, (*See Romero*, 235 F.R.D. at 483); four employee declarations establishing a common policy of not paying overtime and standardized job qualifications and duties, (*See Morton v. Valley Farm Transport, Inc.* (N.D. Cal. 2010) No. C 06-2933 SI, 2007 WL 1113999, *2 (evidence of a uniform practice of requiring participation in an initial training but not paying for time spent in the training, *Harris v. Vector Marketing Corp.* (N.D.Cal. May 18, 2010) No. C-08-5198, 2010 WL 1998768; and the

complaint's allegations and exhibits attached thereto establish putative collection action members subject to a single decision, policy, or plan, *Newton v. Schwarzenegger* (N.D. Cal. June 1, 2010) No. C-09-5887, 2010 WL 2280532.)

Importantly, the district courts within the Ninth Circuit do not jump to the second stage while discovery remains open. (*Kress*, 263 F.R.D. at 629.) Even where "extensive discovery has already taken place," courts in this circuit still apply the two-tiered approach. (*Leuthold,* 224 F.R.D. at 467.)

Stage Two

The second stage is usually prompted by a defendant's motion for decertification following the close of discovery, although some courts require a plaintiff to move for final certification. The district court determines whether the representative named and opt-in plaintiffs are "similarly situated" in this final certification analysis. The standard is generally stricter than the more lenient first stage. (*Luque*, 2010 WL 4807088, *3 (citing *Kress*, 263 F.R.D. at 627).) The following factors are considered in determining whether, at the second stage, the plaintiffs are "similarly situated": (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations. (*Leuthold,* 224 F.R.D. at 467; *Murillo v. Pacific Gas & Elec. Co.* (E.D.Cal.2010), 266 F.R.D. 468, 470).) Note that if the district court concludes that the plaintiffs are not "similarly situated," the opt-in plaintiffs are dismissed without prejudice.

Evidence that helps establish that the employees are similarly situated includes a common job description, common training, common job duties, common day-to-day requirements through use of standardized procedures, common performance reviews and common compensation policies. The similar nature of the evidence demonstrates that judicial economy is furthered through a representative trial.

Notice to class members

Unlike a class action, which requires a party to opt-out or the party will be bound to the settlement or judgment, in a collective action the party must join the case or will not benefit from any settlement or judgment in the collective's favor. If conditional certification is granted, the notice to the class members is supervised by the district court. The parties will have to either agree on the form of the notice or, if an agreement cannot be reached, have the court decide on the language of the notice.

The notice will generally describe the lawsuit, provide a deadline to join, and provide a written "consent" form for the class member to return and be filed. (See 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").) The notice should also include language that retaliation against employees is prohibited by law. The joining plaintiff is commonly referred to as an "opt in" plaintiff, as opposed to the representative or named plaintiff. While notice is at minimum provided by mail, we would also recommend requesting that the notice be emailed to class members (to the extent practicable) and posted at the employer's workplace if current employees are part of the class. In recent cases, our office has had opt-in rates of 14 percent, 27 percent and 30 percent.

If a class member attempts to join after the opt-in period has closed, judicial economy principles strongly favor allowing the plaintiff to join. (See, e.g., *Raper v. State of Iowa* (S.D.Iowa 1996) 165 F.R.D. 89, 91 (opt-ins allowed after finding of liability as it would serve "judicial economy, convenience of the parties, and the interest in reducing litigation expense" and if not allowed in "they would be compelled to file a separate action which, in all probability, would be consolidated with this one"); *In re Wells Fargo Home Mortg. Overtime Pay Litigation* (N.D.Cal. Oct. 23, 2008) No. MDL 06-01770-MHP, 2008 WL 4712769, *2 ("It is relatively likely that this number of claims would, if not joined to this action, spawn a separate class action."); *Wren v. RGIS Inventory Specialists* (N.D.Cal. June 19, 2009) No. C-06-05778 JCS, 2009 WL 1773133, *3-4.))

Tolling of the limitations period

A potentially significant difference between class actions and collective actions is that, while the filing of a class action will toll the statute of limitations for putative class members, in a collective action, the statute of limitations runs for each opt-in plaintiff until that plaintiff submits a written consent to join the case. (See 29 U.S.C. § 256(b).) Therefore, you should be prepared to argue for tolling in your motion to conditional certification motion, and there are a number of avenues that may apply.

First, by simply recognizing the unique nature of opt-in collective actions, courts have been open to tolling the statute of limitations during the opt-in period. (See, e.g., *Stransky v. HealthONE of Denver, Inc.* (D.Colo. June 14, 2012) No. 11-cv-02888-WJM-MJW, 2012 WL 2190843; *In re Bank of America Wage and Hour Emp't Litig* (D.Kan. Oct. 20, 2010), No. 10-MDL-2138, 2010 WL 4180530; see also *Partlow v. Jewish Orphans' Home of Southern Cal., Inc.* (9th Cir. 1981) 645 F.2d 757, 760-61 (equitable tolling proper where plaintiffs were without fault and "practical effect of not tolling the statute would be to bar forever any claim" the employees had against defendant), *abrogated on other grounds by Hoffmann-LaRoche Inc. v. Sperling* (1989) 493 U.S. 165; *Beauperthuy v. 24 Hour Fitness USA, Inc.* (N.D.Cal. Mar. 6, 2007), No. 06-cv-0715, 2007 WL 707475 at *8 (equitably tolling FLSA statute of limitations because of factors outside plaintiffs' control).

Second, if the defendants are refusing to provide information about the putative collective action members, courts may toll on this basis as well. (*Stransky*, 2012 WL 2190843, *3 ("Although early notice to Opt-in Plaintiffs in a collective action such as this is favored, such notice was not possible here as Defendant is in sole possession of the names and last known physical addresses of all potential Opt-in Plaintiffs.").)

A third basis to request tolling is if the facts demonstrate the application of equitable estoppel. Under this doctrine, "conduct or representations by the defendant-employer which tend to lull the plaintiff into a false sense of security, can estop the defendant from raising the statute of limitations, on the general equitable principle that no man may take advantage of his own wrong." **(***Huseman v. Icicle Seafoods, Inc***.** (9th Cir. 2006) 471 F.3d 1116, 1121 (citing *Atkins v. Union Pac. R.R.* (9th Cir. 2006) 685 F.2d 1146, 1149 x).) This doctrine "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit . . . [including] the plaintiff 's actual and reasonable reliance on the defendant's conduct or representations." (*Id.* (citing *Santa Maria v. Pac. Bell* (9th Cir. 2006) 202 F.3d 1170, 1176 x). Statute of limitations may also be equitably tolled when "there was excusable delay by the plaintiff '" and "'*despite all due diligence,* a plaintiff is unable to obtain vital information bearing on the existence of his claim.'" (*Huseman*, 471 F.3d at 1120 (quoting *Santa Maria,* 202 F.3d at 1178 (emphasis added in *Huseman*, citation omitted).) The Ninth Circuit applies the doctrine of equitable estoppel and tolling to FLSA claims. (See *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1113 ; see also *Bureerong v. Uvawas,* 922 F.Supp. 1450, 1463 X.))

Finally, some – but not all – courts hold that tolling will apply if the employer fails to post the required FLSA notices at work. (See *Summa v. Hofstra University* (E.D.N.Y. June 1, 2010) No. 07 CV 3307, —- F.Supp.2d ——, 2010 WL 2232671, *8 ("the FLSA requires that employers post a notice explaining the Act's requirements 'in conspicuous places . . . where such employees are employed so as to permit them to observe readily a copy.'" (quoting 29 C.F.R. § 516.4)); *Cisneros v. Jinny Beauty Supply Co., Inc***.** (N.D.Ill. Feb. 6, 2004) No. 03 C 1453, 2004 WL 524482, *1 ("We agree with our colleague in this district that an employer's failure to post the notice required by 29 C.F.R. § 516.4 tolls the FLSA statute of limitations until an employee acquires a general awareness of his rights under the FLSA.)"); *Henchy v. City of Absecon* (D.N.J. 2001) 148 F.Supp.2d 435, 439**;** *Kamens v. Summit Stainless, Inc.* (E.D.Pa.1984) 586 F.Supp. 324, 328 ("[a]n employer's failure to post a statutorily required notice of this type tolls the running of any period of limitations.") (citing *Bonham v. Dresser Indus.,* 569 F.2d 187, 193 (3d Cir. 1977)).

Benefits of a representative case

Once a case is conditionally certified as a collective action, it should proceed on a representative basis both through discovery and at trial. (*Reed v. Cnty. of Orange* (C.D.Cal. 2010) 266 F.R.D. 446, 463) ("a collective action is designed to permit the presentation of evidence regarding certain representative plaintiffs that will serve as evidence for the class as a whole").)

Regarding discovery, defendants will oftentimes attempt to serve voluminous written discovery as well as depositions on each plaintiff who joins the case. There is ample authority rejecting this tactic. (See, e.g., *Scott v. Bimbo Bakeries USA, Inc.* (C.D.Cal. 2010) No. 10-3154, 2012 WL 6151734 X; *Kress v. Price Waterhouse Coopers* (E.D.Cal. Sept.25, 2012) No. CIV S-08-0965, 2012 WL 4465556; *Gentrup v. Renovo Svcs.* (S.D.Ohio Aug.17, 2010) *LLC,* No. 1:07-cv-430, 2010 WL 6766418; *In Re: Am. Family Mut. Insur. Co. Overtime Pay Litig.* (D.Colo. Jan. 30, 2009), No. 06 cv17430-MDL Docket No. 1743, Order Adopting and Affirming Magistrate Judge's Order, 2009 U.S. Dist. LEXIS 39383, at *8 (D.Colo. Apr. 27, 2009); *Cranney v. Carriage Services, Inc.*, No. 2:07-cv-01587, 2008 WL 2457912 at *3-5; *Geer v. Challenge Financial Investors Corp.,* (D. Kan. May 4, 2007) No. 05-1109, 2007 WL 1341774, *3-5 *Morales-Arcadio v. Shannon Produce Farms* (S.D.Ga. Aug 28, 2006) No. CV605-062, 2006 WL 2578835; (*Smith v. Lowes Home Ctrs*., (S.D.Ohio 2006) 236 F.R.D. 354, 356-58; *Bradford v. Bed, Bath & Beyond* (N.D. Ga. 2002) 184 F. Supp.2d 1342, 1344; *Takacs v. Hahn Auto Corp.* (S.D. Ohio 1999) No. C-3-95-404, 1999 WL 33127976); *Belcher v. Shoney's Inc.* (M.D. Tenn. 1998) 30F.supp2d 1010; *McGrath v. City of Philadelphia* (E.D. Pa. Feb. 10, 1994) No. CIV. A. 92-4570, 1994 WL 45162, *2-3; *Adkins v. Mid-America Growers Inc.* (N.D. Ill. 1992) 141 F.R.D. 466, 468-69.))

The representative nature of a collective action makes it ideal for a plaintiff to file a motion for summary adjudication on a critical disputed issue. For example, our office has had success in obtaining summary adjudication on dispositive affirmative defenses.

In addition, the trial should also proceed on a representative basis. A good example of a representative FLSA collective action trial is *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) 551 F.3d 1233, 1241. There, the court denied the defendant's motion to decertify the class and an eight-day jury trial ensued with the named plaintiffs representing the interests of over 1,400 opt-in plaintiffs. The jury heard testimony from store managers, Family Dollar executives, and the presentation of Family Dollar's central, common corporate policies and procedures regarding the position. (*Id.* at 1247.) The jury found that the position was improperly classified as exempt and that the violation was willful, and awarded approximately $19 million in overtime damages. (*Id.* at 1258.) The Eleventh Circuit affirmed, approving the use of the

representative evidence, noting "that the FLSA is a remedial statute that should be liberally construed," whose purpose is "to efficiently resolve a large number of plaintiffs' claims" and "[g]iven the substantial similarity of the class members' jobs and uniform corporate treatment of the store managers, it would not serve the interest of judicial economy to require these overtime-pay claims to be adjudicated in 1,424 individual trials." (*Id.* at 1264-65 (internal citations omitted.)

Recent Supreme Court decision

The United States Supreme Court recently addressed FLSA collective actions in *Genesis Healthcare Corp. v. Symczyk* (Apr. 16, 2013) 133 S.Ct. 1523. In *Symczyk*, the Supreme Court (5-4) held that, once it had been determined that the named plaintiff's claims were moot, the case could not be kept alive even though the plaintiff had not yet moved for conditional certification. It is important to note that due to the procedural history of that case, the Supreme Court's decision was based on a number of assumptions. The Supreme Court assumed (but did not decide) that an unaccepted Rule 68 offer of judgment could moot the plaintiff's claim and, perhaps more importantly, assumed (but did not decide) that the Rule 68 offer of judgment in the case before it provided the plaintiff with full and complete relief to actually moot the claim. The Supreme Court also did not address the impact of a pending motion for conditional certification when the Rule 68 offer is made. The dissent highlights why *Symczyk* is an exceedingly narrow decision. (*Id.* at 1532-37.)

Settlement process

The settlement process also usually does not involve the procedural and substantive requirements of settling a class action. However, the Eleventh Circuit has held, and many district courts have followed, that an FLSA collective action settlement generally must be supervised by either the Court or the United States Department of Labor. (*Lynn's Food Stores Inc. v. Dep't of Labor* (11th Cir. 1982) 679 F.2d 1350, 1352-53.) District courts in the Ninth Circuit generally follow this procedure. (See, e.g., *Lee v. The Timberland Co.*, (N.D.Cal. 2008) 2008 WL 2492295, *2 ("[T]he proper procedure for obtaining court approval of the settlement of FLSA claims is for the parties to present to the court a proposed settlement, upon which the district court may enter a stipulated judgment only after scrutinizing the settlement for fairness."); *Yue Zhou v. Wang's Restaurant* (N.D.Cal. Jan. 17, 2007) No. C 05-0279 PVT, 2007 WL 172308, *1 ((("The proper procedure for obtaining court approval of the settlement of FLSA claims is for the parties to present to the court a proposed settlement, upon which the district court may enter a stipulated judgment only after scrutinizing the settlement for fairness.").)

Approval requires the court to "first determine whether the settlement involves the resolution of a bona fide dispute over an FLSA provision, and then decide whether the settlement is fair and reasonable." (*Camp v. Progressive Corp.* (E.D. La. Sept. 23, 2004) No. Civ. 01-2680, 2004 WL 2149070, *4.) There is a strong presumption that a proposed settlement is entitled to a finding of fairness. One court has noted that "[i]f the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable." (*Bonetti v. Embarq Management Co.* (M.D.Fla. 2009) 715 F.Supp.2d 1222, 1227.)

While there is no requirement that ADEA claims be approved by the court, there are circumstances when it may be prudent to seek approval. For example, counsel should seek preliminary and final approval similar to a traditional class action if the settlement involves employees who are not already before the court to receive notice and opportunity to join the settlement. The same is true for an FLSA settlement if the settlement involves employees who are not already before the court.

In our experience, having every plaintiff return a signed release or consent to the settlement prior to the approval hearing goes a long way to establishing that the settlement is fair and reasonable. In other words, if the plaintiffs have been informed of the terms of the settlement, including their settlement amounts, the amount of attorney fees and costs, and other provisions of the settlement, and have affirmatively agreed to those terms, that is a strong indication that the settlement is fair and should be approved. In one case, we had the court approve the settlement on the day of the hearing after we informed the court that all plaintiffs had returned signed consents. In another case, the Court vacated the approval hearing once being informed that all plaintiffs had returned signed consents to the settlement after being informed of the terms and conditions.


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Endnote

[1] For a discussion of two other standards for handling collective actions, please see *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001). The two step procedure is the overwhelming standard used by district courts in the Ninth Circuit and therefore is the focus of this article.