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EXPERT ANALYSIS

# Successful FLSA Discovery Practices: Opening the Door to Opt-In Discovery

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Fair Labor Standards Act collective actions can comprise just a handful of opt-in plaintiffs or a nationwide cohort of thousands. Regardless of their size, though, they depend on the court finding the opt-ins are "similarly situated" such that the plaintiffs can try their case based on representative proof.

Unlike their cousin the Rule 23 class action — which is based on the Federal Rules of Civil Procedure — FLSA collectives are often "conditionally" certified at the early or pre-discovery stage to facilitate the issuance of notice to putative opt-ins. As the term implies, "conditional" certification can be challenged down the road, after the parties have had the benefit of discovery — at which point the plaintiffs' burden of demonstrating that they are similarly situated is heightened.

For defendants, the surest path to decertification starts with seeking discovery from all opt-in plaintiffs. This discovery should probe their individual work situations and potential differences among the collective.

Whether discovery from all opt-ins is permissible, however, is an open question on which courts have split, with one line of cases holding that representative discovery is sufficient and another permitting discovery from all opt-ins.

The factors that courts have considered in navigating this split are good guideposts for charting a proposed discovery plan that will maximize an employer's ability to probe weaknesses in a conditionally certified class, develop evidentiary support for dispositive motions and identify potential trial witnesses.

## THE SPLIT: OPT-INS AS PARTY PLAINTIFFS OR RULE 23 DOPPELGANGERS

The split among courts regarding the propriety of full opt-in discovery stems from differing views of the status of opt-in plaintiffs.

Cases permitting discovery from all opt-ins rest on the premise that opt-ins are party plaintiffs who have affirmatively chosen to participate in the litigation — as opposed to Rule 23 class members — and thus are expected to participate in the discovery process like named parties.

Courts in this camp have also recognized that the two-step certification process is a crucial distinction between FLSA collective actions and Rule 23 class actions because the second step in FLSA certifications requires the court to "'make ... a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff.'"[1] Absent such a determination, the collective action should be decertified.

Thus, "[b]ecause of the second step in which a defendant can seek de-certification, 'numerous' courts have held that it is 'essential for a defendant to take individualized discovery of the opt-in

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plaintiffs to determine if they are "similarly situated" within the meaning of [the] FLSA.'"[2] Such considerations are an effective rejoinder to the complaint that opt-in discovery is burdensome, as plaintiffs bear responsibility for balancing the size of the class and shoulder the attendant burden of proving that each class member is similarly situated to the others.

As one court explained, "After all[,] plaintiffs conditionally certified a nationwide class of 572 assistant store managers located around the United States. Plaintiffs can hardly be heard to complain about the cost, burden and difficulties associated with defendants' discovery when they chose to pursue an extensive class. Plaintiffs knew 'what they were in for' when they filed the case."[3]

On the other hand, several courts have rejected the distinction between FLSA collective actions and Rule 23 class actions, finding that the same discovery standards should apply in both cases. These cases thus limit opt-in discovery to "representative samples." Courts base this approach on the rationale that permitting individualized discovery "would undermine the purpose and usefulness of both class actions and collective actions."[4]

Accordingly, these courts analyze requests for opt-in discovery through the lens of Federal Rule of Civil Procedure 26(b). This rule gives the court discretion to limit discovery to the proportionate needs of the case. Courts may take into account whether the sought discovery is unreasonably cumulative or duplicative; is obtainable from a more convenient source; or is too burdensome in comparison with the parties' resources, amount in controversy and importance of the issues at stake.

While the principle that opt-in plaintiffs are party plaintiffs argues for permitting opt-in discovery regardless of the size and contours of the case, courts often base their decisions regarding the scope of discovery on a more pragmatic balancing of factors.

With the recently amended Rule 26(b)(1) requiring that discovery be "proportional to the needs of the case," the following factors and considerations are likely to become an increasingly important feature of any dispute concerning the scope of permissible opt-in discovery.

### *The number of opt-ins and their geographic location*

The smaller the number of opt-in plaintiffs, the more likely the court will permit individualized discovery from all of them. This tendency reflects the reality that at a certain class size the burden and unmanageability of individualized discovery necessarily overcomes judicial commitment to treating all opt-ins as party plaintiffs.

There is no consensus among courts as to when the size of a collective action makes individualized discovery impractical.

Some courts have allowed discovery from over 100 opt-ins, and in at least one case a court permitted discovery from over 300.

Further, in some cases with opt-ins numbering in the hundreds or thousands, courts have permitted discovery from samples totaling over 200, demonstrating both a willingness to permit discovery from well over 100 opt-in plaintiffs where there is a demonstrable rationale for engaging in extensive discovery.[5]

On the other hand, courts have rejected individualized discovery in collective actions involving fewer than 100 plaintiffs.[6]

Generally speaking, it will be harder to persuade a court to permit individualized discovery absent other factors once the size of the collective action climbs into the hundreds.

One such factor that may weigh in favor of individualized discovery is whether the opt-in plaintiffs are primarily located in one geographic area or are widespread throughout the country. In the former situation, counsel's collection of discovery responses and coordination of depositions is far less burdensome than if they have to bridge long geographic distances.

Nonetheless, geographic dispersion need not bar individualized discovery, including depositions, if attorneys are willing to adopt alternative discovery methods, such as conducting depositions by telephone and/or videoconference or declining to argue that deponents must travel to the forum jurisdiction for depositions.[7]

### *The type of discovery sought*

As a general rule, as the size of the collective increases, interrogatories and other forms of written discovery become more amenable to full opt-in discovery than depositions, which may require travel and substantial time commitments for both the opt-in plaintiffs and counsel.

Going one step further, courts are even more likely to permit class-wide questionnaires that call for opt-in plaintiffs to answer most questions with a "yes" or "no" or that ask for basic factual information, even when the number of opt-ins is large.

For example, in *Crawford v. Professional Transportation Inc*. the court rejected the employer's proposed 18-page questionnaire as unduly burdensome but permitted a much shorter questionnaire to be served on all of the approximately 3,000 opt-in plaintiffs.[8] The approved, abbreviated questionnaire asked three yes or no questions about any relevant documents each opt-in might possess, one yes or no question as to whether the opt-in contended he was entitled to additional pay, and one question asking the respondent to identify any bankruptcy filings. All 3,000 opt-ins were also directed to produce all documents relating to any affirmative response to questions regarding their possession of relevant materials.

Likewise, in *Bonds v. GMS Mine Repair & Maintenance Inc.*, the court allowed a five-part questionnaire to be served on all 157 opt-ins, while also allowing for an additional selection of opt-ins to complete more extensive written discovery and be deposed.[9]

While a limited questionnaire may not be ideal, it may provide sufficient information for the defendant to go back to the court and ask for additional follow-up or more extensive discovery from either all opt-ins or a much larger sample. Armed with answers showing differences among questionnaire responders, defendants will have more substance on which to base a request for additional or fuller discovery. Defendants should also tie such differences to key points arising in class certification briefing.

### *The substance and purpose of discovery sought*

Courts are more inclined to reason discovery from all opt-in plaintiffs is necessary if the propriety of class certification is at issue, including cases when the defendant intends to move to decertify. The rationale behind this conclusion is that the employer is able to test whether any one of them has been improperly joined to the action because opt-ins are party plaintiffs.[10]

With the trend toward requiring FLSA plaintiffs to submit trial plans detailing how they intend to prove their claims at trial on a class-wide basis through representative evidence, defendants may likewise be able to argue that discovery from all opt-ins is necessary to probe whether plaintiffs' proposed use of representative plaintiff testimony would be sufficiently"representative" of other opt-ins' experiences.

Similarly, employers can argue that discovery from all opt-ins is necessary to assist in picking potential opt-in trial witnesses to demonstrate to the fact finder that plaintiffs cannot prove their claims on a class-wide basis. Employers can enhance this argument by pointing out that, absent discovery from all opt-in plaintiffs, they have little means by which to identify those whom they may want to call at trial given that they are ethically prohibited from communicating with opt-in plaintiffs who are represented by counsel.

Likewise, discovery from all opt-ins is more likely to be permitted where the employer can show it is tailored to probe information that the employer cannot obtain from its own files or resources. Thus, an employer in a misclassification case can make a more compelling claim for seeking information such as employee resumes and job applications submitted to other employers than

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for requesting information, such as dates of employment, pay rates and job duties, that the employer should already possess.[11]

Using this rationale, employers could also seek basic information about claimed off-the-clock work to prove the nature and extent of alleged FLSA violations, arguing that such information bears directly on whether the opt-ins are similarly situated and cannot be ascertained by reviewing employee records.

The underlying theme of these arguments is that the information goes both to the merits of the plaintiffs' claims and the suitability of collective action treatment. At the same time, the requests are limited in scope to information that is uniquely in the plaintiffs' possession.

As a result, such arguments increase the likelihood that the requests will withstand judicial scrutiny in light of Rule 26(b)(1)'s requirement that the parties' relative access to relevant information be considered in defining the scope of discovery.

The bedrock argument for permitting full opt-in discovery is that opt-in plaintiffs are party plaintiffs and thus should be expected to participate fully in discovery regardless of number. Not all courts accept this premise, however, and practical considerations often dominate courts' consideration of whether to allow discovery from all opt-ins and whether to restrict the scope of such discovery.

Tailoring the discovery sought to minimize burden and focus on issues relevant to decertification and trial witness selection can help assuage judicial concerns that full opt-in discovery will overwhelm the discovery process or drive up litigation costs.

Further, employers may be able to use the initial results of tailored opt-in discovery to identify to the court further areas of inquiry warranting additional opt-in discovery, thereby allowing a defendant to expand the scope of discovery to fit the particular issues arising in a putative collective action.

## NOTES

[1] *Camesi v. Univ. of Pittsburgh Med. Ctr.,* 729 F.3d 239, 243 (3d Cir. 2013) (quoting *Symczyk v. Genesis Healthcare Corp.,* 656 F.3d 189, 193 (3d Cir. 2011), rev'd on other grounds, 133 S. Ct. 1523 (2013)); *see also Bonds v. GMS Mine Repair & Maint.,* No. 13-cv-1217, 2014 WL 6682475, at *2 (W.D. Pa. Nov. 25, 2014) (quoting *Camesi*); *Forauer v. Vt. Country Store Inc.,* No. 12-cv-276, 2014 WL 2612044, at *3 (D. Vt. June 11, 2014) (recognizing line of cases treating opt-in plaintiffs as "ordinary party plaintiffs subject to the full range of discovery" and permitting discovery from all 24 opt-in plaintiffs) (internal quotation omitted); *see also Chavez v. WIS Holdings Corp.,* No. 07-cv-1932, 2013 WL 2181214, at *2 (S.D. Cal. May 20, 2013) ("This court is of the opinion that a party who has chosen to opt-in to a collective action has an obligation to participate in the litigation, if necessary."); *Morangelli v. Chemed Corp,* No. 10-cv-876, 2011 WL 7475, at *1 (E.D.N.Y. Jan. 1, 2011) ("When an individual voluntarily chooses to participate in [a] lawsuit, he takes on the obligation to provide discovery about his claim."); *Krueger v. N.Y. Tel. Co.,* 163 F.R.D. 446, 449 (S.D.N.Y. 1995) (162 Age Discrimination in Employment Act opt-ins had "freely chosen to participate" in the lawsuit and had "relevant information with respect to the claims and defenses" that was subject to discovery).

[2] *Forauer*, 2014 WL 2612044 at *3 (quoting *Khadera v. ABM Indus.*, No. 08-cv-417, 2011 WL 3651031, at *3 (W.D. Wash. Aug. 18, 2011)).

[3] *Goodman v. Burlington Coat Factory Warehouse Corp.,* 292 F.R.D. 230, 233 (D.N.J. 2013).

[4] *Wellens v. Daiichi Sankyo Inc.*, No. 13-cv-581, 2014 WL 7385990, at *3 (N.D. Cal. Dec. 29, 2014); *see also Smith*, 236 F.R.D. at 357; *Ross v. Jack Rabbit Servs.*, No. 14-cv-44, 2015 1565430, at *3 (W.D. Ky. Apr. 7, 2015) (limiting discovery to "representative sampling" of 236 opt-in plaintiffs); *Cranney v. Carriage Servs. Inc.*, No. 07-cv-1587, 2008 WL 2457912, at **2-3 (D. Nev. June 16, 2008); *Adkins v. Mid-Am. Growers Inc.*, 143 F.R.D. 171 (N.D. Ill. 1992); *Bradford v. Bed Bath & Beyond Inc.*, 184 F. Supp. 2d 1342, 1344 (N.D. Ga. 2002); *see also Forauer*, 2014 WL 2612044, at **2-3 (collecting cases and ultimately allowing individualized opt-in discovery).

[5] *See, e.g., Lloyd v. JPMorgan Chase & Co.,* Nos. 11-cv-9305 and 12-cv-2197, 2015 WL 1283681, at * 4 (S.D.N.Y. Mar. 20, 2015) (rejecting plaintiffs' request for representative sampling and allowing defendants to serve written discovery from the 100 opt-in plaintiffs who had not signed arbitration agreement); *Renfro v. Spartan Comput. Servs.*, No. 06-cv-2284, 2008 WL 821950, at *203 (D. Kan. Mar. 26, 2008) (permitting discovery of all 136 opt-in plaintiffs); *Brooks v. Farm Fresh Inc.*, 759 F. Supp. 1185, 1188 (E.D. Va. 1991) (authorizing depositions of all 127 opt-ins), *rev'd on other grounds sub nom. Shaffer v. Farm Fresh*, 966 F.2d 142 (4th Cir. 1992); *Abubakar v. City of Solano*, No. 06-cv-2268, 2008 WL 508911, at *1, *3 (E.D. Cal. Feb.

22, 2008) (allowing individualized discovery of 160 opt-in plaintiffs); *Krueger*, 163 F.R.D. at 451 (S.D.N.Y. 1995) (permitting individualized discovery on damages as to all 162 class members); *see also Kaas v. Pratt & Whitney*, No. 89-cv-8343, 1991 WL 158943, at *8 (S.D. Fla. Mar. 18, 1991) (requiring named plaintiff and approximately 100 opt-in plaintiffs to respond to written discovery, and allowing depositions of all opt-ins); *Coldiron v. Pizza Hut Inc.*, No. 03-cv-5865, 2004 WL 2601180, at *2 (C.D. Cal. Oct. 25, 2004) (allowing discovery from over 300 opt-in plaintiffs); *Morgan v. Family Dollar Stores Inc.*, 551 F.3d 1233 (11th Cir. 2008) (U.S. District Court for the Northern District of Alabama permitted depositions of 250 opt-in plaintiffs out of total of 1,424); *O'Toole v. Sears Roebuck & Co.*, No. 11-cv- 4611, 2014 WL 1388660, at *3 (N.D. Ill. Apr. 10, 2014) (permitting written discovery from 33 percent of 700 opt-ins); *Smith v. Family Video Movie Club Inc.*, No. 11-cv-1773, 2012 WL 4464887, at **1-3 (N.D. Ill. Sept. 27, 2012) (permitting discovery on 166 of 828 opt-in plaintiffs); *Ross*, 2015 WL 1565430, at *3 (limiting discovery to "representative sampling" of 236 opt-in plaintiffs).

[6] *See, e.g., Higueros v. N.Y. State Catholic Health Plan Inc.*, No. 07-cv-418, 2009 WL 3463765, at *2 (E.D.N.Y Oct. 21, 2009) (denying request to depose all opt-in plaintiffs because "deposing each of the 47 plaintiffs would defeat the very purpose contemplated by Congress in authorizing these collective actions."); *Strauch v. Comput. Scis. Corp.*, No. 14-cv-956, 2015 WL 540911, at *3 (D. Conn. Feb. 10, 2015) (permitting limited discovery of 32 of approximately 80 opt-in plaintiffs but recognizing some additional discovery might be permitted if significantly more of the approximately 3,000 potential opt-in plaintiffs filed consents to join the collective action).

[7] *See Forauer*, 2014 WL 2612044, at *7 (denying employer's motion to compel opt-in plaintiffs to attend depositions in Vermont but allowing them to be deposed by remote means); *Morangelli*, 2011 WL 7475, at *2 (permitting depositions of opt-in plaintiffs to be taken by phone or video).

[8] *Crawford v. Prof'l Transp. Inc.*, No. 14-cv-18, 2015 WL 5123871, at *4 (S.D. Ind. Sept. 1, 2015).

[9] *Bonds*, No. 13-cv-1217, 2014 WL 6682475, at *3 (W.D. Pa. Nov. 25, 2014).

[10] *See Lloyd*, 2015 WL 1283681, at *4; *Coldiron*, 2004 WL 2601180, at * 2; *Kaas*, 1991 WL 158943, at *3 (because defendant could challenge joinder of any party as to whether parties were in fact similarly situated, meaningful discovery from opt-ins was not only permissible, but "essential"); *see also Forauer*, 2014 WL 2612044, at *4 (permitting deposition of all 24 opt-in plaintiffs where defendant intended to challenge certification).

[11] *See Lloyd*, 2015 WL 1283681, at *6 (noting distinction between information sought about aspects of employment from personnel and corporate files and information from resumes and job applications to which employer did not have access); *Crawford*, 2015 WL 5123871 at *4 (approving reduced questionnaire to be served on approximately 3,000 opt-ins that eliminated questions about each plaintiff's employment history that defendant presumably must have known from its own records); *cf. Goodman*, 292 F.R.D. at 234 (denying request for written discovery from all 572 opt-in plaintiffs where information sought related to personnel data likely in the possession and control of employer, and thus discovery was not likely "to advance the ball").

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