Happy 30th Birthday *Hoffman-La Roche*: It's Time for a Change

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Approximately 30 years ago, the U.S. Supreme Court established the framework for collective actions in a landmark decision: Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480, 51 Fair Empl. Prac. Cas. (BNA) 853, 29 Wage & Hour Cas. (BNA) 937, 52 Empl. Prac. Dec. (CCH) P 39479 (1989). While Hoffmann-La Roche involved an Age Discrimination in Employment Act (ADEA) case, the collective action notice framework from the decision is cited most often today in Fair Labor Standards Act (FLSA) cases. FLSA collective actions have increased exponentially and flooded the federal dockets in the last 30 years. This article traces the history and current environment that has evolved based upon the still evolving case law.

According to data compiled by Lex Machina, FLSA collective actions have soared over time. For instance, in 2009 there were a reported 1,821 FLSA collective action filings. This number continued to increase year over year for five years straight until it peaked in 2015 with 4,134 FLSA collective action filings. Filings later dropped slightly from 4,134 filings to 3,858 filings in 2016, and held steady with 3,476 filings and 3,441 filings in 2017 and 2018, respectively.[1]

In general, FLSA lawsuits also made up a larger proportion of all federal civil lawsuits than they did in prior years.[2] In 1991, FLSA lawsuits made up less than one percent (0.6%) of all civil lawsuits. By 2012, they accounted for almost 3% of all civil lawsuits, an increase of 383%.[3] Many of these matters are not being litigated to the merits and, because of the uncertainty surrounding the certification standard, are instead generating more settlements. In 2016, the top 10 FLSA collective settlements amounted to an astonishing $403,950,000.[4] On top of the appeal of these large settlements, plaintiffs' attorneys also are attracted in part because *Hoffmann-La Roche* makes it easier for them to identify additional plaintiffs to sue companies.[5]

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In 2018, the U.S. Supreme Court pronounced that the FLSA should be given a "fair reading" by courts.[6] The current state of FLSA conditional certification jurisprudence under *Hoffmann-La Roche*, however, is anything but fair. Because the Supreme Court did not give clear instruction as to when a collective action should be conditionally certified, courts have reach wildly inconsistent results on similar fact patterns.

Like Rule 23 class actions, conditional certification in large national cases exerts settlement pressure on a defendant, even when the underlying claims are weak. For small employers, a collective action can be an existential event. Unlike FLSA conditional certification, however, the Supreme Court has provided lower courts with clear instruction on when a court should grant Rule 23 class certification, thereby protecting the due process rights of defendants and avoiding in terrorem class actions.

It is time the Supreme Court provide courts with specific guidance as to FLSA conditional certification to ensure the law is given a "fair reading" and applied consistently across our courts.

IN THE BEGINNING

The FLSA establishes federal minimum wage, maximum hour, and overtime guarantees that cannot be modified by contract. The FLSA is silent on what role district courts should have regarding the Section 16 notice procedure. Section 16(b) of the FLSA[7] gives employees the right to bring a private cause of action on their own behalf and on behalf of "other employees similarly situated" for specified violations of the FLSA. A suit brought on behalf of other employees is known as a "collective action."[8] While *Hoffmann-La Roche* involved claims brought under the ADEA, because ADEA incorporates Section 16(b) of the FLSA into its enforcement scheme, the same rules have been used to govern judicial management of collective actions under both statutes.[9]

In *Hoffmann-La Roche*, the Supreme Court held that district courts may facilitate notice to potential plaintiffs "in a manner that is orderly [and] sensible," as well as have managerial responsibility to . . . "assure that the task is accomplished in an efficient and proper way."[10] Further, the Court made explicitly clear that this discretion is for "case-management purposes," which is "distinguishable in form and function from the solicitation of claims."[11] Justice Antonin Scalia, with whom Chief Justice John Roberts joined, dissented from the majority opinion. He stated, "The Court holds that in a § 216(b) action[,] the district court can use its compulsory process to assist counsel . . . in locating nonparties to the litigation who may have similar claims, and in obtaining their consent."[12] He continued, "I know of no source of authority for such an extraordinary exercise of the federal judicial power."[13] Justice Scalia cautioned in his dissent that giving a *court* the ability to "generat[e]" and "manage *other* disputes is, if not unconstitutional, at least so out of accord with age-old practices that it surely should not be assumed unless it has been clearly conferred."[14] He also warned that "[t]he difficultly with sweeping these orders under the rug of 'case management' is that they were *not at all* designed to facilitate the adjudication of any claim before the court."[15] Justice Scalia concluded his dissent with an admonition that the notice device could and would be used to "stir[] up litigation," which, he remarked, was "roundly condemned by this and all American courts."[16]

The majority acknowledged the concerns expressed by Justice Scalia in his dissent and made careful efforts to limit a district court's authority to facilitate "*accurate* and timely notice" to "potential plaintiffs," that is, those that

could opt-in and actually participate as plaintiffs in the collective action.[17] The majority stated that the judicial benefits of a collective action require employees timely receive notice "so that they can make informed decisions about *whether to participate.*"[18]

The Supreme Court also made clear that federal courts maintain discretion to limit issuance of notice or even decide not to issue any notice at all even if the plaintiffs demonstrated that the putative collective was similarly situated.[19] Even though the Supreme Court's instructions made clear that collective actions should be used sparingly when required for case management purposes, as discussed below, the case law at the district court level has developed as though the Supreme Court instructed courts to do the exact opposite. Most federal courts grant FLSA conditional certification with nothing more than boilerplate allegations that the putative class members have similar claims under the FLSA.

THE POTENTIAL HARM: CONDITIONAL CERTIFICATION RESULTS IN SOLICITATION OF CLAIMS

The Supreme Court has repeatedly instructed that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[20] The Supreme Court has also instructed that class action litigation often results in unfair settlements of claims.[21] Similarly, the Supreme Court has recently issued the same warning regarding FLSA collective actions.[22] In other words, like class action decisions, courts should be mindful of granting FLSA conditional certification, because doing so enacts similar pressure to settle unmeritorious claims. In addition, plaintiffs often use FLSA conditional certification as the first step in creating a massive multi-party lawsuit. For example, plaintiffs will first secure FLSA conditional certification under the exceedingly low standard adopted by federal district courts. Subsequently, the plaintiffs will amend the complaint to add Rule 23 class claims for any state laws where opt-in plaintiffs join.[23] Such a litigation tactic, however, is counter to the purposes of the FLSA collective procedure, which was designed to vindicate *federal claims* not hunt for plaintiffs in other states who can bring opt-out Rule 23 state law class actions.

IN PRACTICE: THE EXCEEDINGLY LOW STANDARD FOR CONDITIONAL CERTIFICATION

Despite that the Supreme Court has been abundantly clear that the sole function of the FLSA notice process is to facilitate notice to "potential plaintiffs" in an "orderly," "sensible," "efficient and proper way," and *not* to be a solicitation of claims, the device has unfortunately resulted in exactly what it was proscribed to be: a process to solicit and stir up FLSA litigation. The development of conditional certification case law has thus unfairly helped pressure defendants to settle unmeritorious claims.

One of the main reasons for the prevalence of FLSA collective litigation is the exceedingly low standard many district courts have employed when analyzing a plaintiff's initial motion for conditional certification. The Supreme Court did not provide any guidance on what standard a district court should use when deciding a motion for conditional certification. Instead, the Court merely noted that the collective action could "proceed on behalf of those similarly situated."[24]

ADEA cases, however, involve significantly different factual allegations and legal claims than those at issue in

FLSA cases. For example, these cases often involve a specific policy, like a reduction in force, that a plaintiff alleges is infected with a discriminatory animus. The district court case in *Hoffmann-La Roche* noted that the ADEA collective action could proceed because the plaintiffs made "substantial allegations that the putative class members were together the victims of a single decision, policy or plan ***infected by discrimination***."[25] That "infected by discrimination" requirement serves as a substantial burden to collective notice, since it ensures that a plaintiff must present a district court with substantial allegations that the policy or plan was indeed infected by discrimination.[26]

In FLSA cases, however, the "infected by discrimination" requirement is of no issue since there is no such discrimination element in an FLSA case. For example, when most companies make exemption classification decisions, they do so consistently across the company.[27] Consequently, the conflation of these legal principles from ADEA cases into inapplicable FLSA exemption cases has resulted in almost automatic conditional certification since the claims at issue in an FLSA case involve an *allegedly* single plan or decision. Although courts have added in the phrase "that violated the law" in FLSA collective actions,[28] that requirement has been all but ignored since every FLSA case could be argued to involve an *allegation* that violates that law. Most courts allow plaintiffs to circumvent this "violated the law" requirement simply by providing an allegation that parrots the statute. And courts will find such a minimal showing to be sufficient. Indeed, courts will not even require proof of an actual violation but will be satisfied with merely a "factual nexus" between the plaintiff's claims and that of other potential collective action members.[29] Specifically, a plaintiff's claim that "he and all putative class members were injured by the same . . . policy—designation as exempt from the FLSA . . . — . . . is sufficient to meet the lenient first-tier collective action standard."[30]

Indeed, courts will often grant ***national*** conditional certification on mere allegations from a single plaintiff in a single location even though the defendant has met those allegations with contradictory evidence.[31] Ad hoc case law has developed at the district court level whereby courts often will not: (1) consider contradictory evidence, (2) consider the underlying merits, (3) make credibility determinations, or (4) resolve factual disputes.[32] Even though these cases often involve significant factual variation, and defendants will present courts with affidavits from current employees, courts typically will not consider those affidavits.[33] To avoid an informed analysis of the contradictory evidence, plaintiffs have slapped these company affidavits with the label of "happy camper" affidavits to undermine their veracity and value.[34] Yet such a label is merely pejorative, fails to inform the necessary legal analysis, and logically assumes that the contrary allegations of the plaintiff—often a former employee who has left the company involuntarily and on bad terms—is an "unhappy camper" whose allegations are merely a guise to transform an exempt job into a non-exempt job.[35] But the Supreme Court never instructed district courts to ignore all contradictory evidence when deciding a motion for conditional certification.

In short, FLSA conditional certification is almost guaranteed even when the alleged violations require highly individualized analyses. Instead, most courts postpone any real analysis of the claims until the second stage.[36] But once notice issues to the collective, the damage is already done since it puts the defendant on the horns of a dilemma: engage in

extensive and expensive collective discovery to establish that the collective is not similarly situated or settle even if that claim lacks merits.

THE LACK OF CONSISTENCY IN FLSA CONDITIONAL CERTIFICATION DECISIONS

The low standard employed by courts is not the only problem with FLSA collective actions. Because the Supreme Court initially envisioned the collective action as a case management tool that the district court may or may not use, it provided federal courts with wide discretion on whether to grant conditional certification. This wide discretion has led to significant inconsistency in conditional certification decisions in many ways. The following are merely a few examples.

First, courts disagree whether discovery can impact the standard employed at conditional certification. Some courts note that a "heightened standard" should be used during the first state of conditional certification.[37] But "the overwhelming case law" from federal district courts "clearly holds that a heightened standard is not appropriate during the first stage of the conditional certification process and should only be applied once the entirety of discovery has been completed."[38] Although defendants have argued for an "intermediate" standard at the appellate level, no circuit court has opined on whether one is appropriate.[39]

Second, courts disagree whether it will consider affidavits of putative class members presented by defendants. Some courts will not consider those affidavits.[40] Other courts will consider those affidavits when making a determination.[41]

Third, courts disagree whether a plaintiff must demonstrate an interest of others who wish to join the collective action. The Eleventh Circuit, which has been flooded with FLSA collective actions,[42] created a requirement that a plaintiff must demonstrate such an interest.[43] This additional requirement helps lower the number of cases where conditional certification is granted. Other circuits, however, do not have such a requirement.[44] Without this requirement, it is far easier for a single plaintiff to make allegations that put in motion a massive, national collective action.

Fourth, courts disagree whether FLSA notice should issue to putative collective members with arbitration agreements containing class and collective action waivers. Some courts, most recently the Fifth and Seventh Circuits, find that putative collective members with arbitration agreements should not receive FLSA notice.[45] Other courts, however, come to the opposite conclusion.[46]

Finally, the Supreme Court's recent decision in *Bristol-Myers Squibb v. Superior Court of California*,[47] has further muddied the already inconsistent collective action jurisprudence. In *Bristol-Myers*, the Supreme Court concluded that courts lacked personal jurisdiction over claims brought by out-of-state plaintiffs against an out-of-state defendant, since neither the conduct nor injuries alleged had occurred in California. Subsequently, courts have addressed the jurisdiction question from *Bristol-Myers* in the context of national FLSA claims for out-of-state opt-in plaintiffs, but lower courts have reached varying conclusions.[48]

The inconsistency in the federal case law leads to bizarre results. Indeed, on similar fact patterns in a national FLSA collective action involving the alleged misclassification of assistant managers, three different federal courts can reach three very different conclusions. A federal court might deny FLSA conditional

certification.[49] A federal court might reach the complete opposition conclusion and grant national FLSA conditional certification.[50] Finally, a federal court might take a middle road, denying national conditional certification but granting certification as to the locals where the named plaintiff worked.[51] The lack of consistency among district courts and circuits courts has led to unclear guidance to companies and encourages plaintiffs to forum-shop their cases.

THE SOLUTION: EMPLOYING A REAL STANDARD FOR FLSA CONDITIONAL CERTIFICATION

After 30 years of FLSA collective actions, it is time for the Supreme Court to provide clear guidance on conditional certification to cure the inappropriate court-sanctioned solicitation of claims. Some federal courts appreciate the clear signals from the Supreme Court and have made the conditional certification standard a real one to be met.[52] These courts recognize that without a real standard, conditional certification is far too easy to secure, since most corporations do have consistent polices, albeit without any transformative legal power. Indeed, "if a uniform job description by itself was sufficient, every business in corporate America would be subject to automatic certification of a nationwide collective action on the basis of the personal experiences of a single misclassified employee."[53] Although these courts are guided by Supreme Court precedent that makes clear that conditional certification should not be automatic, these courts are in the minority.

To cure the improperly low standard for FLSA collective actions and remedy the inconsistent results in federal courts, the Supreme Court should provide additional guidance to lower courts that raises the bar for conditional certification and makes clear that, like Rule 23 class actions, lower courts should conduct a vigorous analysis of the claims. To ensure that collective actions do not continue to be used as a court-sanctioned solicitation of claims, the Supreme Court should instruct that lower courts *must*: (1) weigh contradictory evidence, (2) consider the underlying merits, (3) make credibility determinations, and (4) resolve factual disputes. FLSA conditional certification motions, much like the FLSA itself, should be given a "fair reading" by courts.

NOTES:

[1]See data compiled by Lex Machina for Employment: FLSA Collective Action case tags filed between January 1, 2009, and December 31, 2018.

[2]Report to the Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives, available at: https://www.gao.gov/assets/660/659772.pdf (last accessed December 5, 2019).

[3]Report to the Chairman.

[4]Mondry, 10 Most Expensive FLSA Overtime Lawsuits of 2016, T-Sheets, available at: https://blog.tsheets.com/2016/business-help/most-expensive-flsa-overtime-lawsuits-2016 (last accessed December 5, 2019).

[5]Several stakeholders interviewed by the U.S. Government Accountability Office reported that *Hoffmann-La Roche* made it easier for plaintiffs' attorneys to identify potential plaintiffs, which reduced the work necessary to form collectives. In addition, according to these stakeholders, case law in other areas of employment litigation—such as employment discrimination—has evolved, making FLSA cases more attractive for plaintiffs' attorneys. See United States Government Accountability Office, Report to the Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives, December 2013, available at: https:// www.gao.gov/ assets/ 660/ 659772.pdf (last accessed December 5, 2019).

[6]Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142, 200 L. Ed. 2d 433, 27 Wage & Hour Cas. 2d (BNA) 1141, 168 Lab. Cas. (CCH) P 36610 (2018) (instructing that FLSA exemptions should be given a "fair (rather than a 'narrow') interpretation.").

[7]52 Stat. 1060, as amended, 29 U.S.C.A. § 216(b).

[8]See Hoffmann-La Roche, 493 U.S. at 169–170.

[9]See, for example, Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 147, 140 L.R.R.M. (BNA) 2564, 30 Wage & Hour Cas. (BNA) 1556, 122 Lab. Cas. (CCH) P 35689 (4th Cir. 1992).

[10]Hoffmann-La Roche, 493 U.S. at 170–171, 174.

[11]See Hoffmann-La Roche, 493 U.S. at 174 ("In exercising the discre-

tionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality.").

[12]See Hoffmann-La Roche, 493 U.S. at 174.

[13]Hoffmann-La Roche, 493 U.S. at 174.

[14]Hoffmann-La Roche, 493 U.S. at 176.

[15]Hoffmann-La Roche, 493 U.S. at 175 (emphasis added).

[16]Hoffmann-La Roche, 493 U.S. at 181.

[17]See Hoffmann-La Roche, 493 U.S. at 170.

[18]Hoffmann-La Roche, 493 U.S. at 170 (emphasis added).

See also Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75, 133 S. Ct. 1523, 185 L. Ed. 2d 636, 20 Wage & Hour Cas. 2d (BNA) 801, 163 Lab. Cas. (CCH) P 36112 (2013) ("The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court.").

[19]See Hoffmann-La Roche, 493 U.S. at 167 (noting that courts may authorize collective notice and, by implication, are not compelled to do so).

[20]Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013) (internal quotation marks omitted).

[21]See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011) ("Other courts have noted the risk of 'in terrorem' settlements that class actions entail.") (citations omitted).

[22]See Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632, 200 L. Ed. 2d 889, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) P 11091 (2018) (noting that collective actions "can unfairly 'place pressure on the defendant to settle even unmeritorious claims' ") (quoting Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n. 3, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 76 Fed. R. Serv. 3d 397 (2010) (Ginsburg, J. dissenting)).

[23]See, for example, Westerfield v. Washington Mut. Bank, 2007 WL 2162989 (E.D. N.Y. 2007) (after previously conditionally certifying FLSA collective, court allowed plaintiffs to bring Rule 23 state-law class claims in California, New York, Illinois, and New Jersey).

See also Brickey v. Dolencorp, Inc., 244 F.R.D. 176, 179 (W.D. N.Y. 2007) ("Rule 23 and FLSA actions are routinely prosecuted together, and the complexities . . . are a challenge that the federal judiciary, and properly instructed juries, are generally well-equipped to meet."); Lee v. ABC Carpet & Home, 236 F.R.D. 193, 202–203 (S.D. N.Y. 2006) (noting that "where a collective action under the FLSA that is based on the same facts has been approved, there is an inclination to grant class certification of state labor law claims.").

[24]Hoffmann-La Roche, 493 U.S. at 170.

[25]Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 407, 48 Fair Empl. Prac. Cas. (BNA) 990 (D.N.J. 1988), judgment aff'd in part, appeal dismissed in part, 862 F.2d 439, 48 Fair Empl. Prac. Cas. (BNA) 1010, 48 Empl. Prac. Dec. (CCH) P 38460 (3d Cir. 1988), judgment aff'd and remanded, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480, 51 Fair Empl. Prac. Cas. (BNA) 853, 29 Wage & Hour Cas. (BNA) 937, 52 Empl. Prac. Dec. (CCH) P 39479 (1989) (emphasis added).

[26]See, for example, Baroni v. BellSouth Telecommunications, Inc., 33 Employee Benefits Cas. (BNA) 2886, 2004 WL 1687434 (E.D. La. 2004) (denying certification of plaintiffs' ADEA and LADEA claims).

[27]See for example, Zaniewski v. PRRC Inc., 848 F. Supp. 2d 213, 215 (D. Conn. 2012) (noting defendant company classifies all of its assistant store managers as exempt from the overtime requirements of the FLSA).

[28]See Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261, 4 Wage & Hour Cas. 2d (BNA) 335, 135 Lab. Cas. (CCH) P 33654 (S.D. N.Y. 1997) (noting courts have held that plaintiffs can meet this burden by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law) (emphasis added).

[29]See, for example, Velasquez v. Digital Page, Inc., 2014 WL 2048425, at *8 (E.D. N.Y. 2014) ("Courts do not require proof of an actual FLSA violation, but rather that a 'factual nexus' exists between the plaintiff's situation and the situation of other potential plaintiffs." (internal quotation marks omitted)).

[30]Neary v. Metropolitan Property and Cas. Ins. Co., 517 F. Supp. 2d 606, 621–622 (D. Conn. 2007).

See also Scholtisek v. Eldre Corp., 229 F.R.D. 381, 387, 62 Fed. R. Serv. 3d 363 (W.D. N.Y. 2005) ("At the notice stage, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination.") (internal quotation marks and citation omitted).

[31]See for example, Young v. Cooper Cameron Corp., 229 F.R.D. 50, 56, 10 Wage & Hour Cas. 2d (BNA) 1183 (S.D. N.Y. 2005) (granting the employee's motion for certification and issuing notice to employees at 108 facilities based on assertions in plaintiff's declaration and stating "[i]n fact, case law imposes only a very limited burden on plaintiffs for purposes of proceeding as a collective action").

[32]See, for example, Lynch v. United Services Auto. Ass'n, 491 F. Supp. 2d 357, 368–369, 15 Wage & Hour Cas. 2d (BNA) 1096 (S.D. N.Y. 2007) (noting that at the conditional certification stage, "the court does not resolve factual disputes, decide substantive issues on the merits, or make credibility determinations.").

[33]See, for example, Stevens v. HMSHost Corp., 2012 WL 4801784, at *3 (E.D. N.Y. 2012) ("[S]uch evidence cannot be used to undermine a plaintiff's initial showing because doing so would require a court to weigh evidence and determine credibility, which is not appropriate until the second stage after discovery.") (quotations omitted).

[34]See, for example, Costello v. Kohl's Illinois, Inc., 2014 WL 4377931, at *7, n. 7 (S.D. N.Y. 2014) ("The Court finds these declarations—dubbed "happy camper" declarations by Plaintiffs—to be of limited value to the instant motion, during which the Court is not to weigh evidence and

make credibility determinations.").

[35]Even "the most skilled physician" can be described to suggest anyone could do high-level medical work "simply by following the protocols and instructions in a rote fashion." Pippins v. KPMG, LLP, 759 F.3d 235, 246–247, 23 Wage & Hour Cas. 2d (BNA) 38, 164 Lab. Cas. (CCH) P 36249 (2d Cir. 2014).

[36]See, for example, Austin v. CUNA Mut. Ins. Soc., 232 F.R.D. 601, 606, 11 Wage & Hour Cas. 2d (BNA) 325 (W.D. Wis. 2006) ("Defendant's arguments about the predominance of individualized inquiries and the dissimilarities between plaintiff and other employees are properly raised after the parties have conducted discovery and can present a more detailed factual record for the court to review."); White v. MPW Industrial Services, Inc., 236 F.R.D. 363, 373 (E.D. Tenn. 2006) ("[A] defendant's assertion of the potential applicability of an exemption should not be permitted to overcome an otherwise adequate threshold showing by the plaintiff . . . Several courts have stated . . . that disparate factual and employment settings of the individual plaintiffs should be considered at the second stage of analysis." (internal citations omitted)).

[37]See, for example, Rosario v. Compass Group, USA, Inc., 2016 Wage & Hour Cas. 2d (BNA) 32869, 2016 WL 471249, at *3 (D. Conn. 2016) (acknowledging use of an "intermediate" standard, which was more than a "modest factual showing" required in step one, but less than the showing required at the second step following full discovery, after the parties "engaged in some discovery").

[38]Amador v. Morgan Stanley & Co. LLC, 2013 WL 494020, at *4 (S.D. N.Y. 2013) (internal quotation marks omitted) (emphasis in original) (collecting cases).

[39]See for example, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 540, 25 Wage & Hour Cas. 2d (BNA) 1716 (2d Cir. 2016) (declining to decide question).

[40]See, for example, Costello, 2014 WL 4377931, at *7, n. 7.

[41]See Martinez v. First Class Interiors of Naples, LLC, 2019 Wage & Hour Cas. 2d (BNA) 335512, 2019 WL 4242409 (M.D. Tenn. 2019)).

[42]FLSA collective actions in the Eleventh Circuit peaked in 2015 with 954 cases.

[43]See Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1218, 104 Fair Empl. Prac. Cas. (BNA) 356, 80 Empl. Prac. Dec. (CCH) P 40646 (11th Cir. 2001) (instructing that to prevail on a motion for conditional certification, a plaintiff must show that other employees are interested in opting into the action).

[44]See, for example, Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 466, 13 Wage & Hour Cas. 2d (BNA) 1392 (S.D. N.Y. 2008) (finding that district courts within the Second Circuit have held that "FLSA plaintiffs are not required to show that putative members of the collective action are interested in the lawsuit in order to obtain authorization for notice of the collective action to be sent to potential plaintiffs.").

[45]See, for example, In re JPMorgan Chase & Company, 916 F.3d 494, 503, 2019 Wage & Hour Cas. 2d (BNA) 58998, 169 Lab. Cas. (CCH) P 36689 (5th Cir. 2019) (rejecting argument that employees "have a right to be given notice of any FLSA claims they might have, even if they cannot join the current collective action."); Lanqing Lin v. Everyday Beauty Amore Inc., 2018 WL 6492741 (E.D. N.Y. 2018).

See also Bigger v. Facebook, Inc., 947 F.3d 1043, 2020 Wage & Hour Cas. 2d (BNA) 25139, 170 Lab. Cas. (CCH) P 36765 (7th Cir. 2020) (holding when a defendant opposing the issuance of notice alleges that proposed recipients entered arbitration agreements waiving the right to participate in the action, a court may authorize notice to those individuals unless: (1) no plaintiff contests the existence or validly of the alleged arbitration agreements, or (2) after the court allows discovery on the alleged agreements' existence and validity, the defendant establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice and remanding the case).

[46]See, for example, Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 2019 Wage & Hour Cas. 2d (BNA) 340169, 170 Lab. Cas. (CCH) P 36736 (D. Mass. 2019); Gathmann-Landini v. Lululemon USA Inc., 2018 WL 3848922 (E.D. N.Y. 2018).

[47]Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773, 198 L. Ed. 2d 395, Prod. Liab. Rep. (CCH) P 20088 (2017).

[48]Compare Seiffert v. Qwest Corporation, 2018 WL 6590836, at *2–4 (D. Mont. 2018), motion to certify appeal denied, 2019 WL 859045 (D. Mont. 2019) (denying motion to dismiss claims of out-of-state putative collective action members; "[t]he Supreme Court's analysis in Bristol-Myers did not intend to restrict the Court's exercise of personal jurisdiction in FLSA collective action cases"), Swamy v. Title Source, Inc., 2017 WL 5196780, at *2 (N.D. Cal. 2017) (on motion for conditional certification, rejecting defendant's argument that the court lacks personal jurisdiction over the claims of out-of-state putative collective action members), and Thomas v. Kellogg Company, 2017 Wage & Hour Cas. 2d (BNA) 371859, 2017 WL 5256634, at *1 (W.D. Wash. 2017) (denying motion to dismiss out-of-state opt-in plaintiffs' claims), with Roy v. FedEx Ground Package System, Inc., 353 F. Supp. 3d 43, 54–61 (D. Mass. 2018) (denying motion to send notice to out-of-state putative collective action members because of lack of personal jurisdiction), and Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850–851 (N.D. Ohio 2018) (granting motion to dismiss for lack of personal jurisdiction over claims of out-of-state opt-in plaintiffs).

[49]See, for example, Brown v. Barnes and Noble, Inc., 252 F. Supp. 3d 255, 2017 Wage & Hour Cas. 2d (BNA) 146437 (S.D. N.Y. 2017); Rosario v. Compass Group, USA, Inc., 2016 Wage & Hour Cas. 2d (BNA) 32869, 2016 WL 471249, at *5 (D. Conn. 2016)).

[50]See, for example, Craig v. Rite Aid Corp., 2009 WL 4723286 (M.D. Pa. 2009) (granting plaintiffs' motion to conditionally certify a class of persons who were employed in any of the 4,901 stores as assistant managers within the previous three years and classified as exempt, salaried employees).

[51]See, for example, Amhaz v. Booking.com (USA), Inc., 2018 WL

427946, at *68 (S.D. N.Y. 2018), report and recommendation adopted, 2018 WL 4360791 (S.D. N.Y. 2018) ("Plaintiffs seek to certify all Booking.com AMs and KAMs nationwide . . . I find that plaintiffs have shown that they are similarly situated to AMs and KAMs in Booking.com's New York and Las Vegas offices and to KAMs in the Los Angeles office; however, they have failed to make the modest factual showing necessary to certify a nationwide collective of AMs and KAMs.").

[52]See, for example, Lang v. DirecTV, Inc., 2011 WL 6934607, at *6 (E.D. La. 2011) (denying conditional certification; noting "[t]oo much leniency at the notice stage can lead to a frivolous fishing expedition conducted by the plaintiff at the employer's expense and can create great settlement pressure early in the case.").

[53]See Brown v. Barnes and Noble, Inc., 252 F. Supp. 3d 255, 263, 2017 Wage & Hour Cas. 2d (BNA) 146437 (S.D. N.Y. 2017) (internal quotations omitted) (citing Costello v. Kohl's Illinois, Inc., 2014 WL 4377931, at *4 (S.D. N.Y. 2014)).