

## Article

# Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards

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On August 30, 2007, the California Supreme Court held that an arbitration agreement allowing employees to pursue state-law wage claims only through individual arbitration proceedings, without resort to a class action, would, in many cases, “lead to a de facto waiver [of statutory rights] and would impermissibly interfere with employees’ ability . . . to enforce the [State’s] overtime laws.”<sup>1</sup> The court based its holding on analysis of the “real world obstacles to the vindication of [employees’] right to overtime pay through individual [action].”<sup>2</sup> The court reasoned that class actions are needed because individual claims “offer no more than the prospect of ‘random and fragmentary enforcement’ of the employer’s legal obligation to pay overtime.”<sup>3</sup> Yet under the federal Fair Labor Standards Act (FLSA),<sup>4</sup> which sets the minimum wage and requires overtime pay nationwide, no employee can be party to a claim in either federal or state court “unless he gives his consent in writing to become such a party and such consent is filed in the court in

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1. *Gentry v. Superior Court*, 165 P.3d 556, 563–64 (Cal. 2007), *cert. denied*, 76 U.S.L.W. 3528 (2008).

2. *Id.* at 568.

3. *Id.* at 567 (quoting *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Ct. App. 2004)).

4. 29 U.S.C. §§ 201–219 (2000).

which such action is brought.”<sup>5</sup> In other words, under the FLSA—enacted to protect “the unprotected, unorganized and lowest paid of the nation’s working population”<sup>6</sup>—employees cannot bring class actions.

Litigants stating virtually every other type of claim in federal court can do so on behalf of a class so long as the standards of Federal Rule of Civil Procedure 23 are satisfied. Shareholders can bring a derivative action against corporate officers,<sup>7</sup> consumers can bring a fraud case,<sup>8</sup> and employees can pursue most claims of discrimination and seek to remedy almost all other legal grievances against their employers through class actions.<sup>9</sup> But employees who are not paid the minimum wage or mandated overtime compensation cannot. Professors Wright and Miller in their treatise on Federal Practice and Procedure observe that “[c]ollective actions under the [FLSA] are a unique species of group litigation.”<sup>10</sup>

Numerous investigations have documented shocking rates of noncompliance with the minimum standards established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries.<sup>11</sup> Several studies trace noncompliance to the inadequate and shrinking resources devoted to public enforcement.<sup>12</sup> But few have pointed to the critical difference in the procedural rules governing workers’ private enforcement of their rights under the FLSA and those applicable to virtually all other litigants in

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5. *Id.* § 216(b).

6. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945).

7. *See* FED. R. CIV. P. 23.1 (governing derivative actions).

8. *See, e.g., Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 531 (D. Minn. 2007).

9. The only exceptions are claims under the Equal Pay Act, which was incorporated into the FLSA, 29 U.S.C. § 206(d), and under the Age Discrimination in Employment Act (ADEA), which adopts the FLSA’s remedial provisions. *See* 29 U.S.C. § 626(b).

10. 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (2005).

11. *See, e.g., NAT’L EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF WAGE AND HOUR STANDARDS FOR LOW-WAGE WORKERS IN AN ERA OF GOVERNMENT INACTION AND EMPLOYER UNACCOUNTABILITY* 4–7 (2006), available at <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor2.pdf>.

12. One study estimates that the annual probability of a Department of Labor inspection of one of the seven million workplaces covered by the FLSA is well below 0.1%. *See* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59, 62 (2005).

federal and state court. When the FLSA was amended in 1947 to require individual, written consent in order to benefit from a private enforcement action, Senator Forrest Donnell, the Republican floor leader, proclaimed, "Certainly there is no injustice in that, for if a man wants to join in the suit, why should he not give his consent, in writing."<sup>13</sup> It is the thesis of this Article, however, that such a requirement, imposed on workers whose employer has failed to respect the nation's minimum labor standards, is not only unjust, but unwise public policy and, as implemented by the courts, incoherent.

Part I of this Article traces the origins of the unintended divergence of the rules governing FLSA actions and almost all other actions in the federal courts caused by the 1947 amendments of the FLSA and the subsequent revision of Rule 23 of the Federal Rules of Civil Procedure. Parts II and III outline the unique jurisprudence of representative actions under the FLSA. Finally, Part IV details the various ways in which the distinctive rules governing FLSA action cripple enforcement of the Act. This Article concludes that Congress should remove the opt-in requirement imposed by section 16(b) in order to harmonize FLSA enforcement and enforcement of virtually all other laws.

#### I. THE HISTORY OF FLSA SECTION 16(B)

Section 16(b) of the FLSA creates a private right of action in federal or state court to enforce the Act's provisions.<sup>14</sup> It provides that the action "may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."<sup>15</sup> It also provides, however, that "[n]o 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."<sup>16</sup> As noted above, it is the last provision that the courts have construed to preclude certification of a plaintiff class under Rule 23 for the purpose of pursuing an FLSA claim.<sup>17</sup>

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13. 93 CONG. REC. 2182 (1947) (statement of Senator Donnell); *see also* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 151, 173 (1991) (discussing Senator Donnell's comments during debate over the Portal-to-Portal Act of 1947).

14. 29 U.S.C. § 216(b).

15. *Id.*

16. *Id.*

17. *See, e.g.,* LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 289 (5th Cir. 1975).

The requirement of individual, written consent to join an FLSA action was inserted into the FLSA by the Portal-to-Portal Act of 1947.<sup>18</sup> Prior to those amendments, the FLSA contained what appears on its face to be an extraordinary enforcement provision, stating that a private cause of action could be maintained “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.”<sup>19</sup> A union, for instance, could be designated to bring an FLSA action on behalf of its members, or even on behalf of the employees of an unorganized company.<sup>20</sup> It was recognized at the time that “[i]nsofar as these provisions make possible the adjudication of numerous employee claims in a single proceeding, they are highly important devices.”<sup>21</sup>

The original FLSA’s private enforcement mechanisms appear even more extraordinary given the limited provision for class actions in the federal courts at the time. Federal Rule of Civil Procedure 23, as it existed in 1938, provided only for what was dubbed a “spurious class action” when numerous employees asserted parallel wage claims and in other cases in which numerous plaintiffs asserted claims raising “a common question of law or fact affecting the several rights” and seeking “common relief.”<sup>22</sup> In a spurious class action, only individuals who affirmatively joined the action could benefit from its outcome. Professor Moore characterized this form of “class action” as nothing more than a “permissive joinder device.”<sup>23</sup>

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18. Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251). The major thrust of the Portal-to-Portal Act was to limit FLSA actions brought by employees, such as miners, seeking compensation for time spent traveling to and from the primary work site. *See Linder, supra* note 13, at 73–75. The Act became law on May 14, 1947, just over a month before the same Congress overrode President Truman’s veto of the Taft-Hartley Act. The Congress of Industrial Organizations (CIO) declared at the time, “In the field of wage legislation, the Portal-to-Portal Act is as severe a blow to workers’ rights as the Taft Hartley Act is in the field of industrial relations.” *Id.* at 176 (quoting FINAL PROCEEDINGS OF THE NINTH CONSTITUTIONAL CONVENTION OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS 92 (1947)).

19. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 216(b)).

20. *See Linder, supra* note 13, at 98 & nn.236–37.

21. James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 U. ILL. L. REV. 119, 122 (1942).

22. FED. R. CIV. P. 23(a)(3) (1938), *reprinted in* 39 F.R.D. 69, 94–95 (1966).

23. 2 JAMES W. MOORE & JOSEPH FRIEDMAN, FEDERAL PRACTICE 2241

Despite the expansive language of the original section 16(b), however, almost all courts construed it to be consistent with the restrictive terms of the then-existing Rule 23.<sup>24</sup> Professor Marc Linder concludes, “even before the 1947 amendments, the courts limited participation in FLSA actions to named plaintiffs, intervenors, and consenters who joined the action before the trial on the merits.”<sup>25</sup> Thus, Linder heads his discussion of the 1947 revision of section 16(b), “The Elimination of the Class Action That Never Was.”<sup>26</sup>

The revision of section 16(b) wrought by the Portal-to-Portal Act eliminated the provision permitting employees to designate an agent or representative to sue for them and also made clear that, even in an action brought by an aggrieved employee on “behalf of . . . other employees similarly situated,” each employee must affirmatively opt into the case in order to benefit from its outcome.<sup>27</sup> The Supreme Court has explained: “In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added.”<sup>28</sup>

The amended section 16(b) remained in place when Rule 23 was revised in 1966 to provide for true class actions in relation to almost all other kinds of claims filed in federal court. The drafters of the 1966 amendment liberalizing Rule 23 specifically stated that “[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.”<sup>29</sup> Subse-

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(1938).

24. See Linder, *supra* note 13, at 167–72 & nn.665–85.

25. *Id.* at 169; see also G.W. Foster, Jr., *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 324 (“Almost complete agreement was reached among the courts that proceedings under Section 16(b) should bind only those employees who in some fashion manifested their consent to become involved in the action.”).

26. Linder, *supra* note 13, at 167.

27. 29 U.S.C. § 216(b) (2000).

28. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989). In the eyes of the Ninety-third Congress, it was primarily unions that were spawning this “excessive litigation.” See Linder, *supra* note 13, at 172. It is unclear, however, why Congress imposed the requirement of written consent when the courts had already consistently construed the existing provision to require it in actions brought by designated agents, like unions, and representative employees.

29. FED. R. CIV. P. 23, advisory committee’s note, *reprinted in* 39 F.R.D. 69, 104 (1966).

quently, the courts have held that “Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA § 16(b).”<sup>30</sup>

The Portal-to-Portal Act’s amendment of section 16(b) thus had little impact when it was adopted in 1947,<sup>31</sup> but its continued existence after 1966, when the law of group litigation was dramatically altered by the revision of Rule 23, has led to a significant divergence between the procedural rights of workers under the FLSA and those of virtually all other litigants. After 1966 and at present, plaintiffs can file a class action suit in federal or state court under appropriate circumstances to pursue almost all federal and state claims over which the court has jurisdiction and, if the court certifies the class, all similarly situated individuals who do not opt out will benefit from a favorable outcome. Under section 16(b), in contrast, employees seeking to enforce their rights under the FLSA must affirmatively opt into a pending action. In the words of the Fifth Circuit, this is a “fundamental, irreconcilable difference.”<sup>32</sup>

## II. THE SUPREME COURT’S DECISION IN *HOFFMANN-LA ROCHE*

Section 16(b) does not provide for any form of certification procedure parallel to Rule 23(c). It was not until *Hoffmann-La Roche Inc. v. Sperling*,<sup>33</sup> when the Supreme Court resolved a split among the circuits concerning the role of the courts in supervising provision of notice under section 16(b), that the federal courts uniformly began to develop a formal process for determining whether FLSA cases could proceed as representative actions and for approving notice to be sent to potential opt-in plaintiffs. The ruling came in response to plaintiffs’ motion to compel production of the names and addresses of similarly situated employees and for the court to send such employees notice of the action.<sup>34</sup> The Court did not mandate or even approve a certification-type procedure, but held only “that district courts have discretion in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs”

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30. *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 289 (5th Cir. 1975).

31. Section 16(b) did, however, preclude enforcement of the FLSA by labor unions with individual employees’ written consent. 29 U.S.C. § 216(b).

32. *LaChapelle*, 513 F.2d at 288.

33. 493 U.S. 165 (1989). The case actually arose under the ADEA, which incorporates section 16 of the FLSA. *See* 29 U.S.C. § 626(b).

34. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 168 (1989).

and that “[t]he District Court was correct to permit discovery of the names and addresses of the” similarly situated employees for that purpose.<sup>35</sup> The Court’s reasoning echoed the rationale for class actions: “A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same [operative facts].”<sup>36</sup> From this foundation, the Court concluded that “[t]hese benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.”<sup>37</sup> Judicial oversight was therefore appropriate, the Court held, both to prevent “misleading communications” via “court-authorized notice”<sup>38</sup> and “to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the [federal Rules].”<sup>39</sup>

### III. THE DEVELOPING JURISPRUDENCE OF SECTION 16(B)

Since the Supreme Court’s decision in *Hoffmann-La Roche*, the lower federal courts have developed an increasingly elaborate process for what they often term “certifying” and “decertifying” section 16(b) actions.<sup>40</sup> As we explain in Part IV, however, clearing the hurdles courts have placed in the way of workers seeking to collectively enforce their rights under section 16(b) does not lead to the same benefits as certification of a class under Rule 23.

Even before *Hoffmann-La Roche*, federal courts recognized that section 16(b) “authorizes a representative action.”<sup>41</sup> *Hoffmann-La Roche* further authorized trial courts to facilitate par-

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35. *Id.* at 169–70.

36. *Id.* at 170.

37. *Id.*

38. *Id.* at 171.

39. *Id.* at 170. In other words, a trial court “has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.” *Id.* at 170–71.

40. See, e.g., *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir. 2001) (describing the review of defendant’s “motion to decertify”); *Goldman v. Radioshack Corp.*, No. Civ. A. 2:03-CV-0032, 2003 WL 21250571, at \*9 (E.D. Pa. Apr. 16, 2003) (holding that the court would “conditionally certify the FLSA representative action”).

41. *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982).

ticipation in such a representative action by supervising provision of notice by the original named employee-plaintiffs and by ensuring a fair and expedited process for similarly situated employees to join an FLSA action.<sup>42</sup> Because section 16(b) does not set forth a certification procedure similar to Rule 23, establish standards for when an action should proceed as a representative action (beyond the terse phrase “on behalf of . . . other employees similarly situated”), or specify when notice should be sent, the courts have developed a set of procedures and standards on a case-by-case basis.<sup>43</sup>

A two-stage process for determining whether FLSA actions will proceed as representative actions is now recognized as “the prevailing federal standard.”<sup>44</sup> Under this approach, at the first stage, plaintiffs move to provide court-approved notice to similarly situated employees informing them of their right to opt into the action.<sup>45</sup> The motion to give notice ordinarily is made early in the litigation before the completion of discovery.<sup>46</sup> The second stage takes place at or near the close of discovery when the defendant has an opportunity to move to “decertify” the representative action.<sup>47</sup> As the Eleventh Circuit has observed, “The second determination is typically precipitated by a motion for decertification by the defendant usually filed after discovery is largely complete.”<sup>48</sup>

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42. *Hoffmann-La Roche*, 493 U.S. at 171–72.

43. See Scott E. Cole & Matthew R. Bainer, *To Certify or Not to Certify: A Circuit-by-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Federal Labor Standards Act*, 13 B.U. PUB. INT. L.J. 167, 170–72 (2004).

44. *Butler v. San Antonio*, No. SA-03-CA-170-RF, 2003 U.S. Dist. LEXIS 15805, at \*5 (W.D. Tex. Aug. 21, 2003). This approach is usually attributed to the District of New Jersey’s 1987 decision in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). The Eleventh Circuit, while calling such an approach “an effective tool for district courts to use in managing these often complex cases” and “suggest[ing] that district courts in this circuit adopt it in future cases,” held that nothing in circuit precedent “requires district courts to utilize this approach.” *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001). The Tenth Circuit suggested that the two-stage “*ad hoc* approach” is “[a]rguably . . . the best,” but did not hold that it was mandatory, stating simply that a district court did not abuse its discretion in adopting the approach. *Thiessen*, 267 F.3d at 1105.

45. *Thiessen*, 267 F.3d at 1103.

46. See, e.g., *Jackson v. N.Y. Tel. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995).

47. *Hipp*, 252 F.3d at 1219 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995)).

48. *Id.* The Tenth Circuit similarly observes, “At the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination.” *Thiessen*, 267 F.3d at 1102–03.



The effect of “decertification” is unclear. Several courts have suggested that, upon decertification, the court should dismiss the claims of the opt-in plaintiffs without prejudice.<sup>49</sup> Yet these individuals will have affirmatively opted in, becoming “party plaintiffs.” In some jurisdictions, plaintiffs’ counsel is required to amend the complaint to add all these individuals as plaintiffs and state claims on their behalf.<sup>50</sup> In some cases, some or all of the opt-ins will have responded to written discovery.<sup>51</sup> It is not clear why decertification should result in dismissal of such opt-ins’ claims as opposed to severance.

The federal courts have considered three possible sources of substantive standards to apply under section 16(b). Under the first approach, “a court determines, on an *ad hoc* case-by-case basis, whether plaintiffs are ‘similarly situated.’”<sup>52</sup> This approach is linked to the now dominant two-stage process described above.<sup>53</sup> Under the second approach, courts use the standards established in Rule 23 to determine whether employees are “similarly situated.”<sup>54</sup> Under the third approach, courts incorporate the pre-1966 standards used under Rule 23 for spurious class actions.<sup>55</sup> The two-step process applying the “ad hoc” standard is now virtually uniformly accepted.

#### IV. THE IMPACT OF SECTION 16(B) ON ENFORCEMENT OF THE FLSA

In several critical respects, section 16(b) makes it less likely that employees will enforce their rights under the FLSA, reduces the damages employees are likely to recover from employers, and makes litigation of FLSA claims on behalf of employees more difficult.

##### A. FEWER PLAINTIFFS

The most obvious result of section 16(b)’s preclusion of an ordinary class action is a lower participation rate in most FLSA lawsuits. As the Third Circuit recognized, “Under most circumstances, the opt-out class will be greater in number, per-

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49. *See, e.g., id.* at 1218.

50. *See infra* note 107 and accompanying text.

51. *See infra* notes 107–08 and accompanying text.

52. *Thiessen*, 267 F.3d at 1102.

53. *See id.*

54. *Id. Shushan v. University of Colorado*, 132 F.R.D. 263 (D. Colo. 1990), is often cited for using this approach.

55. *Thiessen*, 267 F.3d at 1103.

haps even exponentially greater” than the section 16(b) opt-in class.<sup>56</sup>

One reason for lack of participation is that many similarly situated employees never receive the typically mailed notice. Because of high turnover in low-wage jobs and frequent changes of address among low-wage workers, the mailing list provided by employers for purpose of sending the notice will ordinarily contain many addresses that are no longer accurate. In the janitorial industry, for example, where wage and hour violations are notorious, the turnover rate is approximately 250% annually, and the average tenure of a janitor is less than five months.<sup>57</sup> For this reason, even if the employer maintains accurate addresses for current employees,<sup>58</sup> the last-known address for many potential plaintiffs (who may have left employment as long as three years prior to the mailing of notice)<sup>59</sup> will not have been updated for a long period before the addresses are provided to the plaintiffs. This is important because low-wage, unskilled workers like janitors are also highly mobile. The Census Bureau confirms that the rate of relocation is highest among people with the lowest income (twenty-eight percent of households with income below the poverty level move during a single year).<sup>60</sup> Hispanics, who occupy many low-wage jobs, have the highest rate of movement of any ethnic group.<sup>61</sup>

The result of high turnover and mobility is obvious: returned notices. In one recent case we were involved in, over half of the almost three thousand notices that were sent to janitors who worked in Illinois and Texas were returned, marked

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56. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003). In *Thiebes v. Wal-Mart Stores, Inc.*, 145 Lab. Cas. (CCH) ¶ 34,442, at 53,887 (D. Or. Jan. 9, 2002), for example, only 425 of the 15,507 similarly situated employees (2.7%) opted in. *Id.* at 53,859.

57. See Repps Hudson, 7 *Cleaning Firms Accept Union's Model Contract*, ST. LOUIS POST-DISPATCH, Feb. 26, 2002, at C1; *High Cost of Turnover*, CLEANING MAINTENANCE & MGMT. MAG. ONLINE, Sept. 2003, <http://www.cmmonline.com/article.asp?IndexID=6633938> (follow “High Cost of Turnover” sidebar hyperlink) (“[T]urnover of 200–300 percent is typical of the industry.”).

58. An employer is required to do so under the FLSA. See 29 C.F.R. § 516.2(a)(2) (2007).

59. A three-year statute of limitations applies to willful violations of the FLSA. See 29 U.S.C. § 255(a) (2000).

60. JASON SCHACHTER, U.S. CENSUS BUREAU, PUBL’N NO. P20-538, GEOGRAPHICAL MOBILITY: POPULATION CHARACTERISTICS MARCH 1999 TO MARCH 2000, at 4–5 (2001), available at <http://www.census.gov/prod/2001pubs/p20-538.pdf>.

61. See *id.* at 4 tbl.B.

undeliverable.<sup>62</sup> In a few cases, such as ours, courts have approved additional forms of notice, such as short-form notices broadcast on the radio, published in newspapers, or posted in gathering spots in neighborhoods where employees are likely to live.<sup>63</sup> But these forms of notice are expensive, particularly in urban markets, and produce a very low yield of opt-ins given the difficulty of precise targeting.<sup>64</sup>

Second, even if the court-approved notice arrives in the correct mail box, its message is unlikely to be received in the manner most judges and lawyers expect. Many people who find such a notice in their mail will throw it away.<sup>65</sup> It is an unsolicited piece of mail involving a legal proceeding. If recipients read the notice, they are likely to find the language confusing, intimidating, or threatening.<sup>66</sup> The notice goes to working-class people (executives, administrators, and professionals are not covered by the FLSA).<sup>67</sup> They are unlikely to be familiar with legal terms; they may not read well; many may be immigrants who have limited facility in English.<sup>68</sup> For any person, words like “judgment,” “attorneys’ fees,” “damages,” and “liable” have troubling connotations. And no matter what the notice says, people who receive it are likely to think that responding could

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62. Memorandum in Support of Plaintiff’s Motion to Extend Opt-in Period and Supplement Mail Notice at 1, Docket No. 167, *Vega v. Contract Cleaning Maint., Inc.*, No. 03-C-9130, 2006 WL 1554383 (N.D. Ill. 2006). At the time we filed this motion, we reported to the court that 1108 out of 2664 notices had been returned. *See id.* However, a significant number of notices were returned as undeliverable after the motion was filed. *See also* *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003) (noting that nearly 800 of 3400 notices “were ‘undeliverable’ and ‘returned to sender’”); *Thiebes v. Wal-Mart Stores, Inc.*, 145 Lab. Cas. (CCH) ¶ 34,442, at 53,858 (D. Or. Jan. 9, 2002) (noting that approximately 3000 of 15,507 notices were returned).

63. *See, e.g.*, *Lima v. Int’l Catastrophe Solutions, Inc.*, 493 F. Supp. 2d 793, 801 (E.D. La. 2007) (allowing the use of consulates, Spanish and Portuguese newspapers, radio, and the Internet to provide notice to opt-in in an FLSA action); *Marroquin v. Canales*, 236 F.R.D. 257, 261–62 & n.19 (D. Md. 2006); Memorandum in Support of Plaintiff’s Motion to Extend Opt-in Period and Supplement Mail Notice, Docket No. 167, and Minute Entry granting Motion, Docket No. 173, *Vega*, No. 03-C-9130 (N.D. Ill.).

64. *See* Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2141 (2000).

65. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts*, 96 YALE L.J. 1, 17 (1986).

66. *See id.* at 22.

67. *See* 29 U.S.C. § 213(a)(1) (2000).

68. *See, e.g.*, SCHACHTER, *supra* note 60, at 4 tbl.B.

lead to trouble.<sup>69</sup> There could be hidden terms that are not described in the notice; it could be a scam; money will have to be paid at some point, recipients are likely to think—no one gets anything for free. Moreover, sensible people do not sign legal documents they have not requested and send them to a court or lawyers they do not know and with whom they have never spoken.

Finally, even potential plaintiffs who receive, read, and understand the notice are unlikely to mail back the opt-in form.<sup>70</sup> Such people will recognize what they are being asked to do: they are being solicited to join a lawsuit *against their employer*.<sup>71</sup> One does not have to be a legal scholar to know that suing the boss is not a safe career move. Joining the case, an employee might reasonably fear, will result in retaliation. It could mean being assigned to the dirtiest job on the worst shift, or it could mean being fired.<sup>72</sup> Even if the notice says, as it should, that retaliation is prohibited by the FLSA,<sup>73</sup> businesses do not always follow the law. If they did, there would not have been a need for the lawsuit in the first place.

This factor dovetails with the first (the difficulty of tracking down potential opt-in plaintiffs) because the employer is most likely to have accurate addresses for its current employees and current employees are the least likely group to opt into a lawsuit against their employer. The Supreme Court has recognized that “it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”<sup>74</sup> And the California high court further explained that “[t]he difficulty of suing a current employer is likely greater for employees further down on the corporate hierarchy,” like those protected by the FLSA.<sup>75</sup> The notice and opt-in process is, in fact, no different than employer polling of employees concerning their union sentiments. The federal courts and National Labor Relations

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69. See Miller & Crump, *supra* note 65, at 17.

70. See Noah A. Finkel, *State Wage-and-Hour Law Class Actions: The Real Wave of “FLSA” Litigation?*, 7 EMP. RTS. & EMP. POL’Y J. 159, 159 (2003).

71. See *id.*

72. Courts have repeatedly recognized “that retaining one’s employment while bringing formal legal action against one’s employer is not ‘a viable option for many employees.’” *Gentry v. Superior Court*, 165 P.3d 556, 565 (Cal. 2007) (quoting *Richards v. CH2M Hill, Inc.*, 29 P.3d 175 (Cal. 2007)).

73. See 29 U.S.C. § 215(a)(3) (2000).

74. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

75. *Gentry*, 165 P.3d at 565.

Board have uniformly held such polling to be unlawful “because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained.”<sup>76</sup> In the case of section 16(b), the information the employer obtains is not which employees support the union but rather which employees have affirmatively chosen to sue the employer. While one district court observed that “plaintiff-employees who proceed collectively [under section 16(b)] can present a united front against an employer, and head off individualized retaliation,”<sup>77</sup> in fact, only a Rule 23 class-action would truly permit employees to present such a “united front.” Indeed, many federal courts have recognized fear of retaliation as a factor supporting a finding that joinder is impracticable and thus that class certification is warranted in employment litigation.<sup>78</sup> Yet under section 16(b), each employee must sign on the dotted line with the specter of workplace reprisal in the back of his or her mind.

The Supreme Court has described the result of an opt-in requirement in terms that are especially apt as applied to the FLSA’s section 16(b): “freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.”<sup>79</sup> Thus, while the same Court declared in ringing tones that “FLSA rights cannot be abridged by contract or otherwise waived,”<sup>80</sup> in practice, waiver is an endemic aspect of the section 16(b) process.

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76. *NLRB v. W. Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). The Supreme Court has recognized that anonymity is an important element of the right to freely associate. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

77. *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999).

78. For example, the Fifth Circuit cited the fact that employees were “unwilling to sue individually or join a suit for fear of retaliation.” *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999); *see also Horn v. Assoc. Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977); *Ark. Educ. Ass’n v. Bd. of Educ. of Portland, Ark.*, 446 F.2d 763, 765 (8th Cir. 1971); *Scott v. Aetna Servs. Inc.*, 210 F.R.D. 261, 267 (D. Conn. 2002); *Gentry*, 165 P.3d at 565.

79. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 n.4 (1985) (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967)) (internal quotation marks omitted).

80. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

## B. LOWER DAMAGE AWARDS

Not only are fewer employees likely to participate in an action brought under section 16(b) than in an ordinary class action, they are likely to receive lower damages awards for two reasons. First, the same tolling rules do not apply under section 16(b) as under Rule 23. In a class action brought under Rule 23, the filing of the complaint tolls the running of the statute of limitations for all members of the proposed class.<sup>81</sup> The same rule does not apply to actions brought under section 16(b), however. This is because at the same time that the requirement of individual written consent was added to the FLSA by the Portal-to-Portal Act, Congress provided that the statute of limitations for claims under the FLSA would not be stayed for any employee until he or she filed such written consent with the court.<sup>82</sup> Because of the time needed to file a motion to give notice, which may be preceded by motions to dismiss and some minimal discovery, and to brief the motion, obtain a ruling, mail notice, and file consent forms, the absence of a stay of the limitations period from the time a representative action is filed until consent forms are filed often significantly reduces the back pay ultimately awarded to opt-in plaintiffs. Some employees may have their right to recovery entirely eliminated because they do not get the notice and file a consent form in time to meet the limitations deadline.

A defendant that has violated the FLSA over a course of years can thus reduce its damage exposure if it can delay the opt-in process—every day that passes before consents are filed is a day less of potential liability. Accordingly, defendants commonly take steps to delay the notice process. In our experience, defendants will not concede that they have to produce names and addresses of similarly situated employees so that notice can be mailed. Instead, they will force plaintiffs to take time negotiating for the discovery.<sup>83</sup> Those negotiations will go nowhere and plaintiffs will have to file and brief a motion to compel and wait for a court decision before they can get what they need to mail a notice. When ordered to produce names and addresses, defendants will take their time before actually pro-

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81. See *Crown, Cork & Seal, Inc. v. Parker*, 462 U.S. 345, 353–54 (1983); *Am. Pipe Constr. Co. v. Utah*, 414 U.S. 538, 561 (1974).

82. See 29 U.S.C. § 256 (2000).

83. See Laura L. Ho, *Collective Action Basics*, 10 EMP. RTS. & EMP. POL'Y J. 427, 432 (2006).

viding them.<sup>84</sup> Defendants will haggle over minor provisions of the proposed notice, forcing a round of briefing, and additional delay, before the court approves a notice. During this time, the limitations period will continue to run.

Despite the fact that the statute of limitations on potential opt-in plaintiffs' claims continues to run until they receive notice and actually opt in, the denial of a motion to proceed as a representative action and thus give notice is not immediately appealable. The Ninth Circuit recently so held in *McElmurry v. U.S. Bank National Ass'n*.<sup>85</sup> The court observed that its holding was consistent with that of other circuits that had addressed the application of the collateral order rule to rulings under section 16(b)<sup>86</sup> as well as with the Supreme Court's decision in *Coopers & Lybrand v. Livesay*,<sup>87</sup> holding that denial of class certification is not immediately appealable. The *Livesay* decision, however, has been largely nullified by the amendment of Rule 23.<sup>88</sup> In *McElmurry*, the plaintiffs argued "that the statute of limitations will continue to run, and that some employees may lose their opportunity to participate in a collective action if they wait until after an appeal from final judgment."<sup>89</sup> "[W]e understand [plaintiffs'] concern," the court stated, but nevertheless held the refusal to approve notice unappealable until after a final judgment.<sup>90</sup>

The second reason why damages in a representative action under section 16(b) are typically lower than in a Rule 23 class action is that in the latter the court can award damages based on the injury inflicted on the entire class whether or not all of its members have appeared and presented claims. Of course, class counsel may not be able to locate all class members post-judgment, just as plaintiffs' counsel often cannot locate all po-

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84. However, some courts have taken action to deprive defendants of the benefit of their delay using the doctrine of equitable tolling. For example, courts may toll the statute of limitations during the period when a defendant should have produced the list but did not. *See, e.g., Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 543 (N.D. Cal. 2007).

85. 495 F.3d 1136, 1139–40 (9th Cir. 2007).

86. *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 549 (6th Cir. 2006) (holding that an order permitting notice is not appealable); *Baldrige v. SBC Commc'ns, Inc.*, 404 F.3d 930, 931 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988) (holding that a decertification order was not appealable); *Lusardi v. Xerox*, 747 F.2d 174, 177–78 (3d Cir. 1984) (same).

87. 437 U.S. 463 (1978).

88. *See* FED. R. CIV. P. 23(f).

89. *McElmurry*, 495 F.3d at 1141.

90. *Id.*

tential opt-in plaintiffs at the notice stage of a section 16(b) action. But in a class action, the court can still assess full, class-wide damages and permit payment of amounts attributable to unlocatable class members to an appropriate, alternative recipient. As the Ninth Circuit recognized, “Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds.”<sup>91</sup>

The cy pres doctrine recognizes that it is inconsistent with public policy to permit a defendant to retain ill-gotten gain when all the victims of the defendant’s wrong cannot be located because to do so would undermine the deterrence function of damage awards. The Seventh Circuit has held that “[t]hose cases where a corporate defendant engages in unlawful conduct and illegally profits [are] most appropriate for” this form of equitable redistribution of class-wide damages.<sup>92</sup> Absent section 16(b), FLSA cases would appear to fall squarely within that category of cases. As Judge Posner observed, “the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment[]).”<sup>93</sup> Under the FLSA, however, this is often exactly what happens because of the operation of section 16(b).

These two factors combine with the facts that the FLSA does not provide for any form of compensatory damages other than back pay<sup>94</sup> or for punitive damages; that the FLSA has a relatively short statute of limitations (two or, for willful violation, three years); and that shaving payroll costs by not paying employees the minimum wage or overtime compensation may impose significant harm on individual workers but often does not add up to a large sum of money for the employer. The result is that damage awards in FLSA actions, particularly those brought on behalf of low-wage workers, do not represent a significant deterrent to violating the law. Employers concerned only with profits, particularly in highly competitive, labor-intensive sectors of the economy, may rationally conclude that it pays to violate the FLSA.

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91. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

92. *Simer v. Rios*, 661 F.2d 655, 677 (7th Cir. 1981).

93. *Mirfasihi v. Fleet Mortgage Co.*, 356 F.3d 781, 784 (7th Cir. 2004).

94. *See* 29 U.S.C. § 216(b) (2000). Plaintiffs are also typically awarded an additional amount equal to one hundred percent of their back pay as liquidated damages to compensate them for the delay in payment. *Id.*



## C. GREATER RISKS AND GREATER BURDENS FOR COUNSEL

Low opt-in rates combine with low damage awards to create higher risks for plaintiffs' counsel in the recovery of attorney's fees, despite the existence of a fee-shifting provision in the FLSA.<sup>95</sup> At the same time, the opt-in requirement tempts many defendants to seek to impose enormous burdens on plaintiffs' counsel during discovery.

Statutory fee shifting provisions, like that in the FLSA, have been construed to provide that a prevailing plaintiff may recover reasonably incurred fees, even if the fees are more than the amount of damages recovered.<sup>96</sup> But it is hard to find a lawyer who will take an individual's case where the damages are five hundred dollars, even when a fee-shifting statute applies. The simplest statutory case, if carried through trial, is likely to require at least ten thousand dollars worth of attorney time and in most cases the fees and costs incurred will be much higher. The prospect of asking a court to award tens of thousands of dollars in fees for recovery of five hundred dollars in damages is not attractive. The risks are too high that a trial court will find that some of the time was not reasonably spent, and cut fees accordingly, despite the established principle explained above.

In addition, the lawyer who takes a small case in anticipation of collecting fees from the defendant pursuant to a fee shifting provision (because the plaintiff cannot pay the lawyer on an hourly basis), will be put in an untenable position when it is time to talk about settlement. Imagine, for example, a case with \$500 in damages at stake and fees of \$8000 already incurred. Suppose a defendant offers to pay four thousand dollars to settle the case. That is more than enough money to provide the client with complete recovery of all his or her damages. Is the lawyer in that situation going to demand that the case be tried (assuming the lawyer has a retainer agreement that per-

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95. *See id.*

96. *City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) (“[Defendants] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response.”). For a thorough discussion of the issues, see *United Automobile Workers Local 259 Social Security Department v. Metro Auto Center*, 501 F.3d 283, 292–96 (3d Cir. 2007), and cases cited therein. The same rule ostensibly applies under the FLSA. *See, e.g.*, *Cho v. Koam Med. Servs. P.C.*, No. 1:05-CV-05265 (ENV) (RML), 2007 U.S. Dist. LEXIS 88697, at \*19 (E.D.N.Y. Nov. 30, 2007) (“[W]here, as here, the plaintiffs were successful on all their claims, the full lodestar amount will not be reduced ‘simply because a plaintiff recovered a low damage award.’”).

mits the lawyer to make that decision), contrary to the interests of the client? With a small claim for damages, even under a fee-shifting statute, a lawyer in settlement discussions is likely to have to choose between taking the case to trial, contrary to the client's best interests, or settling the case and being paid for only a fraction of the time spent.<sup>97</sup> From the lawyer's point of view, it is better to avoid small-damages cases and not to be placed in that position.

Not only do lawyers handling FLSA actions face greater risks as a result of smaller damage awards largely as a result of the opt-in requirement, they must also often fend off efforts by employers to impose extraordinary burdens in discovery based on the same peculiar requirement. This is because employees who opt into an FLSA representative action are in an anomalous position under the discovery rules. They are not one of the original named plaintiffs who brought the lawsuit. But they are also not unnamed class members. They are something in between—in the words of section 16(b) they are “party plaintiff[s].”<sup>98</sup> This hybrid status often leads to major discovery disputes in FLSA litigation.

The amount of discovery that can be required from absent class members under Rule 23 is clearly limited.<sup>99</sup> A defendant is entitled to the full range of discovery only from the named plaintiffs.<sup>100</sup> It is entitled to full discovery concerning the nature of the class' claims and damages.<sup>101</sup> And a defendant is entitled to discovery about class members who are likely to be called as witnesses at trial.<sup>102</sup> But each member of the class is not a “party” with the corresponding obligation to answer inter-

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97. If the settlement offer is rejected and the results at trial are not good, there is high risk that fees will be slashed and the attorney will not be paid for a large portion of his or her time. *See, e.g.,* Sheffer v. Experian Information Solutions, Inc., 290 F. Supp. 2d 538 (E.D. Pa. 2003); Keeton v. Wal-Mart Stores, Inc., 21 F. Supp. 2d 653, 660–61 (E.D. Tex. 1998).

98. *Id.*

99. Cornn v. United Parcel Serv., Inc., No. C03-2001 THE, 2006 WL 2642540, at \*2 (N.D. Cal. 2006); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D. Conn. 1995); *see also* Phillips Petroleum, 472 U.S. at 810; Collins v. Int'l Dairy Queen, 190 F.R.D. 629, 630–31 (M.D. Ga. 1999); Long v. Trans World Airlines, Inc., 761 F. Supp. 1320, 1326 (N.D. Ill. 1991).

100. *See, e.g.,* *In re Scimed Life Sec. Litig.*, [1992–1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,220 (Nov. 20, 1992); *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 260, 264 (N.D. Ill. 1979).

101. *See* Ho, *supra* note 83, at 432–33.

102. *See, e.g.,* Bogosian v. Gulf Oil Corp., 1984-1 Trade Cas. (CCH) ¶ 65,776 (Dec. 16, 1983); *see also* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977).

rogatories, produce documents, respond to requests for admissions, and appear at a deposition pursuant to a mere notice under Rules 30, 33, 34, and 36. As the Supreme Court has plained, “an absent class action plaintiff is not required to do anything.”<sup>103</sup> Nor can a defendant ordinarily take the depositions of all class members, even if it serves them with a subpoena as third parties.<sup>104</sup> These rules save the class and its lawyer from being overwhelmed with the burden of answering discovery requests, person-by-person, for hundreds of class members. As one district court observed, “Individualized discovery is thought to thwart the efficiencies of a class action and place undue burdens on the absent class members.”<sup>105</sup>

In contrast, defendants often take the position that because the FLSA designates each person who opts-in as a party plaintiff, that means each opt-in is a full party under the discovery rules. One plaintiffs’ lawyer observed that “[s]ome defendants will insist that it is their right to take individualized discovery of all opt-in plaintiffs.”<sup>106</sup> The defendants’ position is bolstered by the law in some courts requiring plaintiffs’ counsel to actually amend the complaint to state a claim on behalf of each such opt-in before the statute of limitations on their FLSA claim is stayed.<sup>107</sup> A few courts have accepted this position,

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103. *Phillips Petroleum*, 472 U.S. at 810 & n.2.

104. See, e.g., *On the House Syndication, Inc. v. Fed. Express Corp.*, 203 F.R.D. 452, 456–57 (S.D. Cal. 2001); *Collins*, 190 F.R.D. at 631; *Kline v. First W. Gov’t, No. Civ. A. 83-1076*, 1996 WL 122717, at \*3 (E.D. Pa. 1996); *In re Carbon Dioxide Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993); *In re Worlds of Wonder Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,018 (July 9, 1992); *In re Lucent Techs. Sec. Litig.*, No. Civ. A. 00-621JAP, 2002 WL 32818345, at \*1 (D.N.J. May 9, 2002). But see, e.g., *Easton & Co. v. Mutual Benefit Life Ins. Co.*, No. 91-4012 (HLS), 92-2095 (HLS), 1994 WL 248172, at \*3–6 (D.N.J. 1994); *Transamerican Ref. Corp. v. Dravo Corp.*, 139 F.R.D. 619, 621 (S.D. Tex. 1991).

105. *Luna v. Del Monte Fresh Produce (Se.), Inc.*, No. 1:06-CV-2000-JEC, 2007 WL 1500269, at \*6 (N.D. Ga. May 18, 2007) (quoting *Collins*, 190 F.R.D. at 631).

106. *Ho*, *supra* note 83, at 432.

107. For example, this is the law in the Northern District of Illinois. “[T]he act of filing a written consent alone does not automatically join an individual to the lawsuit. Rather, Section 216(b) operates in conjunction with Rule 8 of the Federal Rules of Civil Procedure and requires the employee to name the individual plaintiff and allege his or her cause of action in the complaint . . .” *Harkins v. Riverboat Servs.*, No. 99 C 123, 2002 U.S. Dist. LEXIS 19637, at \*16–17 (N.D. Ill. May 16, 2002). “The filing of a written consent in and of itself is insufficient to join this lawsuit. . . . ‘It is ‘necessary’ under the Federal Rules of Civil Procedure to plead facts in the complaint regarding the FLSA claims asserted by the prospective parties who filed consents.” *Id.* at \*17.

treating a person who opts into a representative action as if he were a full party required to respond to the full-range of written discovery—interrogatories, requests to produce documents, requests to admit—and to appear for a deposition without being subpoenaed, absent a protective order.<sup>108</sup>

If trial courts accept the contention that each opt-in is a full party for purposes of discovery, defense counsel can overwhelm the plaintiffs simply by addressing written discovery to each person who has opted in. In a recent case, United Parcel Service and other defendants served interrogatories,<sup>109</sup> requests for production, and requests for admissions on all the approximately 150 original and opt-in plaintiffs. Together, the three forms of written discovery sought over 25,000 separate responses from the plaintiffs.<sup>110</sup> In a section 16(b) action with hundreds or thousands of opt-in plaintiffs, this form of indivi-

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108. See, e.g., *Ingersoll v. Royal & Sunalliance USA, Inc.*, No. C05-1774-MAT, 2006 U.S. Dist. LEXIS 50912, at \*7–8 (W.D. Wash. July 25, 2006) (concluding that “the Court is persuaded by the reasoning of courts permitting individualized discovery of opt-in plaintiffs,” but also finding that “[p]laintiffs fail to adequately support their contention that discovery relating to a total of thirty-six individuals would be unduly burdensome”); *Coldiron v. Pizza Hut, Inc.*, No. CV03-05865TJHMCX, 2004 WL 2601180, at \*2 (C.D. Cal. Oct. 25, 2004) (noting that 306 people who opted into the FLSA case were required to respond to individual requests to admit, interrogatories, and document requests); *Rosen v. Reckitt & Colman, Inc.*, No. 91 CIV. 1675 (LMM), 1994 WL 652534, at \*3, 12 (S.D.N.Y. Nov. 17, 1994) (describing an ADEA case in which fifty people who opted in could be deposed); *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466 (N.D. Ill. 1992) (describing that discovery supervised by a magistrate judge in an FLSA case included service of written discovery on all opt-ins and eighty-one depositions of people who opted in); *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185 (E.D. Va. 1991) (holding that all 127 people who opted into an FLSA case could be deposed), *rev’d on other grounds*, *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992); *Kaas v. Pratt & Whitney*, No. 89-8343-CIV-PAINE, 1991 WL 158943, at \*2, 5 (S.D. Fla. 1991) (noting that, in an ADEA case, approximately one hundred people who opted in were required to answer interrogatories, produce documents, and be deposed). Other courts, while not treating opt-in plaintiffs as full parties, still treat them differently than Rule 23 class members. See *Luna*, 2007 WL 1500269, at \*6–7 (“Plaintiffs . . . however, are not absent members of a Rule 23 class action, but opt-in plaintiffs under § 216(b) of the FLSA. . . . Having opted into the litigation, [plaintiffs] are not ‘passive’ in the same sense as absent Rule 23 class members.”).

109. The Federal Rules limit the number of interrogatories that can be served “on any other party” to twenty-five. FED. R. CIV. P. 33(a). Thus, the number of interrogatories that can be served turns on whether opt-in plaintiffs are “part[ies]” according to the Rule.

110. Memorandum in Support of Plaintiff’s Motion for Final Approval of Partial Class Action Settlement at 3–4, Docket No. 452, *Vega v. Contract Cleaning Maint., Inc.*, No. 03-C-9130, 2006 WL 1554383, (N.D. Ill. 2006).

dualized written discovery and depositions can impose an unbearable burden on plaintiffs. This is true not simply because of the number of responses that must be prepared, but also because plaintiffs in FLSA action, typically low-wage workers, cannot ordinarily independently review the questions and requests and prepare draft responses for their counsel as corporate defendants can. Rather, a laborious process of interviewing, drafting, checking, and revising is required, one that forces counsel to repeatedly contact multiple plaintiffs who usually cannot talk about such matters at work and often work two and even three jobs.

Recognizing the costs and impracticality of conducting discovery person-by-person in an opt-in case, as well as the fact that it is ordinarily not necessary in FLSA actions, most courts have, however, exercised their discretion to supervise discovery and prevent “undue burden or expense”<sup>111</sup> by limiting discovery to a representative sample of opt-ins, at least in cases where the number of opt-ins is large.<sup>112</sup> Courts have authority to regulate and control discovery to avoid unwarranted burdens and excess.<sup>113</sup> At trial in an FLSA case, testimony from a representative sample of employees is sufficient to establish liability and the measure of damages for those similarly situated, i.e. each opt-in does not have to testify to be awarded damages.<sup>114</sup> If lia-

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111. FED. R. CIV. P. 26(c).

112. *See, e.g.,* Geer v. Challenge Fin. Investors Corp., No. 05-1109-JTM, 2007 WL 1341774, at \*6 (D. Kan. May 4, 2007) (granting a motion for a protective order quashing notices of depositions of 256 plaintiffs, including 246 opt-ins); Smith v. Lowes Home Ctrs., Inc., 236 F.R.D. 354, 357–58 (S.D. Ohio 2006) (demonstrating, in an FLSA case with more than 1500 opt-ins, discovery conducted using a statistically significant sample of opt-ins); Morales-Arcadio v. Shannon Produce Farms Inc., No. CV605-062, 2006 WL 2578835, at \*4 (S.D. Ga. Aug. 26, 2006) (denying a motion to compel all forty-five plaintiffs to answer interrogatories and respond to production requests); Bradford v. Bed Bath & Beyond, Inc., 184 F. Supp. 2d 1342, 1352 (N.D. Ga. 2002) (permitting discovery from 31 of more than 300 opt-in plaintiffs); McGrath v. City of Philadelphia, No. CIV. A. 92-4570, 1994 WL 45162, at \*3 (E.D. Pa. Feb. 10, 1994) (applying the law under Rule 23 by analogy to prevent discovery from over 4100 opt-in police officers).

113. *See* FED. R. CIV. P. 26(b)(2)(A), (C); *id.* R. 26(c).

114. *See, e.g.,* Grochowski v. Phoenix Constr., 318 F.3d 80, 88 (2d Cir. 2003) (“Although the plaintiffs correctly point out that not all employees need testify in order to prove FLSA violations or recoup back wages, the plaintiffs must provide sufficient evidence for the jury to make a reasonable inference as to the number of hours worked by non-testifying employees.”); Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 66–68 (2d Cir. 1997); Janowski v. Castaldi, No. 01CV0164(SJF)(KAM), 2006 WL 118973, at \*5 (E.D.N.Y. Jan. 13, 2006).

bility can be determined based on the testimony of representative employees, most courts see no reason why discovery should be permitted from more than a representative group of employees.

Yet there is no guarantee that a trial court in an opt-in case will limit discovery to a sample of opt-ins. And in each case in which the defendant employs the tactic of serving discovery on all “party plaintiffs,” plaintiffs will be forced to negotiate with defendants over the number of opt-ins who should be subject to discovery and, often, to move for a protective order. Under Rule 23, in contrast, it is the defendant who must move for an exception to the accepted principle that absent class members have no obligation to answer written discovery. Further, under Rule 23, in order to serve such discovery or take depositions of absent class members, the defendant bears the “burden of showing necessity and absence of any motive to take undue advantage of the class members.”<sup>115</sup> In some cases, the court may require person-by-person discovery, as burdensome as that may be. In many cases, the opt-in provisions of the FLSA, as opposed to the rules that prevail under Rule 23, will make it more time-consuming and expensive—in some cases impractical—to prosecute a collective action.

#### D. DIFFICULTIES IN SETTLEMENT

Section 16(b)'s anomalous status outside the developed Rule 23 jurisprudence also produces unique difficulties in settlement of FLSA representative actions. Under Rule 23, settlement negotiations can be conducted on a class-wide basis, by the lawyer and named plaintiffs, without consulting each class member, person-by-person, or obtaining each class member's consent before a settlement is reached.<sup>116</sup> It would be impractical, to say the least, to arrive at settlement positions, communicate a defendant's responses, formulate counteroffers, and engage in the rapid back and forth that is required for effective negotiation, if it had to be done for each class member individually. Moreover, at the conclusion of the settlement process,

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115. *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974). Indeed, the Seventh Circuit held that the defendant must carry a greater burden before taking depositions of absent class members under Rule 23 “in light of the nature of the deposition process—namely, the passive litigants are required to appear for questioning and are subject to often stiff interrogation by opposing counsel with the concomitant need for counsel of their own.” *Id.*

116. FED. R. CIV. P. 23(a).

the courts have developed a process under Rule 23(e) during which objecting class members can be heard and can request exclusion from the settlement, resulting in court approval if the settlement is fair and adequate.<sup>117</sup> A settlement approved pursuant to Rule 23(e) binds all members of the class who did not request exclusion, as well as the defendant.<sup>118</sup> A class member who requests exclusion does not prevent effectuation of a court-approved settlement and the consequent termination of the litigation, but the class member may file a new action.<sup>119</sup>

By contrast, in an action under section 16(b) of the FLSA, each opt-in is a “party plaintiff” and must consent to the settlement of his or her claim. Defendants, who understandably want a settlement to terminate the litigation completely, often condition offers to the individual plaintiffs, or a lump-sum offer to all plaintiffs, on acceptance by all the plaintiffs. Securing such consent can be onerous for counsel and can place counsel in an ethically treacherous position<sup>120</sup> if one or more plaintiffs refuse to settle or holds out for a larger share of a lump-sum offer, thereby jeopardizing the settlement for the entire group. While judicial supervision of the settlement process is possible<sup>121</sup> and judicial approval may actually be essential for a binding settlement,<sup>122</sup> courts have not developed any mechanism under section 16(b) for approval of a class-wide settlement over the objection of a single opt-in plaintiff. Thus, despite the

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117. See, e.g., *In re Cement & Concrete Antitrust Litig.*, No. 296, 1980 WL 1994, at \*3 (D. Ariz. Dec. 22, 1980) (giving an example of a settlement objection procedure).

118. See, e.g., *Payton v. Abbott Labs*, 83 F.R.D. 382, 392 (D. Mass. 1979) (noting that class members are bound unless they exclude themselves).

119. ALDA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 16:18 (4th ed. 2002).

120. American Bar Association Model Rules of Professional Conduct (Model Rules) Rule 1.8(g) governs a lawyer’s participation in a lump sum or aggregate settlement when the lawyer represents multiple potential beneficiaries of the settlement. It provides, “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of . . . the clients . . . unless each client gives *informed consent*, in a *writing signed* by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2005) (emphases added).

121. See, e.g., *Woodall v. Drake Hotel*, 913 F.2d 447, 450–52 (7th Cir. 1990).

122. This is due to the fact that employees cannot waive their rights under the FLSA, see *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 723, 940 (1981), except under the supervision of the Secretary of Labor, see 29 U.S.C. § 216(c) (2000). It is widely accepted that judicial supervision is also sufficient to render a waiver that is part of a settlement agreement binding.

fact that litigation of FLSA claims under section 16(b) typically involves far fewer plaintiffs and far lower damage awards than litigation under Rule 23, their settlement remains more difficult and cumbersome.

#### E. ETHICAL AMBIGUITIES

The anomalous status of opt-in plaintiffs under section 16(b) extends to their relationship to counsel. The rules of legal ethics impose numerous requirements on an attorney who forms an attorney-client relationship with an individual client. Many states, for example, require a written, signed retainer agreement under certain circumstances.<sup>123</sup> Various obligations of disclosure, for example, of potential conflicts, are also imposed on attorneys in relation to individual clients.<sup>124</sup> In a class action, it is well established that these obligations run only to the named plaintiffs and that the fidelity of counsel to the class is insured by a judicial finding that the named plaintiffs and their counsel will “fairly and adequately protect the interests of the class” as well as by continued court supervision.<sup>125</sup>

As under the rules of discovery, however, the peculiar status of opt-in plaintiffs under section 16(b) confounds the rules of ethics and places plaintiffs’ counsel in a veritable minefield of ethical dilemmas. In a large case where hundreds and even thousands of employees opt in, is counsel obligated to insure that he or she has a signed, written retainer agreement with each opt-in plaintiff? How long can counsel continue to represent opt-in plaintiffs in the absence of a retainer agreement? Must counsel inform each such opt-in, in writing, that there is a potential conflict between him or her and all other plaintiffs, if, for example, defendant makes a lump-sum settlement offer to the entire group? And must counsel obtain each individual opt-in plaintiffs’ written consent to continued representation under the disclosed circumstances? While workers who are unfamiliar with the rules of ethics, as a practical matter, have no alternative counsel, and have no interest in assert-

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123. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (stating that a contingent fee agreement must be in writing).

124. See, e.g., *id.* R. 1.7(b)(4) (stating that informed written consent is necessary if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”).

125. See FED. R. CIV. P. 23(a)(4).



ing abstract rights as clients that would undermine their ability to enforce their rights as employees, are unlikely to raise these issues, employers are likely to seek advantage by exploiting these ambiguities in the application of the rules in motions to disqualify counsel, strike consent forms, and dismiss claims. While there is a paucity of precedent addressing these issues, courts should not permit defendants to use the rules of ethics as a sword to impose obligations on counsel in relation to each plaintiff who opts in under section 16(b), which would frustrate Congress's clear intent to facilitate collective enforcement of the FLSA.

#### F. SECTION 16(B)'S CORROSIVE EFFECT ON ENFORCEMENT OF STATE WAGE-AND-HOUR LAWS

Precisely because of the limitations created by section 16(b), representatives of aggrieved employees often join claims under the FLSA with claims under parallel state wage-and-hour laws.<sup>126</sup> State law may be more favorable to employees in a variety of substantive respects, and, more importantly, no state wage-and-hour law that we are aware of contains a restriction parallel to section 16(b). In other words, claims under state wage-and-hour laws can be pursued as ordinary class actions. Since 1990, when Congress amended the provision governing federal courts' jurisdiction to decide pendent state-law claims to create jurisdiction over not only pendent claims but also pendent parties (in this case, similarly situated employees who do not opt in) so long as they assert claims arising out of the same nucleus of operative facts,<sup>127</sup> there have been a large

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126. Of course, not all states have such laws. For example, Louisiana, Mississippi, Alabama, Tennessee, and South Carolina do not. See U.S. Dep't of Labor, Minimum Wage Laws in the States, <http://www.dol.gov/esa/minwage/america.htm> (last visited Apr. 16, 2008). Also, not all state laws are as protective as the FLSA. See *id.*

127. The Supreme Court had held that pendent party jurisdiction did not exist in *Finley v. United States*, 490 U.S. 545, 556 (1989). Congress responded in the Judicial Improvements Act of 1990 by extending supplemental jurisdiction to pendent parties. Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 1367 (2000)). The arguments outlined below concerning the exercise of supplemental jurisdiction over class-wide, state-law claims are inapplicable to claims over which there is federal jurisdiction under the newly enacted Class Action Fairness Act, i.e., where the amount in controversy is over \$5 million and any member of the class is a citizen of a different state than any defendants so long as less than two-thirds of the plaintiffs and the primary defendants are not citizens of the state in which the action was filed. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 10 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2000 & Supp. IV 2006)).

number of such “hybrid” actions filed in the federal courts. In response, employers have crafted a variety of arguments aimed at convincing federal courts that the limitations of section 16(b) should be read to effectively bar certification of a Rule 23 class for purposes of pursuing pendent state wage-and-hour claims.<sup>128</sup>

Employers have argued that certifying a class to pursue parallel state claims would circumvent section 16(b) and, therefore, that federal courts may not exercise supplemental jurisdiction over the claims of any employees who do not opt in.<sup>129</sup> This argument rests on the suggestion, articulated by the Third Circuit, that there is a “general federal interest in opt-in wage actions” that extends beyond the express limitation on FLSA actions.<sup>130</sup> Pursuing parallel state-law claims on a class-wide basis, employers argue, undermines the federal policy embodied in section 16(b). As one district court observed,

There are powerful policy considerations that led Congress to change the original version of the Fair Labor Standards Act by enacting the Portal-to-Portal Act. . . . That policy and the underlying congressional intent would be thwarted if a plaintiff were permitted to back door the shoehorning in of unnamed parties through the vehicle of calling upon similar state statutes that lack such an opt-in requirement.<sup>131</sup>

While some federal district courts have embraced this asserted, derivative limitation on their authority to enforce state wage-and-hour law on a class-wide basis,<sup>132</sup> the majority of courts, including the D.C. Circuit, have rejected the argument. These

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128. This Section of our Article benefited greatly from reading James Reif, *Some Thoughts on the Opt-In/Opt-Out Conundrum in Group Wage/Hour Litigation*, LAB. L. EXCHANGE (forthcoming 2008), and Andrew Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. (forthcoming 2008).

129. *Moeck v. Gray Supply Corp.*, No. 03-1950 (WGB), 2006 WL 42368, at \*5 (D.N.J. Jan. 6, 2006).

130. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003).

131. *Rodriguez v. Texan*, No. 01 C 1478, 2001 WL 1829490, at \*2 (N.D. Ill. Mar. 7, 2001).

132. See, e.g., *Lindsay v. Gov't Employees Ins. Co.*, 355 F. Supp. 2d 119, 120–21 (D.D.C. 2004), *rev'd*, 448 F.3d 416 (D.C. Cir. 2006); *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 578 (N.D. Ill. 2004) (holding that certifying the state-law class “would undermine Congress’s directive that FLSA collective actions [be] limited to those parties who opt in to the action”); *Leuthold v. Destination Am., Inc.*, 222 F.R.D. 462, 470 (N.D. Cal. 2004). Many of these decisions cite the statement in *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975), which held that section 16(b) and Rule 23 “class actions are mutually exclusive and irreconcilable.” But *LaChapelle* involved the question of whether a class could be certified to pursue an ADEA claim, not a parallel state-law claim. *Id.* at 287.

courts reason that “section 216(b) [does] not expressly prohibit the exercise of supplemental jurisdiction over the state-law claims of opt-out class members”—as required to bar supplemental jurisdiction under the amended jurisdiction statute.<sup>133</sup> As one district court succinctly put it, section 16(b) “does not guarantee that employers will never face traditional class actions pursuant to state employment law.”<sup>134</sup> These courts are surely correct not only for that reason but because, as we explain above, the divergence of section 16(b) and Rule 23 jurisprudence was more the result of historical accident than deliberate congressional action that can properly be understood to have created a “federal interest in opt-in wage actions.”<sup>135</sup>

Recognizing that federal courts are not precluded from exercising supplemental jurisdiction over parallel state-law claims on a class-wide basis by the unwarranted extension of the nonexistent federal policy allegedly underlying section 16(b), employers still rely on the very limitations of section 16(b) to argue that courts should nevertheless exercise their

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133. *Lindsay*, 448 F.3d at 422. Congress has provided for federal court jurisdiction “[e]xcept . . . as expressly provided otherwise by federal statute.” 28 U.S.C. § 1367(a) (emphasis added). See also *Marquez v. PartyLite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667, at \*3 (N.D. Ill. Aug. 27, 2007); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 391–94 (W.D.N.Y. 2005); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 308 (D. Mass. 2004) (“I should not, however, infer from that restriction on *federal* remedies a concomitant restriction on *state* remedies. Nothing in the statute limits available remedies under state law.”); *Goldman v. Radioshack Corp.*, No. Civ.A. 2:03-CV-0032, 2003 WL 21250571, at \*4 (E.D. Pa. Apr. 16, 2003) (“The clear weight of authority is in favor of exercising supplemental jurisdiction.”).

134. *Klein v. Ryan Beck Holdings, Inc.*, No. 06 Civ. 3460(WCC), 2007 WL 2059828, at \*6 (S.D.N.Y. July 13, 2007). The Court continued, “the FLSA’s collective action mandate applies only to actions brought pursuant to the FLSA—not to employment law actions generally. . . . The FLSA contains no provision preempting other methods of prosecuting state law employment litigation.” *Id.* at \*5; see also *De Leon-Grandos v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1220 (11th Cir. 2007) (“If Congress intended § 216 to be the exclusive remedy for violations of [another statute’s] wage payment provision, it would have said so.”). The employer’s argument in *Klein* was actually a variant of the above-described argument based on the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2000). The employer argued that section 16(b) vests a right in employers not to be sued by an employee who has not affirmatively opted into an action and, correspondingly, vests a right in employees not to be bound by a judgment in any action into which they have not affirmatively opted. The employer argued that certifying a class to pursue a parallel state-law claim would abridge those rights in violations of the Enabling Act. The Court rejected the argument as have all others that have considered it. *Klein*, 2007 WL 2059828, at \*6.

135. *De Asencio*, 342 F.3d at 312.

discretion to decline such jurisdiction.<sup>136</sup> For example, precisely because following section 16(b) procedures is likely to lead to only a small fraction of the class opting into the litigation, employers have argued that the state-law wage-and-hour claim “substantially predominates” over the federal FLSA claim and thus the courts should decline supplemental jurisdiction.<sup>137</sup>

In *De Asencio v. Tyson Foods, Inc.*, for example, only 447 of the 4100 potential plaintiffs opted in.<sup>138</sup> Based on those numbers, the Third Circuit reasoned that

[p]redomination under section 1367 generally goes to the type of claim, not the number of parties involved. But the disparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog.<sup>139</sup>

Based on the failure of the section 16(b) process, together with differences in the proof required for the federal and state claims, the court concluded that declining jurisdiction over the state-law claims of absent class members was within the trial court’s discretion.<sup>140</sup> But a mere disparity in the number of opt-ins compared to the potential size of a state class should not alone lead to the conclusion that state law issues will predominate when the legal and factual issues under federal and state law are parallel<sup>141</sup> or when the members of the putative state-law class have highly parallel claims so that the size of the class will not greatly affect the evidence that will be necessary or the scope of the issues that will be raised under state law.<sup>142</sup> Yet this argument continues to have currency in a minority of federal courts.<sup>143</sup>

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136. See 28 U.S.C. § 1367(c) (permitting federal courts to decline to exercise supplemental jurisdiction).

137. See *id.* § 1367(c)(2).

138. 342 F.3d at 310.

139. *Id.* at 311.

140. *Id.* at 312–13.

141. See, e.g., *Lindsay v. Gov’t Employees Ins. Corp.*, 448 F.3d 416, 424–25 (D.C. Cir. 2006); *Chavez v. IBP, Inc.*, No. CT-01-5093-EFS, 2002 WL 31662302, at \*2 (E.D. Wash. Oct. 28, 2002) (“[T]he Court does not view sheer numbers as the relevant comparison. Rather, the determining factor is the relative size of the *issues* raised by the varying claims.”). The governing statute refers to the predominance of the state “claim” over the federal “claim or claims” not to the number of claimants. See 28 U.S.C. § 1367(c)(2).

142. See, e.g., *Marquez v. PartyLite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667, at \*6 (N.D. Ill. Aug. 27, 2007).

143. See, e.g., *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004).

In those rare cases when the use of section 16(b) procedures results in a substantial number of similarly situated employees opting into the litigation, employers turn the previous argument on its head. Employers argue both that Rule 23(a)'s requirement that joinder be "impracticable" and that Rule 23(b)(3)'s requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" are not satisfied.<sup>144</sup> Based on the first argument, some courts defer ruling on certification until the close of the opt-in period in order to be "better equipped to determine if joinder is impracticable."<sup>145</sup> If only a few employees opt in, the employer will assert the previously described argument that the state tail will wag the federal dog, while if a large number of employees opt in, the employer will argue that joinder is not impracticable. And even if only a few opt in, the employer will argue that section 16(b) provides a "superior" method because it provides any employee "truly" interested in participating in the action with that opportunity.<sup>146</sup> But, as we explained in Part IV.A above, failure to return a consent form is not reliable evidence of lack of interest in participating in the case. Moreover, section 16(b) provides a method for similarly situated employees to become parties to the FLSA claims, not the state-law claims.<sup>147</sup> The section 16(b) procedure is not even an "*available* method[] for the fair and efficient adjudication of the [state law] controversy."<sup>148</sup> Thus, a section 16(b) opt-in proceeding is not a superior means of resolving state-law claims that should be addressed on a class-wide basis using Rule 23.

Finally, employers argue that the mere difference between section 16(b), in particular its opt-in requirement, and Rule 23, in particular its opt-out requirement, will cause confusion and therefore that a class action is not a superior means of resolving the claims and that difficulties will be encountered in the management of the class action.<sup>149</sup> But confusion can be re-

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144. FED. R. CIV. P. 23(a), (b)(3).

145. *De la Fuente v. FPM Ipsen Heat Treating, Inc.*, No. 02 C 50188, 2002 WL 31819226, at \*1 (N.D. Ill. Dec. 16, 2002).

146. *See, e.g., Leuthold*, 224 F.R.D. at 469 ("[T]he FLSA suit provides a means of participating for individuals who truly wish to join the suit."); *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 578 (N.D. Ill. 2004); *Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*, No. 01 C 2361, 2002 WL 1359411, at \*2 (N.D. Ill. Jun. 21, 2002).

147. FED. R. CIV. P. 23(b)(3).

148. *Id.* (emphasis added).

149. *See* FED. R. CIV. P. 23(A) & (B)(3)(d); *see also* *Chase v. Aimco Props.*,

duced by sending the section 16(b) notice giving employees the opportunity to opt in before the Rule 23 notice giving employees the opportunity to opt out and also through well-drafted notices. Moreover, more confusion will likely result if the state-law claims proceed in state court and thus employees receive two different notices from two different courts.<sup>150</sup>

While the arguments that the peculiar limitations in section 16(b) should, directly or indirectly, preclude federal court certification of a class to pursue parallel state wage-and-hour claims are ultimately unsound, they have proved persuasive to some courts and represent one more handicap imposed on employees seeking to enforce minimum employment standards.<sup>151</sup>

### CONCLUSION

The Supreme Court has held that the provisions of the FLSA “are remedial and humanitarian in purpose,” instructing that the “statute must not be interpreted or applied in a narrow, grudging manner.”<sup>152</sup> Yet the seemingly modest restriction contained in section 16(b), in practice, is both narrow and grudging, particularly as applied to low-wage workers, the primary victims of FLSA violations. Adopted in 1947, section 16(b) unintentionally caused group litigation under the FLSA to diverge from virtually all other forms of group litigation in the federal courts since Rule 23 was amended in 1963. This divergence has no rationale, is poor public policy, and handicaps one of the most vulnerable sectors of society in the enforcement of

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L.P., 374 F. Supp. 2d 196, 202 (D.D.C. 2005).

150. See *Cryer v. InterSolutions, Inc.*, No. 06-2032 (EGS), 2007 WL 1191928, at \*3 (D.D.C. Apr. 20, 2007).

151. Employees can, of course, file hybrid actions in state court. See 29 U.S.C. § 216(b) (2000) (providing that actions can be filed “in any Federal or State court of competent jurisdiction”). While employers can remove such actions to federal court, see *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), several federal district courts have held that after removing the case to federal court the employer cannot make the above-described arguments. See, e.g., *Acosta v. Scott Labor*, No. 05 C 2518, 2006 U.S. Dist. LEXIS 153 (N.D. Ill. Jan. 3, 2006); *Yon v. Positive Connections*, No. 04-C-2680, 2005 U.S. Dist. LEXIS 3396 (N.D. Ill. Feb. 2, 2005). Otherwise, they reason, plaintiffs will be encouraged to split their claims, filing state-law claims in state court and FLSA claims in federal court. *Yon*, 2005 U.S. Dist. LEXIS 3396, at \*3–4. However, other courts express skepticism on this point, pointing out that in federal courts federal procedural rules apply to state claims. See *Marquez v. PartyLite Worldwide, Inc.*, 2007 U.S. Dist. LEXIS 63301, at \*17 (N.D. Ill. 2007).

152. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

2008]

*MINIMUM LABOR STANDARDS*

1347

their rights to fair wages. If Congress wishes to truly adopt a Class Action Fairness Act,<sup>153</sup> it will amend section 16(b) to remove the opt-in requirement<sup>154</sup> and thereby harmonize the law of collective actions under the FLSA with the rules applied to virtually all other causes of action brought on behalf of a class in the federal and state courts.

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153. 28 U.S.C. § 1332(d)(2) (2000).

154. Congress should also remove the corresponding provisions concerning the tolling of the statute of limitations in 29 U.S.C. § 256.