

Off-The-Clock Claims From The Employee's Perspective

Adam Klein
and
Sean Farhang

- I. Defining Compensable Work
 - A. What Time is Compensable?
 - B. Statutory Exclusions
 - 1. Preliminary and Postliminary Work
 - 2. Changing Clothes and Washing
- II. Ascertaining Compensable Work Time In Practice
 - A. Travel Time
 - B. Preparatory & Concluding Activities: Clothes, Equipment, & Animal Care
 - C. Meal/Rest Breaks
 - D. Training, Lectures, Etc.
 - E. On-Call Time
 - F. De Minimis Time
- III. Suffer Or Permit Standard Applied To Off-The-Clock Claims
- IV. Record-Keeping Duties Applied To Off-The-Clock Claims
 - A. Basic Record Keeping Duties On Employer
 - B. Consequences Of Record Keeping Violation In Off-The-Clock Case
- V. Collective Actions
 - A. Notice
 - B. Similarly Situated Standard Applied In Off-The-Clock Claims
 - 1. Two-Stage Approach
 - 2. Lenient Standard For Ordering Notice In Off-The-Clock Claims In Stage One
 - 3. A Significant Number Of Opt-Ins Weighs In Favor Of Ordering Notice
 - 4. Where Plaintiffs' Evidence Does Not Warrant Notice Of The Scope Sought, Courts Nevertheless Frequently Order Notice Of An Appropriate Scope
 - 5. Stage-Two: Close of Discovery
- VI. Off-The-Clock Class Actions Under State Law
 - A. Availability Of The Class Device As Opposed To Collective Action
 - B. Possible Advantages Under State Labor Laws In Off-The-Clock Claims
 - C. Concurrent FLSA Collective Actions And State Class Actions

Introduction

In this paper we discuss legal issues relevant to off-the-clock wage and hour claims. By “off-the-clock” claims we refer to claims alleging that the defendant failed to pay an employee for work time which was compensable under relevant wage and hour law. Our primary focus is application of the Fair Labor Standards Act (“FLSA”) to off-the-clock claims.

I. Defining Compensable Work

A. What Time is Compensable?

The starting point for analyzing potential off-the-clock FLSA claims is to determine whether the time for which compensation is sought is in fact compensable under the FLSA. Though the FLSA does not define compensable work, it does define “employ” broadly as “to suffer or permit to work.”¹ The Supreme Court in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*² initially defined the meaning of work under the Act “as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” In *Anderson v. Mt. Clemens Pottery Co.*,³ the Supreme Court shortly thereafter dropped the “exertion” requirement in practice and emphasized that compensable work hours are characterized instead by the employer’s control of the employee’s time. The Court stated that “the

¹ 29 U.S.C.A. §§ 203(g).

² 321 U.S. 590, 598 (1944).

³ 328 U.S. 680 (1946).

statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, [and that] the time spent in these activities must be accorded appropriate compensation.”⁴ The implementing regulations define compensable work time as time spent by a worker for the benefit of the employer, with the employer’s actual or constructive knowledge, performing the worker’s “principle” activity or functions integral to his or her principle activity.⁵

B. Statutory Exclusions

While the FLSA does not provide an express definition of compensable work, it does contain two express exclusions of activity that would otherwise appear to meet the definition of compensable work just set forth. These exclusions are very narrow, and it is important to recognize their precise contours for purposes of evaluating the viability of off-the-clock claims.

1. Preliminary and Postliminary Work

The 1947 Portal-to-Portal Act, which amended the FLSA, provides that employers are not subject to FLSA requirements for “activities which are preliminary to or postliminary to [an employee's] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at

⁴ *Id.* at 690-91.

⁵ 29 C.F.R. §§ 785.6-7, 785.9, 785.11, 785.24.

which he ceases, such principal activity or activities.”⁶ “Principal activities” are those that are an integral and indispensable part of an employee's work duties.⁷ Thus, pre and post-shift work should be considered compensable principal activity, rather than non-compensable preliminary or postliminary activity, if it is “ ‘an integral and indispensable part of the principal activities for which covered workmen are employed....’ ”⁸

Employees have succeeded in making off-the-clock claims, and in defeating employers’ attempts to invoke the preliminary/postliminary defense, where pre or post-shift work was performed by employees because it was necessitated by employees’ work assignments, even if the employer did not ask that the work be performed outside employees’ scheduled shift. The Second Circuit’s decision in *Kosakow v. New Rochelle Radiology Associates, P.C.*,⁹ is illustrative. There, a “radiological technologist” was expected to receive patients at the commencement of her shift, and in order to do so she had to arrive early to complete certain pre-shift tasks. Specifically, in order to be able to receive patients at the beginning of her shift she had to come in 15 minutes early to turn on the x-ray machine to allow it to warm up, perform tests on the machine to

⁶ 29 U.S.C. § 254(a)(2).

⁷ *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998); *Jerzak v. City of South Bend*, 996 F. Supp. 840 (N.D. Ind. 1998).

⁸ *Reich v. New York City Transit Authority*, 45 F.3d 646, 649-50 (2d Cir. 1995) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956)).

⁹ 274 F.3d 706 (2d Cir. 2001).

make sure it was working properly, and pull patient files for individuals with appointments that day. The defendant argued, and the lower court held, that the off-the-clock work alleged by the plaintiff was excluded from FLSA coverage by the Portal-to-Portal amendments.

The Second Circuit reversed, finding that the work was compensable principal activity, rather than non-compensable preliminary or postliminary activity, because it was “ ‘an integral and indispensable part of the principal activities for which covered workmen are employed....’ ”¹⁰ It was irrelevant, the court explained, that the employer had not directed the plaintiff to come in early: “If the proper performance of their job required the preparatory work to be completed when the first walk-in patient could potentially arrive, the time should have been counted, regardless of whether anybody specifically instructed them to arrive early.”¹¹

In general, preliminary or postliminary activities are excluded from FLSA coverage *only* where (1) such activities are predominantly in employees' own interests, (2) are undertaken for employees' own convenience, (3) are not required by the employer, and (4) are not necessary to the employee's performance of his or her work duties.¹² The preliminary/postliminary

¹⁰ *Id.* at 718 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956)).

¹¹ *Id.* at 718.

¹² U.S.--*Jerzak v. City of South Bend*, 996 F. Supp. 840 (N.D. Ind. 1998); *Hellmers v.*

exception is, therefore, extremely narrow.

2. Changing Clothes and Washing

Section 3(o) of the FLSA, added by amendment in 1949, provides that for purposes of calculating “hours worked” under the Act, “there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.”¹³ As will be discussed below, in the absence of a contractual exclusion, there are some circumstances in which changing cloths and bathing at the beginning or end of a work day is compensable and can be the basis of a successful off-the-clock claim. This, too, is an extremely narrow exception.

II. Ascertaining Compensable Work Time In Practice

Courts’ efforts to apply the definition of compensable work time has turned on highly fact specific case characteristics. Certain issues have recurred, however, and because the precise meaning of compensable work is crucial to evaluating off-the-clock claims, we briefly touch upon the main ones that have arisen in disputes over what work is compensable. An exhaustive discussion of this large topic is well beyond this scope of this paper, however.

Town of Vestal, N.Y., 969 F. Supp. 837 (N.D.N.Y. 1997); *U.S. v. Ewald Iron Co.*, 67 F. Supp. 67 (W.D. Ky. 1946).

¹³ 29 U.S.C. § 3(o).

A. Travel Time

While ordinary travel from home to work and back is not compensable,¹⁴ some work-related travel time is compensable. If employees must initially report to one location, such as the employer's dispatching center, to receive assignments, and then must proceed to travel to other job locations, the time spent traveling from the initial place the employee reported to other job locations is compensable.¹⁵ Further, if travel time spent includes any duties performed on behalf of the employer or otherwise is for the employer's benefit, then the time should be compensable.¹⁶ Travel time to and from work in a special one-day assignment to another city is also compensable.¹⁷

B. Preparatory & Concluding Activities: Clothes, Equipment, & Animal Care

As stated above, time spent on "integral and indispensable" duties performed for the employer's benefit will be compensable. Such duties include time spent changing into/out of special work uniforms,¹⁸ and time spent servicing or otherwise caring for the employer's equipment (including the

¹⁴ 29 U.S.C. § 254(a); 29 C.F.R. § 785.35.

¹⁵ See 29 C.F.R. § 785.38; *Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000); *Dole v. Enduro Plumbing, Inc.*, 1990 U.S. Dist. LEXIS 20135 (C.D. Cal. 1990).

¹⁶ See *Baker v. Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998) (return travel time for refueling and restocking welding rigs was integral to welding work and compensable).

¹⁷ See 29 C.F.R. § 785.37.

¹⁸ See, e.g., *Steiner v. Mitchell*, 350 U.S. 247 (1956) (battery plant workers must be paid for time spent changing clothes and showering to avoid caustic and toxic materials).

employer's animals).¹⁹

C. Meal/Rest Breaks

Break and rest periods of 5 to 20 minutes are work time for which an employee is to be paid.²⁰ Thus, an employee who works 8:00 a.m. to 5:00 p.m. with a ½ hour unpaid lunch and two 15 minute breaks – one in the morning and the other in the afternoon – has worked an 8.5 hour work day and *not* an 8 hour work day. For a period to be classified as a bona fide meal period, and thus non-compensable, an employee “must be completely relieved from duty for the purposes of eating regular meals.”²¹ Because such breaks must be compensated unless the employee is “completely relieved from duty,” an employer must compensate “break” time when an employee is required to remain on (or even “near”) the premises and available for duty.²²

¹⁹ See, e.g., *Reich v. Monfort*, 144 F.3d 1329 (10th Cir. 1998) (slaughterhouse employees to be paid for time spent washing up and removing safety equipment); *Holzappel v. Town of Newburgh*, 145 F.3d 516 (2nd Cir. 1998) (police officers must be paid for time walking, feeding, grooming police dogs).

²⁰ 29 C.F.R. § 785.17.

²¹ 29 C.F.R. § 785.19; *Hartsell v. Dr. Pepper Bottling Co.*, 207 F.3d 269 (5th Cir. 2000); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1110, 1115 (4th Cir. 1985).

²² See *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (2^d Cir. 1996) (half-hour lunch break must be compensated because employees required to remain “at or near the work site” so they could intervene if any threat to security arose during lunch).

D. Training, Lectures, Etc.

Attendance time at lectures, meetings, training programs and similar activities is compensable unless attendance is voluntary, outside of normal working hours, and not related to the employee's job.²³

E. On-Call Time

If employees, while on-call, are required to stay on the employer's premises or so close by that they are unable to engage in personal activities, such on-call time must be compensated.²⁴ Even if employees do not have to remain on or near the employer's premises, if their on-call duties restrict their travel, and occupy their attention to the point of excluding other activities, such time will be compensable.²⁵

F. De Minimis Time

Finally, according to the "de minimis" doctrine, otherwise compensable time is not actionable under the FLSA if it is so trivially small that it cannot be recorded and has no real value even in aggregate. "[A] few seconds or minutes

²³ See 29 C.F.R. §§ 785.27–785.32; *Dade County v. Alvarez*, 124 F.3d 1380 (11th Cir.1997), *cert. denied*, 523 U.S. 1122, 118 S.Ct. 1804, 140 L.Ed.2d 943 (1998).

²⁴ See 29 C.F.R. § 785.17; *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

²⁵ *Cross v. Arkansas Forestry Commission*, 938 F.2d 912 (8th Cir.1991) (On-call time compensable where employees had to monitor hand-held radios twenty-four hours per day, and be prepared to respond to emergency calls immediately).

of work beyond the scheduled working hours ... may be disregarded. Split-second absurdities are not justified....”²⁶ In order to determine whether time worked is de minimis, the following three factors are to be weighed: “(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether ‘the claimants performed the work on a regular basis.’ ”²⁷ “Employers . . . must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.”²⁸ Courts have found off-the-clock time in the amount of roughly fifteen minutes per day *not* to be de minimis.²⁹

III. Suffer Or Permit Standard Applied To Off-The-Clock Claims

The most common defense by an employer in off-the-clock claims is that it did not request the work and was unaware that the work was being performed. Indeed, employers commonly defend in off-the-clock actions by arguing that they have a policy expressly prohibiting employees from working off-the-clock. Aided by an extremely broad definition of “employ,” and also informed by recognition of the many indirect ways in which employers can pressure

²⁶ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 66 S.Ct. 1187, 1194, 90 L.Ed. 1515 (1946).

²⁷ *Reich v. New York City Transit Authority*, 45 F.3d 646, 649-50 (2d Cir. 1995); *see also Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir.1998).

²⁸ *Lindow v. United States*, 738 F.2d 1057 (9th Cir.1984).

²⁹ *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2d Cir. 2001); *Usery v. City Electric, Inc.*, 23 W.H. Cases 256, 257 (W.D. Tex.1976).

employees to work off-the-clock, the improbability that employees would voluntarily work without compensation absent such pressure, and the inherent unfairness of allowing an employer to receive the benefit of its workers' labor without paying for it, courts have almost uniformly rejected this line of defense.

The FLSA defines "employ" broadly as "to suffer or permit to work."³⁰ The "suffer or permit to work" standard was first utilized in state child-labor laws calculated to reach businesses that used middlemen to unlawfully hire and oversee child laborers.³¹ It was called, by one of the sponsors of the FLSA bill, "'the broadest definition [of employ] that has ever been included in one act.'"³² The "suffer or permit" test is intended to impose a duty on firms to police their premises against violations, and it is "rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge [be] avoided."³³ If an employer does not want work performed by an employee, according to Department of Labor regulations,

*it is the duty of management to exercise its control and see to it that the work is not performed It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.*³⁴

³⁰ 29 U.S.C. § 203(g).

³¹ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 n. 7, 67 S.Ct. 1473, 1476 n. 7, 91 L.Ed. 1772 (1947); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474, 476 (1918).

³² *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 297 n. 3, 89 L.Ed. 301 (1945) (quoting 81 *Cong. Rec.* 7,657 (1938) (statement of Sen. Hugo Black)).

³³ *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474, 476 (1918).

³⁴ 29 C.F.R. § 785.13 (emphasis added).

In *Kosakow v. New Rochelle Radiology Associates, P.C.*,³⁵ the case discussed above in which a radiological technologist arrived at work 15 minutes early to perform certain necessary activities before the scheduled start of her shift, the employer asserted as a defense that it had not asked her to perform the work. In rejecting this argument, the court stressed that it was irrelevant that the employer did not expressly “require” unpaid pre-shift work. The employer had reason to know that the pre-shift work would have to be performed as a result of its demand that the plaintiff be prepared to receive patients at the start of her shift, and thus the time was compensable.

In *U.S. Dep't of Labor v. Cole Enters., Inc.*,³⁶ the plaintiffs claimed that they performed both pre and post-shift work, performing such tasks as setting up the employer-restaurant's dining room, preparing coffee and tea, filling condiment containers, cleaning tables, and finishing serving customers. The plaintiffs further maintained that they were told by managers to record only their scheduled hours on their time sheets. The majority shareholder of the restaurant, who was named as a defendant, attempted to defend partly on the ground that it had a policy against off-the-clock work, and partly on the ground of lack of knowledge of what was going on inside the restaurant. The court rejected these defenses, stating that “it is the responsibility of management to see that work is not performed if it does not want it to be performed. The management ‘cannot

³⁵ 274 F.3d 706 (2d Cir. 2001).

³⁶ 62 F.3d 775, 779-80 (6th Cir.1995).

sit back and accept the benefits without compensating for them.’ ”³⁷

IV. Record-Keeping Duties Applied To Off-The-Clock Claims

The FLSA’s record keeping requirements, and the consequences of breaching them, are especially important in the context of off-the-clock claims. In the vast majority of circumstances that give rise to successful off-the-clock claims, no records exist of the time actually worked by the employees for which compensation is sought. Typical are factual scenarios such as those just discussed in *Kosakow* and *Cole*, where the employer records only the employee’s scheduled shift, and the employee seeks compensation for the unrecorded hours worked outside his or her scheduled shift. In such circumstances employers have frequently sought to avoid liability on the ground that the employees have no records of the hours they claim to have worked. Courts have decisively rejected this defense, and have accepted FLSA plaintiffs’ general recollection of uncompensated hours worked as sufficient evidence.

A. Basic Record Keeping Duties Of Employer

The FLSA provides that “[e]very employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other

³⁷ *Id.* (citing 29 C.F.R. § 785.13). See also *Moon v. Kwon*, 248 F.Supp.2d 201, 228 (S.D.N.Y. 2002) (after endorsing 29 C.F.R. § 785.13, court stated that “[i]t follows that even if ... [employee] had violated hotel policies concerning supervisory approval of overtime and the performance of evening work ... his work nevertheless would remain compensable under FLSA”).

conditions and practices of employment maintained by him, and shall preserve such records....”³⁸ An employer’s failure to keep such records is an FLSA violation.³⁹

B. Consequences Of Record Keeping Violation In Off-The-Clock Cases

In an off-the-clock case, if the employer failed to keep records of employee hours worked, then the damages proceedings will be less precise than they would have been if the employer had kept the legally required records. In the early days of the FLSA, the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.* held that FLSA defendants should not benefit from the evidentiary complications that result from their own record-keeping failures, because it “would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.”⁴⁰

Faced with inadequate employer records of hours worked, *Anderson* noted that it is the employer who has the “duty ... to keep proper records of wages, hours and other conditions,” while “[e]mployees seldom keep such records themselves.”⁴¹ In the absence of proper employer records, employees enjoy a

³⁸ 29 U.S.C. § 211(c).

³⁹ 29 U.S.C. § 215(a)(5).

⁴⁰ 328 U.S. 680, 688, 66 S. Ct. 1187, 1193, 90 L. Ed. 151 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 250, 75 L. Ed. 544 (1931)).

⁴¹ 328 U.S. at 687, 66 S. Ct. at 1192.

lenient burden of proof.

[W]here the employer's records are inaccurate or inadequate ... [t]he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work.... [A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.... [T]he court may then award damages to the employee, even though the result be only approximate. The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records.... It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.⁴²

Accordingly, in an off-the-clock case, once an employee establishes (a) a basic *prima facie* case that he or she was not paid for all compensable time worked, and (b) that the employer's records do not accurately record all hours worked, then the burden shifts to the employer to prove either (1) the actual hours worked (since they have no records, this is a daunting task) or (2) that the employee's testimony regarding the magnitude of uncompensated time worked is not credible.⁴³

Moreover, where defendants have violated their duty to keep records that could show damages, plaintiffs receive the benefit of the doubt as to the proper approximations. Courts will uphold "somewhat generous" damages approximations in such circumstances, because the need to make the

⁴² 328 U.S. at 687-88, 66 S. Ct. at 1192-93.

⁴³ See *Anderson, supra*; 29 C.F.R. §§ 516, 516.2 (required showings in non-records cases).

approximation “simply points out the difficulty of precisely determining damages when the employer has failed to keep adequate records.”⁴⁴

V. Collective Actions

The prospect of aggregating claims and adjudicating them together, through the collective action or class action devices, is especially important in the context off-the-clock claims. While off-the-clock claims can sometimes be sufficiently substantial to litigate individually,⁴⁵ much more often they are too small to warrant individual litigation. In many instances pre and post-shift off-the-clock work is on the order of 15 to 30 minutes per day per employee. While small at the individual level, with large employee populations such claims can quickly aggregate into enormous liability.

The FLSA allows the filing of “collective actions” under § 216(b).⁴⁶ There are significant differences between such collective actions and class actions under Federal Rule of Civil Procedure 23, which will be addressed separately below. Most fundamentally, § 216(b) collective actions are “opt-in,” meaning that “no employee shall be a party plaintiff to any [FLSA] action unless he gives consent in writing to become a party and such consent is filed in the court in which such action is brought.”⁴⁷

⁴⁴ *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58, 70 n.3 (2d Cir. 1997).

⁴⁵ *See, e.g., Moon v. Kwon*, 248 F.Supp.2d 201, 228 (S.D.N.Y. 2002).

⁴⁶ 29 U.S.C. § 216(b).

⁴⁷ *Id.*

A. Notice

While the FLSA itself does not provide any notice procedure to prospective plaintiffs, the Supreme Court in *Hoffman-La Roche, Inc. v. Sperling*⁴⁸ held that district courts have discretion to direct notice to potential plaintiffs. The Court stressed that allowing district courts to facilitate notice comported with both congressional intent that FLSA plaintiffs be permitted to litigate collectively, as well as the judicial goals of the efficient, expeditious, orderly, and consistent resolution of cases.⁴⁹

B. Similarly Situated Standard Applied In Off-The-Clock Claims

Section 216(b) of the FLSA permits plaintiffs to sue for unpaid overtime wages on behalf of themselves and “other employees similarly situated,”⁵⁰ and thus in deciding whether or not to direct notice and allow an action to proceed collectively a court must determine whether the individuals which the plaintiffs proposes to represent are similarly situated with the plaintiffs.

1. Two-Stage Approach

Courts have adopted a two step approach to this problem, first articulated in *Lusardi v. Xerox Corp.*⁵¹ Under this approach, the threshold

⁴⁸ 493 U.S. 165 (1989).

⁴⁹ *Id.* at 170-72.

⁵⁰ 29 U.S.C. § 216(b).

⁵¹ 118 F.R.D. 351 (D.N.J. 1987), *mandamus granted in part, sub nom., Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *original order vacated in part, modified in part*

showing necessary to send out notice to potential plaintiffs is modest.

“[P]laintiffs need only describe the potential class within reasonable limits and provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist.”⁵² The approach was recently summarized as follows:

Under the two-tiered approach, the trial court must first decide whether the potential class should receive notice of the action. At this initial "notice stage", the court usually relies only on the pleadings and any affidavits which have been submitted. Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. Indeed, some courts have held that, at the "notice" stage, plaintiffs need only make substantial allegations that the putative class members were subject to a single decision, policy, or plan that violated the law. After discovery is complete, the party opposing the conditional class may file a motion for decertification. If the district court concludes that the putative class members are not "similarly situated", it may decertify the class, and dismiss the opt-in plaintiffs without prejudice. If, on the other hand, the court finds that the putative class members are "similarly situated", it permits the case to go to trial as a class action.⁵³

2. Lenient Standard For Ordering Notice In Off-The-Clock Claims In Stage One

pursuant to mandamus sub nom., Lusardi v. Xerox Corp., 122 F.R.D. 463 (D.N.J. 1988), *aff'd in part, appeal dismissed*, 975 F.2d 964 (3d Cir. 1992).

⁵² *Schwed v. General Elec. Co.*, 159 F.R.D. 373, 375-76 (N.D.N.Y. 1995).

⁵³ *Kane v. Gage Merchandising Services, Inc.*, 138 F.Supp.2d 212 (D. Mass. 2001) (citations and internal quotations omitted). For other cases following the two-step approach, *see also, e.g., Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001); *Felix de Asencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 663 (E.D. Pa. 2001); *Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 306 (S.D.N.Y. 1998); *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306-07 (N.D. Ca. 1991); *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 399 (D.N.J. 1988).

As the following examples illustrate, plaintiffs in off-the-clock cases have usually easily satisfied their burden of establishing that prospective plaintiffs are similarly situated for purposes of directing notice by including detailed allegations in their complaint supported by even a modest number of affidavits. In *Thiebes v. Wal-Mart Stores, Inc.*,⁵⁴ the court stated that the plaintiffs' burden was to "show that potential class members are similarly situated 'by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the law.'" ⁵⁵ The court concluded that this standard was satisfied by allegations in the complaint, and two supporting declarations, stating that Wal-Mart's "policy prohibiting employees from working overtime, in conjunction with its policy of requiring employees to finish their job duties, creates an atmosphere in which working off the clock is essentially mandatory," and that they and other Wal-Mart employees had worked off-the-clock at many of Wal-Mart's twenty-three stores in the state of Oregon.⁵⁶ The court directed § 216(b) notice state-wide.

In *Realite v. Ark Restaurants Corp.*,⁵⁷ the court characterized the plaintiffs' burden to show that prospective plaintiffs were similarly situated as "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." The

⁵⁴ 1999 WL 1081357 (D. Or. Dec. 1, 1999).

⁵⁵ *Id.* (quoting *Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 306 (S.D.N.Y.1998).

⁵⁶ *Id.* at 2.

⁵⁷ 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998).

court found this burden satisfied by plaintiffs' allegations in the complaint, supported by ten declarations, that the defendant had a policy and practice of paying employees only for their regularly scheduled shift while requiring that they work off-the-clock outside the parameters of their regularly scheduled shift. The court found these allegations sufficient to direct notice despite the fact that they were leveled against an enterprise of fifteen restaurants with different names and menus owned and managed by the defendant, and that the plaintiffs had worked in many different positions ranging from dishwasher, to security guard, to waiter.

In *Barron v. Henry County School System*,⁵⁸ the district court stated that name plaintiffs may obtain notice to prospective FLSA plaintiffs "without pointing to a particular plan or policy," provided that they "make some rudimentary showing of commonality between the basis for [their] claims and that of the potential claims of the proposed class" The court found that the plaintiffs had satisfied this burden with an expert witness' affidavit stating that he had read notes of interviews with prospective plaintiffs, and had noted two individuals who stated that they were given tasks to perform beyond the end of their shift but were only paid for their scheduled shift.⁵⁹

⁵⁸ 242 F. Supp. 2d 1096, 1101 (M.D. Ala. 2003) (citing *Haynes v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983)).

⁵⁹ For additional off-the-clock cases in which the court granted notice based upon allegations in the complaint and supporting affidavits, see *Muecke v. A-Reliable Auto Parts and Wreckers, Inc.*, 2002 WL 1359411 (N.D. Ill. June 21, 2002); *Ballaris v. Wacker Siltronic Corp.*, 2001 WL 1335809 (D. Or. Aug. 24, 2001); *Harper v. Lovett's*

3. **A Significant Number Of Opt-Ins Weighs In Favor Of Ordering Notice**

Courts evaluating whether the similarly situated standard has been met have relied partly upon the extent of opt-ins at the time the notice motion is decided. When a substantial number of employees have already opted-in, this will naturally lend credibility to the claim that a similarly situated group of potential plaintiffs exists. For example, in *De Ascencio v. Tyson Foods, Inc.*,⁶⁰ where the plaintiffs claimed a systematic practice of nonpayment of wages for certain work performed, the court directed the notice requested. In addition to relying upon the plaintiffs' declarations describing defendant's pattern and practice of failure to pay wages for work performed, the court also relied upon the fact that ninety-four employees had already filed opt-in forms.⁶¹

4. **Where Plaintiffs' Evidence Does Not Warrant Notice Of The Scope Sought, Courts Nevertheless Frequently Order Notice Of An Appropriate Scope**

Where plaintiffs do not provide sufficient evidentiary support (usually in the form of specific allegations and supporting declarations) to underwrite notice of the scope sought, courts generally do not deny notice altogether, but rather order notice of a scope justified by the allegations and the evidence. In *Bernard v. Household International, Inc.*,⁶² plaintiffs alleged that managers had violated the FLSA by failing to pay employees for all hours worked, including by deleting

Buffet, 185 F.R.D. 358 (M.D. Ala. 1999).

⁶⁰ 130 F. Supp. 2d 660 (E.D. Pa. 2001).

⁶¹ See also *Belbis v. County of Cook*, 2002 WL 31600048 (N.D. Ill. Nov. 18, 2002).

⁶² 231 F. Supp. 2d 433 (E.D. Va. 2002).

overtime from payroll records, and that this practice resulted from a company-wide program that gave managers incentives to limit payroll expenditures. All plaintiffs worked in the defendant's two Virginia offices, but notice was sought company-wide, where the employer's other eighteen offices were located in fourteen additional states. The court found that declarations from the Virginia plaintiffs stating that they "believed that," or that it was their "understanding that," the practice was company-wide, with no specific allegations regarding practices outside Virginia, were not sufficient to direct company-wide notice. However, the court further found, based upon the plaintiffs' common allegations that they were not paid for all hours worked in the Virginia facilities, that the plaintiffs were similarly situated with respect to all FLSA covered workers in the Virginia facilities.

In *Harper v. Lovett's Buffet, Inc.*,⁶³ the plaintiff employees of a restaurant chain alleged that they were required to work outside the parameters of their scheduled shift, and during their unpaid lunch period, without compensation, and that this practice of requiring off-the-clock work was fostered by a program of manager bonuses for keeping the restaurant's labor budget below some predetermined level. All the plaintiffs were employed in a single restaurant location, but they alleged, without providing any evidence, that the off-the-clock practices were company wide, and they sought notice throughout the southwest. The court found that the plaintiffs' declarations pertaining to practices in only

⁶³ 185 F.R.D. 358 (M.D. Ala. 1999).

one restaurant location was insufficient to warrant such broad notice. However, the court further found that the employees' common allegations that they were not paid for all hours worked in the particular restaurant in which they were employed was sufficient to judge them similarly situated with respect to all FLSA covered employees in that restaurant, and the court directed notice accordingly.

In *Camper v. Home Quality Management, Inc.*,⁶⁴ plaintiffs complained of working before their scheduled shift and during lunch without pay, and maintained that these FLSA violations occurred because of defendants' company-wide policy of not permitting plaintiffs to punch in before the start of their scheduled shift without management authorization, and of automatically deducting a half-hour per day for lunch regardless of whether an employee worked during their lunch. Plaintiffs worked in a single nursing home facility for a company that owned forty-seven such facilities, and they sought notice with respect to all forty-seven facilities. The only evidence before the court in support of plaintiffs' allegations was the deposition testimony of two plaintiffs regarding working off-the-clock in the facility in which they were employed, and two corroborating affidavits from two other employees in the same facility stating that they had seen the two plaintiffs work off-the-clock. The court denied company-wide notice, but ordered notice with respect to all FLSA covered employees in the plaintiffs' facility.

⁶⁴ 200 F.R.D. 516 (D. Md. 2000).

5. Stage-Two: Close of Discovery

At the close of discovery, upon a decertification motion by the defendant, the court will revisit the similarly situated issue using a more stringent standard based upon the evidence adduced during discovery. At this stage most courts have weighed the following broad considerations: (1) the extent of disparate versus common factual and employment settings of the individual plaintiffs; (2) the extent to which defenses available to the defendant apply to only individual plaintiffs as opposed to all opt-ins or substantial subsets of opt-ins; and (3) fairness, efficiency, and procedural considerations.⁶⁵ Some courts have proceeded to make the similarly situated determination after the close of discovery on an ad hoc basis, with out reference to these factors,⁶⁶ while others have suggested the consideration of additional factors.⁶⁷

⁶⁵ *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001); *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995); *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623 (D. Colo. 2002); *Moss v. Crawford & Co.*, 201 F.R.D. 398 (W.D. Pa. 2000); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).

⁶⁶ *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 209 (S.D.W.V. 1985); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982); *Plummer v. General Electric Co.*, 93 F.R.D. 311, 312 (E.D. Pa. 1981).

⁶⁷ *Wynn v. National Broadcasting Co., Inc.*, 234 F.Supp.2d 1067 (C.D. Cal. 2002).

VI. Off-The-Clock Class Actions Under State Law

Plaintiffs may also seek redress for unlawful off-the-clock practices by bringing a claim as a class action under state labor laws. Plaintiffs may gain a number of advantages by doing so.

A. Availability Of The Class Device As Opposed To Collective Action

In contrast to the FLSA's opt-in requirement, plaintiffs will often have the option to file an off-the-clock claim under state wage and hour law, or even common law, as a class action. Such state law off-the-clock class actions can be brought in federal court provided that there is either pendant or diversity jurisdiction, in which case they will be governed by Federal Rule of Civil Procedure 23. They can also be brought in state court, where they will be governed by the state's rules regarding class actions, which are often substantially parallel to Rule 23. As distinct from FLSA § 216(b) collective actions, class actions generally include as plaintiffs all individuals within some class definition except those that affirmatively "opt-out" of the case. Though a discussion of application of Rule 23 criteria (and analogous state class action rules) to off-the-clock claims is beyond the scope of this paper, we note that off-

the-clock classes have been regularly certified with respect to both state statutory and common law claims.⁶⁸

This, of course, is a tremendously important procedural advantage for plaintiffs. Practice has shown that even where a fairly small proportion of eligible employees opt-in to FLSA actions, an even smaller proportion opt-out of the *same* claims. It seems quite unlikely (if not downright inconceivable) that this is due to plaintiffs deciding to pursue their state but not their federal claims. Rather, this is likely the result of numerous other factors in combination, most notably: (1) a powerful reluctance to opt-in to a suit on the part of current employees due to fear of retaliation; (2) a low level of recognition and understanding among many employees of the content of the notices they receive and the requirements of opting-in; and (3) the fact that, particularly among lower wage workers, a high rate of residence change causes a large percentage of notices not to reach the intended recipients. Whatever the reason, the class device can massively increase the size of the class, and with it the value of an off-the-clock claim and the magnitude of potential liability faced by defendants.

⁶⁸ See, e.g., *Salvas et al. v. Wal-Mart Stores, Inc.*, Civ. No. 01-3645 (Mass. Superior Ct. Jan. 5, 2004); *Braun et al. v. Wal-Mart et al.*, Court File No. 19-CO-01-9790 (Minn. 1st Dist. Nov. 3, 2003); *Savaglio et al v. Wal-Mart Stores, Inc. et al.*, Case No. C-835687 (Ca. Superior Ct. Nov. 6, 2003). Plaintiffs have been successful in achieving certification with a variety of common law theories. For example, in *Braun*, the court certified a class-wide fraud claim based upon Wal-Mart's promise to provide employees with meal periods and breaks -- a policy characterized by Wal-Mart's President and CEO as "non-negotiable" and "the law" -- combined with an internal audit that demonstrated that the upper reaches of Wal-Mart management were aware of widespread violations of the policy and did nothing to put and end to them.

B. Possible Advantages Under State Labor Laws In Off-The-Clock Claims

Aside from the class devise, a state's substantive and procedural law may provide additional advantages. There is, of course, substantial variation across states' wage and hour laws, with some states having more generous rights than exist under the FLSA while other states entirely lack minimum wage and overtime protections. Practitioners contemplating bring an off-the-clock claim should bear in mind that some state laws confer important advantages over the FLSA by providing, for example: (1) coverage of employers too small to be covered by the FLSA;⁶⁹ (2) longer statutes of limitations;⁷⁰ (3) coverage of employees exempted from FLSA coverage;⁷¹ (4) more liberal rules governing what hours worked must be compensated at an overtime rate, such as hours worked in excess of eight per day, regardless of whether the employee exceeds forty in the week;⁷² and (5) available remedies.⁷³ While a comparison of state

⁶⁹ The FLSA coverage requires that an employer be engaged in interstate commerce with an annual gross volume of sales or business of \$ 500,000 or more. 29 U.S.C. §§ 203(b), (s). Some state wage and hour laws are less restricted in their coverage.

⁷⁰ For example, while the FLSA's limitations period is two years, or three years for "a cause of action arising out of a willful violation," 29 U.S.C. § 655(a), New York's labor law has a six year limitations period for wage and hour claims. New York Labor Law, Article 19, §§ 198(3), 663(3).

⁷¹ For example, while agriculture workers are exempted from overtime coverage by the Fair Labor Standards Act, 29 U.S.C. § 213(b)(13), they are covered by Connecticut's wage and hour laws. Connecticut General Statutes § 31-58 *et seq.*

⁷² For example, while the FLSA's overtime requirements apply only to hours worked in excess of forty in a week without reference to the number of hours worked in a particular day, 29 U.S.C. § 207, California labor law requires overtime compensation for all hours worked in excess of eight per day.

laws is beyond the scope of this paper, suffice it to say that practitioners should consult their state labor laws to determine whether state law dimensions of off-the-clock claims exist, on their facts, in addition to those available under the FLSA.

One potential feature of state law coverage is particularly important in off-the-clock claims. This concerns the FLSA's failure to cover off-the-clock straight time (as distinct from overtime) claims at any rate exceeding minimum wage. Generally, where an employee claims to have worked off-the-clock without compensation, he or she will have a claim only for weeks in which he or she worked more than forty hours. Thus, part-time employees who are scheduled to work significantly fewer than forty hours, and who regularly work off-the-clock, will frequently find themselves with no off-the-clock federal overtime claim. An employee scheduled to work, for example, thirty hours per week, would have to work 10 hours off-the-clock in a week before any *additional* off-the-clock hours (those exceeding 40) would be compensable as overtime and recoverable under the FLSA.

The FLSA's minimum wage provisions are, of course, still operative at fewer than 40 hours per week, but courts will only find a minimum wage violation under the FLSA if the employee's aggregate wages for the week,

California Labor Code § 510.

⁷³ For example, while the FLSA provides for liquidated damages an amount equal to unpaid wages, 29 U.S.C. § 216(b), Massachusetts labor law provides for liquidated damages in an amount equal to three times unpaid wages. Massachusetts General Laws, Chapter 151, § 1B.

divided by the total number of hours actually worked in the week (including off-the-clock time), yields an hourly wage below the statutory minimum.⁷⁴ Needless to say, only employees at the bottom of the wage scale will be likely to have off-the-clock minimum wage claims. However, in many states there are statutory and/or common law causes of action for nonpayment of wages under valid wage agreements that allow for recovery of off-the-clock hours worked at straight time. Such state laws can be an extremely important component of off-the-clock claims involving employees scheduled to work fewer than forty hours per week.

C. Concurrent FLSA Collective Actions And State Class Actions

Given that FLSA and state wage and hour claims can provide distinct advantages in the off-the-clock context, it is often desirable for off-the-clock plaintiffs to proceed with a FLSA collective action concurrently with a state class action. Courts have generally allowed such concurrent federal and state off-the-clock actions to proceed as a matter of course, without any discussion.

⁷⁴ *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1270 (4th Cir. 1996) (Employees "have been properly compensated under FLSA when, for any work period during which they have performed less than the applicable maximum hours standard, they have received at least the minimum wage ... for all hours worked." (quoting October 22, 1987 United States Department of Labor Wage & Hour Division Opinion Letter); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986) (provided that total weekly wage exceeds minimum wage for all hours worked, there has been no FLSA minimum wage violation); *Dove v. Coupe*, 750 F.2d 167, 171 (D.C. Cir. 1985) (same); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960) (same); *Birch v. Kim*, 977 F. Supp. 926, 931 (S.D. Ind. 1997) (same).

In *Belbis v. County of Cook*,⁷⁵ the plaintiff nurses alleged that the defendant had compelled them to work off-the-clock during pre and post-shift briefings, performing post-shift activities, and attending job-related training activities outside their scheduled shift. They brought both FLSA and state wage and hour claims. Early in the case, based principally upon the plaintiffs declarations and the fact that 350 plaintiffs had already opted in to the FLSA claim, the court granted both notice to the FLSA class and certified a Rule 23 class for the state claim on a single motion by the plaintiffs. In *Chavez v. IBP, Inc.*,⁷⁶ workers in a meat packing plant filed a joint FLSA and state law claim alleging that they were required to perform pre and post-shift off-the-clock work, and were not paid for meal periods of less than 30 minutes. The court initially granted plaintiffs' notice motion under the FLSA. After approximately 1100 workers had opted-in, and apparently without substantial discovery having yet been conducted, the court certified a Rule 23 class of approximately 3,900 people on the same claims.

In a number of cases, defendants have argued that the mere existence of the FLSA collective action made it impossible for the plaintiff to satisfy the Rule 23 requirements to proceed as a class. These efforts by defendants to evade being held to account under both federal and state law concurrently have been largely rejected by courts.

⁷⁵ 2002 WL 31600048 (N.D. Ill. Nov. 18, 2002).

⁷⁶ 2002 WL 31662302 (E.D.Wash. Oct. 28, 2002).

In *Ladegaard v. Hard Rock Concrete Cutters, Inc.*,⁷⁷ the defendant argued that off-the-clock FLSA and state class action claims cannot be maintained concurrently because the existence of the FLSA case undercuts the plaintiffs' ability to satisfy the numerosity requirement necessary to achieve class certification. The defendant maintained that joinder of all interested parties was, in fact, readily practicable without the class device because they could easily return the opt-in card in the FLSA case and seek redress for both their federal and state claims in federal court. In *Ladegaard*, the plaintiffs sought to recover for alleged off-the-clock hours during certain work-related travel time and while attending safety meetings. In response to the defendant's numerosity challenge to class certification, the court stressed that, realistically, joinder under the FLSA is actually less effective than under the Rule 23 class device due to employee fear of retaliation for affirmatively opting-in. The court stated:

The possibility of retaliation is . . . a factor when considering whether joinder is impracticable. Plaintiff has asserted that current employees may feel inhibited to sue making joinder unlikely. Although there is only plaintiff's suggestion of intimidation in this instance, the nature of the economic dependency involved in the employment relationship is inherently inhibiting. Further, the court does not agree with defendants' assertion that the availability of the FLSA action cures these problems.⁷⁸

The defendants made a similar argument in *O'Brien v. Encotech Construction Servs., Inc.*,⁷⁹ also an off-the-clock case in which the plaintiffs alleged that their employer did not pay them for all hours worked. There, the defendant

⁷⁷ 2000 WL 1774091 (N.D. Ill. Dec.1, 2000).

⁷⁸ *Id.* at *4.

⁷⁹ 203 F.R.D. 346 (N.D. Ill. 2001).

argued that the existence of the FLSA claim undercut the plaintiffs' ability to satisfy the superiority requirement since "if class certification were denied, plaintiffs would be given the easy-to-exercise choice of filing a claim with the FLSA collective action." The court rejected this argument, stressing that "an FLSA action seeks to address violations of federally-conferred rights, while the putative class action . . . seeks to address violations of state-conferred rights." The court concluded that full regard for both state and federal rights, combined with the dictates of judicial equity and efficiency, required allowing the two substantially overlapping but nevertheless distinct federal and state cases to proceed concurrently as an FLSA collective action and a state class action in a single forum.⁸⁰ The court also brushed aside the defendant's contention that plaintiffs would be unduly confused by a class action notice indicating that plaintiffs are members of the action by default unless they opt-out, along with an FLSA collective action notice indicating that workers are excluded by default unless they affirmatively opt-in. The court suggested that this concern could be addressed through careful drafting of the notices.

⁸⁰ The *O'Brien* court relied on *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 89 (S.D.N.Y. May 24, 2001), in support of this conclusion. In *Ansoumana* the court stated, when certifying a state class action wage and hour claim in an case with a concurrent FLSA claim, that "[t]hese common questions [in the state law class action] are best litigated in a single forum, and the proceedings already undertaken cause any separate actions in this and other forums to be wasteful and inefficient.").