

# Case Assessment Checklist (FLSA Collective and Rule 23 Class Action) (Employee)

A Lexis Practice Advisor® Practice Note by Melissa Lardo Stewart, Outten & Golden LLP



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This checklist is a guide for a plaintiff/employee-side attorney who is assessing a potential wage and hour class or collective action case. Litigating a class, collective, or hybrid wage case is a resource-intensive endeavor, often lasting several years. It is important to vet the claims and the class issues carefully before filing and investing the time and resources required to see this type of complex litigation through to completion.

## Identify a Consistent Policy or Practice

Class and collective action devices are designed to allow a large number of employees to challenge wage violations resulting from a broadly applicable policy, practice, or pattern of conduct. Once you identify the policy or practice, the next step is to determine its scope and assess the consistency of its application within the group. Often the goal is to file a case on behalf of the largest homogenous group to whom the policy or practice applies.

In evaluating the policy or practice, consider the following:

- o Confirm that employees in the potential group are similar in terms of:
    - Pay
    - Time-keeping practices
    - Duties
    - Hours worked –and/or–
    - Any other factual questions relevant to the claims
  - o Gather this information from:
    - Your clients –and–
    - Publicly available research sources, including prior court cases against the same company, company websites, and/or company job descriptions
- **When did the policy or practice occur?**
  - o Assess when the company instituted the policy or began the practice
  - o Confirm that the policy or practice continued during a substantial portion of the relevant statutory period –and–
  - o Determine whether the potential violation is ongoing
- **What is the geographic scope of the violation?** Variations among class members with respect to the violation may make it more difficult to certify a class or proceeding collectively. Determine whether the violation is consistent across:
  - o Supervisors
  - o Offices/plants/locations
  - o Cities
  - o States
  - o Corporate regions
  - o Nationwide
- **Which employees are impacted?** Evaluate which groups of employees are subject to the policy or practice. A class action definition tailored to a particular job title or a similar set of job titles is more likely to be certified than a class covering many different types and levels of employees (unless some other glue holds the class together).

- **What is the total class size?** Based on the above considerations (including applicable job title(s), the relevant period, and the geographic scope of the violation), estimate the potential size of the class or collective. Although there is no minimum required number of employees for a collective action, and a class action is presumed to be sufficiently numerous where there are as few as 40 class members, a larger group is generally more worth the resource investment that class or collective action litigation demands.

To evaluate the potential class size:

- o Make a set of educated assumptions based on:
  - Information from your client(s)
  - The company website –and–
  - Research into other publicly available sources
- o Determine:
  - How many company offices/plants/locations are at issue
  - The estimated number of full-time-equivalent employees in the relevant job title(s) at each office/plant/location –and–
  - How often employees in the relevant job title(s) turn over
- **What type of discovery will prove the class or collective claims?** Class and collective action discovery can be resource intensive:
  - o Consider what discovery will be needed to prove the claims, and what discovery the company will demand to establish its defenses
  - o Consider also that:
    - The more the claims hinge on information kept at the corporate level, such as corporate witnesses, handbooks, policies, or centrally-maintained databases (such as time-keeping records), the more you can take advantage of the class or collective action mechanisms' economies of scale to streamline discovery efforts and avoid producing resource-intensive individualized discovery on behalf of the members of the collective.
    - The more the claims hinge on decentralized sources of information, such as eye witness accounts or one-off emails among class members and their supervisors, the more resources you'll need to invest in seeking and producing discovery.

## Gather Intelligence about the Employer

Before you file, conduct due diligence on the employer:

- **Can the employer pay a judgment?** Investigate the company's financial standing. You don't want to win a judgment or settlement only to find that the company cannot pay.
- **Is the violation a recurring one?** Find out whether the company's policy or practice has been challenged before:
  - o Research past cases against the company. If a prior case was resolved, determine whether the temporal scope of any judgment or release limits your potential class period.
  - o Submit Freedom of Information Act (5 U.S.C. § 552) (FOIA) requests to the U.S. Department of Labor and any applicable state departments of labor (note that many states have their own versions of FOIA).

## Vet the Named Plaintiff(s)

Select named plaintiffs carefully. The named plaintiff is the face of the lawsuit. As counsel for the class or collective, your relationship with the named plaintiff will be longstanding. Conduct numerous in-depth interviews with the potential named plaintiff as well as independent research and vetting to confirm that he or she is an appropriate representative for the class or collective:

- **Is the named plaintiff typical of the members of the class?** The named plaintiff should be similarly situated to the other members of the class and collective. His or her experiences with respect to the violation should not be particularly unique or atypical. The policy or practice that applied to the class or collective should have applied with equal force to him or her.
- **Does the named plaintiff understand the duties and responsibilities of representing the class?** Prepare your client(s) for the duties and responsibilities that are expected of a named plaintiff, including:
  - o Representing the interests of the class members, and considering the class and collective members' interests as if they were his or her own.
  - o Participating actively in the lawsuit, such as by:
    - Providing counsel with the facts, information, and documents
    - Testifying at a deposition and trial

- Answering written interrogatories –and–
- Staying generally aware of the status and progress of the lawsuit

- **Might prior bankruptcies or convictions jeopardize the named plaintiff's ability to serve as a representative?**

These are sensitive topics and your client may not have all the information at his or her fingertips, so consider conducting public records searches to supplement your client's recollection regarding the details of any bankruptcies or convictions:

- o Has the named plaintiff filed for bankruptcy in the recent past? If he or she knew about the wage and hour claims at the time of the filing for bankruptcy and failed to disclose the claims in the bankruptcy filing, the defendant-company may claim that he or she is judicially estopped from asserting them.
- o Has the named plaintiff been convicted of a crime that would allow the defendant-company to question his or her credibility under Fed. R. Evid. 609?
- **Do you need more than one named plaintiff?** Depending on the nature of the legal claims and any potential sub-variations within the class, consider naming more than one plaintiff or class representative in the complaint:
  - o **Are there violations of multiple state laws?** If so, allege a separate class or subclass for each state law. Each class or subclass will require at least one class representative who worked in that state during the relevant statutory period.
  - o **Does the violation impact employees in various job titles?** Although not always necessary, consider adding at least one named plaintiff who worked in each of the impacted job titles.

## Evaluate Applicable State Laws

If there are violations of federal wage laws, consider alleging violations of analogous (or more protective) state laws too. Alternatively, there may be strategic reasons to bring state law claims in lieu of federal claims. Consider your options carefully:

- **Research applicable state laws.** Consider:
  - o The substantive protections afforded by state law
  - o The length of the applicable state statutes of limitations –and–
  - o Penalties available under state law

- **Consider the class claim mechanisms.**

- o The mechanism for grouping federal wage claims is the FLSA's collective action, 29 U.S.C. § 216(b), which requires employees to affirmatively opt into a case in order to be included.
- o In contrast, plaintiffs can pursue state wage claims on behalf of similarly situated co-workers under the class action mechanism, Fed. R. Civ. P. 23, which includes all except those who affirmatively opt out.
- o Plaintiffs often bring hybrid wage actions, alleging a collective action and one or more state law class.

## Research Arbitration Issues

Many employers require new or current employees to agree to arbitration and waive class claims in arbitration. Research:

- Whether this employer has an arbitration regime
- When the employer instituted the regime
- Which representatives and members of a class or collective may have signed such agreements –and/or–
- The terms of the employer's standard arbitration agreement (if you are able to obtain a copy in the investigative stage)

## Evaluate Venue Options

- **Research the local bench.** In selecting a venue, read local wage and hour and class/collective decisions to get a sense of how the local judges might view the merits and class issues applicable to your client's claims, and any arbitration issues.
- **Engage local counsel.** Even if you or another lawyer in your firm is admitted to practice in the selected jurisdiction, if it is not a venue in which you and your colleagues regularly practice, consider engaging local counsel who is familiar with the judges and local practices.

## Calculate Potential Damages

- Calculate the estimated per-person damages, and the estimated damages on behalf of the potential class or collective as a whole (based on the estimated class size).
- Calculate the potential risks of proving each aspect of the class claim(s), including merits and damages, and the odds of maintaining a certified class and/or collective through trial.
- Consider how a court may evaluate an eventual application for attorney's fees, including:

- o The common fund method (awarding plaintiffs' counsel a certain percentage of the settlement or judgment, sometimes subject to a lodestar "cross-check") –or–
- o The lodestar method (awarding plaintiffs' counsel's customary hourly rate multiplied by reasonable hours worked on the case).
- Estimate the likely out-of-pocket expenses that will be needed to prosecute the case, including deposition costs, expert costs, travel costs, etc.

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Melissa Lardo Stewart is a partner at Outten & Golden LLP in New York, where she represents employees in class action wage and discrimination cases. She has represented workers across many industries and job functions, including retail, sales, food service, hospitality, financial services, accounting, and telecommunications. She has prosecuted wage theft claims on behalf of workers who were required to work off-the-clock, subjected to time-shaving, wrongly classified as exempt from overtime protections, and improperly treated as independent contractors. Ms. Stewart also currently represents employees and applicants in class and collective action gender and age discrimination cases.

Before Ms. Stewart joined Outten & Golden LLP in November 2013, she clerked for the Honorable James Orenstein in the Eastern District of New York and the Honorable Dickinson R. Debevoise in the District of New Jersey, and represented workers and labor unions as an associate at Woodley & McGillivray in Washington, D.C. She graduated magna cum laude from Fordham University School of Law in 2009.

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