This practice note identifies key considerations when litigating a hybrid Fair Labor Standards Act (FLSA) and Federal Rule of Civil Procedure 23 (Rule 23) wage and hour class action. It provides an overview of the procedural steps and legal standards involved in litigating a hybrid action, discusses strategies to consider at each stage of the case, and offers practical guidance on litigating such claims.

Specifically, this practice note discusses:

- What Is a Hybrid Action?
- Procedural and Legal Differences between FLSA Collective Actions and Rule 23 Class Actions in Hybrid Cases
- Advantages and Disadvantages of a Hybrid Action for Employers
- Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action

For additional information on class and collective actions, see the forms and guidance in the Employment Litigation—Class and Collective Actions subtopic.

**WHAT IS A HYBRID ACTION?**

A hybrid class and collective action (or simply “hybrid action”) refers to a lawsuit that a plaintiff brings on behalf of a group of employees that asserts claims under both federal and state wage and hour laws. Since plaintiffs often rely on similar factual allegations to support both their federal and state law wage and hour claims, it is common for them to assert both types of claims in a single hybrid action.

Because federal and state law claims are subject to distinct procedural and legal requirements, plaintiffs who initiate hybrid actions must independently satisfy the requirements under both frameworks to successfully assert their claims on a representative basis. As discussed in more detail below, FLSA’s collective action mechanism governs the federal claims, while the class action mechanism of Federal Rule of Civil Procedure 23 governs state law claims.

**PROCEDURAL AND LEGAL DIFFERENCES BETWEEN FLSA COLLECTIVE ACTIONS AND RULE 23 CLASS ACTIONS IN HYBRID CASES**

Review this section to familiarize yourself with the unique procedural and legal aspects of hybrid actions and the ways in which the FLSA and Rule 23 claims differ. For more information on wage and hour class and collective action procedures and legal standards, see Wages & Hours: Law and Practice § II.
Class and Collective Certification

When litigating a hybrid action, you should understand the contrasting certification procedures for FLSA and state law claims and how they interact, as discussed below.

FLSA

District courts typically apply a two-step analysis to determine whether an action should be certified as a collective action under the FLSA. At the first step—conditional certification—courts typically apply a fairly lenient standard to the question of whether plaintiffs and their proposed class are “similarly situated.” At the second step, in which a defendant typically moves for decertification of the conditionally certified class following extensive discovery, the court applies a more exacting standard to the same question. See Roberts v. TJX Cos., Inc., 2017 U.S. Dist. LEXIS 49174, at *8-12 (D. Mass. Mar. 31, 2017); Ambrosia v. Cogent Commc’n’s, Inc., 312 F.R.D. 544, 549-50 (N.D. Cal. 2016).

FLSA Conditional Certification

An employee may bring an action against an employer on behalf of him or herself and any other employees who are “similarly situated.” 29 U.S.C. § 216(b). However, the statute does not define the phrase “similarly situated.” Courts have generally found that plaintiffs may meet their burden at the conditional certification stage by making an evidentiary showing that the putative class members were together the victims of a single decision, policy, or plan that violated the law. Roberts, 2017 U.S. Dist. LEXIS 49174, at *11-12. However, because plaintiffs generally move for conditional certification before much discovery has occurred, the court has limited evidence to review and generally applies a fairly lenient certification standard. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995).

The precise standard for conditional certification varies from circuit to circuit. For example, in the Eleventh Circuit, not only must a plaintiff demonstrate that the proposed class is similarly situated to the named plaintiff, but a plaintiff must also show that proposed class members want to join the lawsuit. See White v. SLM Staffing LLC, 2016 U.S. Dist. LEXIS 109089, at *4-5 (M.D. Fla. Aug. 17, 2016). Unsupported assertions by the plaintiff’s counsel are insufficient to meet this standard. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008).

For strategies on how to oppose conditional certification in a hybrid action, see the section “Step Three: Opposing the Motion for Conditional Certification” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.

FLSA Decertification

If the court conditionally certifies the collective, then, typically, after extensive discovery, the defendant moves for decertification. At this stage, the named plaintiffs have the burden of proving by a preponderance of the evidence that they are similarly situated to the members of the opt-in collective (i.e., the additional plaintiffs who “opted in” to the lawsuit by signing and filing an opt-in consent form to participate—see section entitled “Class Notice,” below). Courts thus apply a far more stringent “similarly situated” standard than is applied at the first stage. See, e.g., Beauperthuy v. 24 Hour Fitness USA, Inc., 772 F. Supp. 2d 1111, 1118 (N.D. Cal. 2011) (“in order to overcome a motion to decertify a conditionally certified class, it is plaintiffs’ burden to provide substantial evidence to demonstrate that they are similarly situated”). Courts consider a variety of factors, including whether plaintiffs can demonstrate the existence of common improper practices that apply to all opt-in class members, whether defenses to the opt-ins’ claims are individualized, and fairness and procedural considerations. See, e.g., Roberts, 2017 U.S. Dist. LEXIS 49174, at *10; Hernandez v. Fresh Diet, Inc., 2014 U.S. Dist. LEXIS 139069, at *3 (S.D.N.Y. Sept. 29, 2014). If the court decertifies the opt-in class, the opt-in plaintiffs will be dismissed without prejudice, leaving only the named plaintiffs to proceed with their individual claims. See, e.g., LaFleur v. Dollar Tree Stores, Inc., 30 F. Supp. 3d 463, 468 (E.D. Va. 2014).
For strategies on bringing a decertification motion in a hybrid action, see the section “Step Six: Briefing FLSA Decertification and Rule 23 Certification” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.

**Rule 23**

As discussed below, to obtain class certification under Rule 23, plaintiffs must satisfy all four requirements of Rule 23(a) and at least one of the three prongs of Rule 23(b). In contrast to an FLSA collective action claim, in which the plaintiff files a conditional certification motion early in the case and a decertification motion after the completion of extensive discovery, a Rule 23 motion for class certification is typically filed only after the parties complete extensive discovery.

For strategies on opposing a Rule 23 class certification motion in a hybrid action, see the section “Step Six: Briefing FLSA Decertification and Rule 23 Certification” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.

**Rule 23(a) Certification Requirements**

Under Rule 23(a), plaintiffs must show that their putative class meets the requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. See *Fed. R. Civ. P. 23(a)*.

Rule 23(a)(1) provides that the class must be “so numerous that joinder of all members is impracticable.” In analyzing numerosity, the number of members in the proposed class is key, but courts generally do not focus on sheer numbers alone. Instead, courts also consider factors such as “the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff’s claim.” *Teta v. Chow* (in re TWL Corp.), 712 F.3d 886, 894 (5th Cir. 2013). Nevertheless, numerosity is generally presumed where a putative class has 40 or more members. *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011).

The Rule 23(a)(2) commonality requirement is met if plaintiffs’ and putative class members’ claims share a common question of law or of fact. *Shahriar*, 659 F.3d at 252. To demonstrate commonality, a plaintiff must do more than simply articulate questions of law and fact common to all class members. Instead, plaintiffs must prove that such common questions will yield common answers across all class members. Plaintiffs must “demonstrate that the class members have suffered the same injury,” because showing “merely that they have all suffered a violation of the same provisions of the law” is insufficient. *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 350 (2011). Plaintiffs’ claims must also depend upon a “common contention” that is capable of classwide resolution—meaning that determining its truth or falsity will “resolve an issue that is central to the validity of each one of the claims in one stroke.” Id.

Under Rule 23(a)(3), the named plaintiff must show that his or her claims are typical of the class’ claims. *Zuniga v. Bernalillo County*, 319 F.R.D. 640, 664 (D.N.M. 2016). That is, a class representative “must possess the same interest and suffer the same injury as the class members in order to be typical.” *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1275 (11th Cir. 2009). In contrast to commonality, which involves an analysis of the group characteristics of the class as a whole, the typicality analysis examines the individual characteristics of the named plaintiff in relation to the class. Id.

The final requirement, adequacy under Rule 23(a)(4), “comprises two parts: the adequacy of the named plaintiff’s counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members.” *Balderrama-Baca v. Clarence Davids and Co.*, 318 F.R.D. 603, 612 (N.D. Ill. 2017). “A class is not adequately represented if class members have antagonistic or conflicting claims.” Id.
Rule 23(b) Certification Requirements
If all of the Rule 23(a) requirements are satisfied, then plaintiffs must show that the putative class meets one of the prongs of Rule 23(b), of which Rule 23(b)(3) – predominance and superiority – is the most common in the hybrid action. Predominance is satisfied when “common questions represent a significant aspect of a case and can be resolved for all class members in a single adjudication.” Costello v. BeavEx, Inc., 810 F.3d 1045, 1059 (7th Cir. 2016); see also Fed. R. Civ. P. 23(b)(3)(A)-(D). Superiority exists where “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

Rule 23 Decertification
A Rule 23 class may be decertified at any time. Thus, if class certification is granted, defendants can subsequently file a motion for decertification. See Fed. R. Civ. P. 23; see also Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation.”); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983) (“Under Rule 23 … [t]he district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts”).

Hybrid Class and Collective Certification and Decertification
The certification process in a hybrid action is unique because, typically, it occurs in stages. Plaintiffs typically move for conditional certification of an FLSA collective early in a case. In many instances, given the relatively lenient standard, plaintiffs move for conditional certification prior to the start of discovery. For their part, defendants should generally seek permission from the court to take some discovery prior to opposing a conditional certification motion. This allows defendants time to investigate and test the claims of the individual plaintiffs as well as generate evidence that can be used to oppose conditional certification. That said, there are situations in which an employer may wish to proceed with conditional certification without discovery, such as where the defendant is in position to argue that conditional certification should be denied because plaintiff relies on too thin an evidentiary record to support conditional certification.

By contrast, FLSA decertification motions and Rule 23 motions for class certification typically occur after extensive discovery is completed. Therefore, in many instances, such motions are briefed and ultimately decided by the court simultaneously.

For more information on hybrid class and collective certification and decertification, including discovery and briefing strategies, see Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action below.

Class Notice
Once a court conditionally certifies an FLSA collective or certifies a Rule 23 class, notice is issued to the class or the putative collective action members. The FLSA requires plaintiffs to “opt in” to the lawsuit by signing and filing an opt-in consent form to participate in a lawsuit. By contrast, in a Rule 23 class action, after a class is certified, class members are given an opportunity to “opt out” of the certified class. In a hybrid action, the timing and content of class notice can vary. FLSA opt-in notice typically issues early in the case, before extensive discovery is taken. The putative class members who submit opt-in forms become members of the FLSA collective and “party plaintiffs” under 29 U.S.C. § 216(b). By contrast, notice in a Rule 23 action typically issues towards the latter stages of the case and after fulsome discovery.

For strategies on obtaining a favorable class notice in a hybrid action, see the section “Step Four: Playing Defense with the Hybrid Class Notice” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.
FLSA Opt-In Notice

The parties must provide employees with written notice of the opportunity to opt in to an FLSA action and become a party plaintiff. See 29 U.S.C. § 216(b). The opt-in notice must be court approved. See, e.g., White v. Integrated Elec. Techs., Inc., 2013 U.S. Dist. LEXIS 83298, at *37 (E.D. La. June 13, 2013). Courts generally prefer that the parties meet and confer regarding the content of the notice before bringing the notice to the court. Id. (finding that the parties “should meet and confer regarding the form of the notice and consent that will be distributed to class members” before submitting the notice to the court for approval).

The FLSA does not lay out any specific requirements for the content of the opt-in notice. Earle v. Convergent Outsourcing, Inc., 2013 U.S. Dist. LEXIS 126662, at *16 (M.D. Ala. Sep. 5, 2013) (“There is no binding statutory or case law defining what a collective action notice under § 216(b) must include or how involved the court must be in effecting notice.”). Instead, content is left up to the broad discretion of district courts. Id.

Commonly included sections are:

- The nature of the action
- The proposed class definition
- The legal effects of opting-in
- Instructions on how to join the lawsuit
- The deadline for joining the lawsuit
- A statement on the court’s neutrality and that the court has made no decision on the merits
- A statement on the voluntary nature of the lawsuit
- Attorney contact information
- A statement informing the class members that they can retain an attorney of their choosing
- A statement informing the class members that, if they decline to join the case, they will not be able to participate in any judgment or settlement

The notice should also include a consent form that potential collective action members can sign and return to plaintiffs’ attorneys to file with the court. Courts typically establish a deadline in the scheduling order for submitting opt-in consents.

For more information on collective action notice requirements, see Notice Requirements for FLSA Section 216(b) Collective Actions. For a sample collective action notice, see Employment Litigation § 11.06.

Rule 23 Opt-Out Notice

In contrast to the FLSA, Rule 23 does not require consent to become a class member. If the court finds that the named plaintiffs prove all of the requisite Rule 23 requirements, then all individuals who fall within the definition of the certified class automatically become class members. Only after a class is certified will Rule 23 class members receive notice of the suit and an opportunity to opt out of the class. Any class member who does not opt out will be bound by any subsequent judgment—favorable or not.

Like the FLSA opt-in notice, the Rule 23 opt-out notice must also be court approved. Aldapa v. Fowler Packing Co., 2016 U.S. Dist. LEXIS 35520, at *20 (E.D. Cal. Mar. 18, 2016). For certified 23(b)(3) classes (the most
common type of class in hybrid actions), the parties must provide “the best notice that is practicable under the circumstances” to all class members who can be identified through “reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Notice to 23(b)(3) classes must clearly and concisely state in plain, easily understood language:

- The nature of the action
- The definition of the class certified
- The class claims, issues, or defenses
- That a class member may enter an appearance through an attorney if the member so desires
- That the court will exclude from the class any member who requests exclusion
- The time and manner for requesting exclusion
- The binding effect of a class judgment on members under Rule 23(c)(3)

Id.

For more information on wage and hour class action notice requirements, see Understanding Rule 23 Class Action Notice Requirements.

**Notices in Hybrid Actions**

The timing and content of notices in a hybrid action varies. Most often, two separate notices issue. Initially, an FLSA opt-in notice issues to the putative collective action members early in the case, shortly after the court grants conditional certification. This notice generally includes the elements discussed above, but it is limited to the FLSA opt-ins and usually does not include a reference to state law claims. A separate notice subsequently issues to Rule 23 class members—after the parties complete extensive discovery and if the court grants Rule 23 certification—informing them of their right to opt out of the state law class(es).

In some cases, a single notice issues to class members simultaneously informing them of their right to opt-in to the FLSA claims and opt-out of Rule 23 state law claims. This is a relatively unusual circumstance, however, as it requires plaintiffs to move for FLSA conditional certification simultaneously with a motion for Rule 23 class certification. This is not advisable from the employer’s perspective, as courts may inadvertently conflate the more lenient conditional certification standard with the stringent Rule 23 standard. Moreover, an all-in-one hybrid notice has the potential to confuse class members.

**Settlement Process**

Because employers facing hybrid actions generally want to resolve all claims in a single settlement, you should be aware of the disparate procedures for settling federal and state wage and hour claims and the process for settling all claims simultaneously. For strategies on settling a hybrid action, see the section “Step Nine: Settling Hybrid Actions” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.

**FLSA Court Approval**

Most jurisdictions require court approval of an FLSA settlement. See Cheeks v. Freeport Pancake House, Inc., 796 F. 3d 199, 206–07 (2d Cir. 2015) (holding that releases of FLSA claims in private settlements are only enforceable with DOL or court approval); but see Bodle v. TXL Mortg. Corp., 788 F.3d 159, 162–65 (5th Cir. 2015) (finding that private settlements of FLSA claims without court approval are enforceable when the settlement resolves a bona fide dispute about compensation owed or hours worked). In deciding whether to approve a
Hybrid Wage and Hour Section 216(b) FLSA Collective and Rule 23 Class Actions

settlement, courts assess whether the settlement is “fair and reasonable” and the “product of a bona fide dispute over the application of the FLSA's provisions, rather than a waiver of statutory rights.” Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982). Once the court approves the settlement, all opt-in plaintiffs are bound by it. 29 U.S.C. § 216(b).

For more information on settling FLSA wage and hour collective actions, see Settlement Agreement (FLSA Section 216(b) Wage and Hour Collective Action).

Rule 23 Fairness Hearing
In Rule 23 actions, the court holds a fairness hearing to determine whether the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). If the class is a Rule 23(b)(3) class, class members can choose to opt out of the settlement at this point. Fed. R. Civ. P. 23(e)(4). At the fairness hearing, courts consider various factors, including:

- The complexity, expense, and likely duration of the litigation
- The reaction of the class to the settlement
- The stage of the proceedings and the amount of discovery completed
- The risks of establishing liability
- The risks of establishing damages
- The risks of maintaining the class action through the trial
- The ability of the defendants to withstand a greater judgment
- The range of reasonableness of the settlement fund in light of the best possible recovery
- The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

Different circuits may employ varying combinations of these factors, but these guidelines are all worth considering during the settlement process.

For more information on settling Rule 23 wage and hour class actions, see Settling Rule 23 Wage and Hour Class Actions.

Settling Hybrid Actions
Generally, a hybrid settlement is advantageous for the employer as it allows the employer to obtain a maximum release of claims covering the largest number of employees. That is, the employer can obtain releases of all federal and state law claims of all putative Rule 23 class and FLSA collective action members in a single resolution.

As discussed above, court approval is required for settling a Rule 23 class action and, in most jurisdictions, for settling an FLSA collective action as well. Thus, while hybrid action settlements are often complex and can take different forms, the most common and advisable approach is for the parties to move jointly for (i) preliminary approval of the FLSA component of the settlement, (ii) preliminary approval of the state law component of the
settlement, (iii) conditional certification of the FLSA class (if it has not already been conditionally certified), and (iv) preliminary Rule 23 certification of the state law class (if it has not already been certified). After the Court grants preliminary approval of the settlement, the parties issue notice to class members regarding the settlement (for more on this notice, see the following section). After the completion of the notice period (during which the putative class members may submit forms opting in to or out of the settlement), the court will hold the fairness hearing required by Rule 23. Generally, at the fairness hearing, the court will also consider whether to approve the FLSA component of the settlement. Members of the putative Rule 23 class must also be given the opportunity to object to the settlement, including by appearing at the fairness hearing to do so. Rule 23 putative class members must also be given the opportunity to opt out of the settlement.

The Settlement Notice in a Hybrid Action
The settlement notice in a hybrid action serves a dual purpose: it must permit FLSA putative collective action members to opt in to the settlement while allowing Rule 23 class action members to opt out of the settlement. (Note, however, that depending upon the structure of the settlement, there may be situations in which individuals who opted into the case prior to the settlement receive a notice that is different than the notice issued to putative FLSA class members, or no notice at all.) Additionally, if there are individuals who fall within the Rule 23 class but not the FLSA class, or vice versa, the parties may need to draft multiple notices to cover these scenarios.

The hybrid notice must pass muster under both Rule 23 and the FLSA. For information on settlement notices in class and collective actions, see Settling Rule 23 Wage and Hour Class Actions — Step 7: The Notice and Claims Process and Settlements for FLSA Section 216(b) Wage and Hour Collective Actions — Notice Requirements

The parties in a hybrid action may append an opt-in form to the Rule 23 class notice that contains the necessary FLSA language to satisfy both sets of requirements. See, e.g., Lizondro-Garcia v. Kefi LLC, 300 F.R.D. 169, 180-81 (S.D.N.Y. 2014).

The parties must submit this notice to the court when they request preliminary approval of the settlement. After the Court grants preliminary approval of the settlement (but before it grants final approval of the settlement), notice issues to all putative class and collective action members.

ADVANTAGES AND DISADVANTAGES OF A HYBRID ACTION FOR EMPLOYERS

Advantages
While defendant employers almost never favor facing a hybrid action, they may enjoy the following advantages from the consolidated format:

● Employers defending against hybrid actions have the convenience of litigating and the opportunity to dispense of related federal and state claims in one consolidated action.
● Plaintiffs face greater hurdles to certification in a hybrid action than in a pure FLSA collective actions because state law opt-out classes must meet stricter certification requirements than FLSA opt-in classes. See “Class and Collective Certification” in Procedural and Legal Differences between FLSA Collective Actions and Rule 23 Class Actions in Hybrid Cases.
● Employers can use phased discovery to test the claims of individual plaintiffs earlier in the action and more cheaply than in a standalone Rule 23 action. Specifically, employers can seek information pertaining to the named plaintiffs’ individual claims as part of the limited first phase of discovery taken prior to conditional certification. The employer can then file early summary judgment motions on those claims, thereby short circuiting burdensome and costly class discovery if successful.
The court will consider strong employer-friendly evidence at the decertification briefing stage that would not be available in an FLSA collective action. (See “Step Five: Maximizing Opportunities for Decertification in Second Phase Discovery” in Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action.

Disadvantages
On the other hand, hybrid actions carry numerous disadvantages for defendant employers. By bringing hybrid actions, plaintiffs get the benefits inherent in both FLSA and state law actions. Including state law claims as opposed to merely FLSA claims provides the following advantages to plaintiffs (and disadvantages to defendants):

- Class sizes are larger than in standalone FLSA collective actions because all members of a Rule 23 class will be pulled into the lawsuit (so long as class certification is granted). By contrast, if an action is filed solely as an FLSA collective action, classes are typically smaller because each class member must affirmatively opt-in to the case by filing a consent form with the court. See, e.g., Ellis v. Edward D. Jones & Co., L.P., 527 F. Supp. 2d 439, 445 (W.D. Pa. 2007) (“[F]or similar causes of action, Rule 23 classes are much larger than the corresponding § 216(b) collective action groups; they may even be exponentially greater and number in the millions.’”). On average, 15 to 30 percent of people who receive opt-in notice for a collective action typically opt in, as compared to a mere fraction of a percent of people who opt out of class actions. Id. at 444.
- Additional state law causes of action and additional remedies—beyond those that the FLSA offers—are available. See, e.g., Rieve v. Coventry Health Care, Inc., 870 F. Supp. 2d 856, 859 (C.D. Cal. 2012) (plaintiff in hybrid action included California state law claims for overtime wages and failure to provide meal and rest breaks); Pridemore v. Jiffy Mini-Marts, Inc., 2008 U.S. Dist. LEXIS 95760, at *2 (S.D. Ind. Nov. 24, 2008) (plaintiff in hybrid action included various Indiana state law wage claims). These additional remedies often drive up the potential liability for employers significantly.
- States may have longer statute of limitations periods for state wage law claims. See, e.g., N.Y. Lab. Law § 198(3) (six years); Ky. Rev. Stat. Ann. (five years); N.J.S.A. 34:11-56a25.1; (two years for unpaid minimum wages and overtime, but six years for claims under the NJ Wage Payment Act).
- States may have standards that are more favorable to employees than the FLSA. For example, in Ramirez v. Yosemite Water Co., the court held that unlike the FLSA, California’s “outside sales” exemption does not treat activities “incidental to sales” as exempt activities. 20 Cal. 4th 785, 797 (Cal. 1999). Accordingly, more outside sales employees are overtime-eligible under California than federal law.
- The longer, more drawn-out discovery period in hybrid actions raises the employer’s litigation costs.

Plaintiffs also benefit from including FLSA claims alongside state law claims for the following reasons:

- The FLSA allows plaintiffs to provide notice to putative collective action members during the conditional certification stage, which is much earlier than the notice stage in Rule 23 class actions. Early notice can identify helpful witnesses for the plaintiffs and increase pressure on defendants to settle before plaintiffs’ counsel has invested significant effort or resources in the case. Such early notice can also create a pool of potential plaintiffs for additional state law claims, and lead to motions to amend to add state law class claims.
- The FLSA offers liquidated damages for willful violations and attorneys’ fees that may not be available under state law.

Key Step-by-Step Strategies for Defending Each Stage of a Hybrid Action
Although FLSA collective claims and Rule 23 wage and hour class claims often involve overlapping factual circumstances, it is important not to lose sight of the independent hurdles each claim presents to litigators and
the way in which they interact in a hybrid suit. The following section outlines key strategies to consider at different stages of litigation in a hybrid action.

**Step One: Responding to a Hybrid Action Complaint**

When a defendant employer is served with a hybrid action, it is critical to develop an attack plan to dismiss or limit the impact of the claims. Consider and discuss with the employer the following strategies for initially responding to a hybrid class and collective action complaint. For more information on responding to non-hybrid class or collective actions, see **Responding to Wage and Hour Class and Collective Action Complaints**.

**Consider Filing a Pre-answer Motion to Dismiss**

Think carefully before deciding to bring a pre-answer motion to dismiss in a hybrid action. As a practical matter, courts are often reluctant to dismiss hybrid actions prior to the parties taking discovery, making it difficult for employers to succeed in dismissing claims on the pleadings. Additionally, you may inadvertently lock yourself into arguments on the motion to dismiss that could be used against the employer down the road, particularly during class and collective certification briefing. On the other hand, a successful motion to dismiss can greatly benefit employers by striking or narrowing the plaintiff’s claims, limiting the scope of discovery, and/or requiring plaintiffs to plead their claims with greater specificity. Thus, when you receive a complaint alleging both FLSA and Rule 23 claims, you should review plaintiffs’ allegations to see if there are grounds to file a motion to dismiss.

**Failure to State a Claim**

First, you should consider filing a motion to dismiss under FRCP 12(b)(6) if plaintiffs have not alleged sufficient facts to state a plausible claim for both the FLSA and the applicable state wage and hour laws. A hybrid action complaint, like any other complaint, must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim has “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” Id. Neither “‘naked assertion[s]’” nor “conclusory statements” are sufficient. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Thus, for example, if plaintiffs bring a cause of action for failure to pay overtime but do not allege that they actually worked more than 40 hours per week, you could file a motion for failure to state a claim upon which relief may be granted.

**Lack of Jurisdiction**

Second, if plaintiffs bring a hybrid action in federal court, consider moving to dismiss the state law claims under FRCP 12(b)(1) on the grounds that the court may not exercise supplemental jurisdiction over the state law claims. Federal law sets forth the grounds on which a court may decline supplemental jurisdiction, namely:

- The claim raises a novel or complex issue of state law
- The state law claims predominate over the FLSA claims
- The district court has dismissed the FLSA claims—or–
- In exceptional circumstances, there are other compelling reasons for declining jurisdiction


However, circuit courts have held that federal courts hearing FLSA claims may exercise supplemental jurisdiction to adjudicate state claims so long as the claims form part of the same case or controversy and “derive from a
common nucleus of operative fact.” Lindsay v. Gov’t. Emps. Ins. Co., 448 F. 3d 416, 422-25 (D.C. Cir. 2006); see also Knepper v. Rite Aid Corp., 675 F.3d 249, 257-62 (3d Cir. 2012) (listing appellate courts that have rejected the argument that there is an “inherent incompatibility” between FLSA and state claims that precludes their adjudication in a single hybrid case).

Additionally, federal district courts have original jurisdiction—and therefore do not need to exercise supplemental jurisdiction—over state law claims pursuant to the Class Action Fairness Act (CAFA) where the matter in controversy exceeds $5 million, the proposed class has at least 100 members, and any plaintiff in the class is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2), (5).

Even if you do succeed in obtaining a dismissal on jurisdictional grounds, the defendant could be left in a worse position than it started. For one, the court will not dismiss the state claims on the merits, allowing plaintiffs to refile their state claims in state court and force the employer to defend two separate actions in two different forums, incurring all of the attendant economic and organizational costs.

Thus, defendants may be better off not filing a motion to dismiss state law claims on jurisdictional grounds at all, and those who do proceed with such a motion face an uphill climb opposing supplemental jurisdiction over claims that arise out of a common nucleus of operative facts.

For more information on supplemental jurisdiction issues in hybrid actions, see Wages & Hours: Law and Practice § III (see section [c]).

**State Law Claims Preempted**

Third, if plaintiffs bring state common law claims, consider moving to dismiss under FRCP 12(b)(6) on the grounds that they are preempted by the FLSA. Many courts have found that the FLSA preempts common law claims that are duplicative of or offer the same relief as FLSA claims. Compare Anderson v. Sara Lee Corp., 508 F.3d 181, 194 (4th Cir. 2007) (holding that the FLSA preempts FLSA-based contract, negligence, and fraud claims), and Hintergerger v. Catholic Health Sys., 2012 U.S. Dist. LEXIS 37066, at *35 (W.D.N.Y. Jan. 8, 2012) (holding that the FLSA preempts state common law claims for unpaid wage and overtime to the extent the FLSA offers the same relief), with Williamson v. General Dynamics Corp., 208 F.3d 1144, 1154 (9th Cir. 2000) (holding that plaintiffs must bring claims that are directly covered by the FLSA—such as overtime and retaliation disputes—under the FLSA, but the FLSA does not preempt common law fraud claims).

**Consider Removing the Case to Federal Court**

Because plaintiffs may bring FLSA claims in either federal or state court, plaintiff attorneys often elect to file hybrid actions in state court. See 29 U.S.C. § 216(b). If this is the case, consider removing the action to federal court. Defendants generally prefer district court judges because of their familiarity with the opt-in process and Rule 23 procedures, and their reluctance to undermine the opt-in process by completely certifying the Rule 23 class.

Removing a hybrid action to federal court is not without risk, however. Removal forces the plaintiffs’ hands by forcing them to litigate in federal court or voluntarily dismiss their FLSA claims to remain in state court. If they do dismiss their FLSA claims, then plaintiffs may refile their federal claims in federal court, leading to a cumbersome and expensive two-forum litigation.

**Consider Filing a Motion to Transfer Venue**

In hybrid actions challenging one universal corporate policy, it may be advisable to stipulate or make a motion under 28 U.S.C. § 1404(a) to transfer the venue to the district in which the employer is headquartered. See, e.g.,
Sovik v. Ducks Unlimited, Inc., 2011 U.S. Dist. LEXIS 40951, at *1 (M.D. Tenn. Apr. 13, 2011) (transferring case to district where defendant had its headquarters). This could result in cost savings for the employer if many of the relevant documents and potential 30(b)(6) witnesses (i.e., witnesses who testify on behalf of the company) are located at its headquarters. This strategy may be particularly effective if plaintiffs and putative collective or class members are spread across a large geographic area and plaintiffs’ chosen venue lacks a strong connection to the claims in the case. Note, however, that the arguments you make in support of a motion to transfer venue may be inconsistent with any subsequent motion to oppose class certification. For example, to succeed on a motion to transfer the case to the venue of the employer’s headquarters, the employer typically has to argue that key witnesses and documents are located there. This argument may undercut subsequent arguments in opposition to class certification that the employer is decentralized and differences in practices between various company locations preclude class certification. Therefore, before filing any motion, you should fully consider the benefits and risks of moving to transfer venue.

**Consider Consolidating Cases via Multidistrict Litigation (MDL)**

Where there are multiple class and/or collective actions (including hybrid actions) filed in different courts against the same employer that raise common factual issues, you may want to move for multidistrict litigation (MDL) consolidation under 28 U.S.C. § 1407 prior to discovery. Consolidating cases from different districts provides employers the convenience of defending all actions against them in a single venue, resulting in a simpler, more cost-effective defense. On the other hand, by putting all cases together before a single judge, the employer may make it easier for plaintiffs to obtain class certification since they will only have to convince one judge to grant certification, as opposed to many different judges across the country.

Courts generally will consolidate FLSA claims where the claims are similar and allege similar facts, such as the violation of a corporate policy or practice applied consistently throughout different offices. See, e.g., In re Wells Fargo Home Mortg. Overtime Pay Litig., 435 F. Supp. 2d 1338, 1339 (J.P.M.L. 2006) (granting consolidation of FLSA claims where plaintiffs asserted similar claims for overtime because centralization would prevent duplicative discovery and inconsistent pretrial rulings, and would conserve the resources of all parties). On the other hand, courts tend not to grant MDL consolidation where the cases have disparate facts or procedures, require individualized discovery, or the cases are at varying points in litigation (such as where one case was recently filed but another is close to trial). See, e.g., In re CVS Caremark Corp. Wage and hour Emp’t Practices Litig., 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) (denying consolidation of FLSA claims even though all actions contained similar factual allegations because discovery in each action was likely to involve individualized, location-specific examination, a majority of plaintiffs and all defendants opposed consolidation, and there were procedural differences between the actions). Ultimately, it is within the court’s discretion to determine whether MDL consolidation is appropriate in a given case. For more information on MDL wage and hour cases, see Wages & Hours: Law and Practice § VI.

**Answer the Complaint**

In answering the complaint, be sure to include all defenses pertinent to both federal and state claims. For example, in a misclassification case, you should assert applicable exemption defenses under both the FLSA and state law. You should also include all procedural defenses you would otherwise include in a standalone Rule 23 or FLSA class or collective action, such as lack of a uniform policy or lack of standing. Note that there may be overlap in the FLSA and Rule 23 defenses, as both tend to focus on how plaintiffs cannot meet certification requirements. For sample answers to wage and hour class or collective actions, see Answer and Defenses to Wage and Hour Class or Collective Action Complaint and Employment Litigation § 11.03.
Step Two: Tackling First-Stage Discovery in a Hybrid Action

Discovery in hybrid actions has the potential to become overwhelming very quickly because of the depth and breadth of discovery needed to defend such cases. Consider requesting from the court a multiphase discovery process to tackle discovery in an efficient manner. Use the first phase of discovery prior to conditional certification to gather evidence about plaintiffs’ individual circumstances that pokes holes in their certification motion’s argument that plaintiffs are “similarly situated.” This phase of discovery is also important for obtaining facts to support any summary judgment motions on plaintiffs’ individual claims. If the case proceeds beyond conditional certification, you can use a second phase of discovery to obtain evidence concerning the putative members of the class or collective action that supports your FLSA decertification motion or your opposition to plaintiffs’ Rule 23 class certification motion.

For more information on managing discovery in non-hybrid wage and hour class or collective actions, see Discovery Strategies for Employers in Wage and Hour Class and Collective Actions. For sample discovery documents to use in hybrid misclassification actions, Document Requests (Defendant to Plaintiff) (FLSA Administrative Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), Document Requests (Defendant to Plaintiff) (FLSA Executive Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), Interrogatories (Defendant to Plaintiff) (FLSA Administrative Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), and Interrogatories (Defendant to Plaintiff) (FLSA Executive Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action).

Strategies for First Phase Discovery

In the first phase of discovery, parties typically conduct discovery related to conditional certification of the FLSA collective action. Defendants may also want to seek discovery to support summary judgment on some or all of plaintiffs’ individual claims. Thus, defendants must be mindful of all applicable state law standards (in addition to the FLSA standards) to allow for a complete motion for summary judgment on the FLSA and state law claims. The goal for the named plaintiffs during this phase is to show that they are similarly situated. Any factual differences that defendants can elicit from named plaintiffs, either through deposition testimony or written discovery, can be used to oppose conditional certification. At this stage, plaintiffs will also want to develop testimony to establish that common policies or practices applied to all putative collective/class members. Defendants should make sure to clearly explain policies and practices that are unique to certain business units or locations of the defendant through written discovery responses and 30(b)(6) witness testimony.

The main goal for defendants in this first phase of discovery, in addition to demonstrating that the named plaintiffs’ individual claims are without merit, is to show distinct legal and factual differences amongst the plaintiffs themselves such that collective adjudication is not appropriate. In addition to named plaintiff depositions, defendants may also want to consider identifying and interviewing putative collective action members whose circumstances contrast with those of plaintiffs and who may be able to provide favorable testimony on behalf of defendants. If the interviews bring to light helpful facts, you may want to attach affidavits or declarations from these witnesses to your opposition to conditional certification. However, you should make sure to refresh yourself on state attorney ethics rules regarding contacting absent class members, as the rules of some jurisdictions may prohibit such contact in certain circumstances. You should also obtain written and deposition discovery from any early-phase opt-ins, which serves the dual purpose of supporting your decertification argument and, potentially, summary judgment motions as to the claims of the opt-ins.

Defendants should also use this opportunity to generate evidence concerning plaintiffs’ Rule 23 claims. This could include obtaining declarations from potential class members to demonstrate that Rule 23 requirements cannot be
met, or including questions in the depositions of the named plaintiffs on matters related to Rule 23 certification, such as their adequacy as class representatives. A strong evidentiary record at this stage could prompt a defendant to preemptively move to deny class certification under Rule 23.

**How to Manage E-Discovery**

Hybrid actions often involve significant amounts of electronically stored data, commonly referred to as ESI, which must be preserved under Fed. R. Civ. P. 34. Therefore, once a complaint is filed, defendants should quickly draft and circulate a litigation hold to all employees potentially involved in the action. You may also want to consider working with a dedicated ESI vendor to help with the data collection, preservation, review, and production processes. To mitigate the cost and burden of retaining large amounts of data, you should confer with opposing counsel early in the case to seek agreement on data retention issues.

Typically the court will require the parties to discuss e-discovery considerations at the Rule 26(f) conference. (For a sample Rule 26(f) discovery plan, see Discovery Plan (FRCP Rule Rule 26(f)) (Wage and Hour Collective Action or Hybrid Class/Collective Action). Both sides should then work together to establish appropriate ESI custodians and search terms. Plaintiffs tend to propose broader search terms in order to receive more discovery, so defendants should counter with appropriate date, time, and other limitations to limit the expense and scope of e-discovery. For example, you may want to propose limiting custodians to those managers who directly supervised named plaintiffs. With multiphase discovery, be sure to consider the scope of e-discovery for each phase of the case and not allow the plaintiffs to overreach in the earlier stages.

**Step Three: Opposing the Motion for Conditional Certification**

At the conditional certification stage, courts may determine whether plaintiffs and potential opt-ins are similarly situated based on pleadings and affidavits, without the benefit of first phase discovery as described above. Even if the court does not allow you to take some discovery prior to deciding plaintiffs’ FLSA motion for conditional certification, the employer may still attack the factual record supporting plaintiffs’ argument for conditional certification. In *French v. Louisiana Cleaning Systems*, the plaintiff included just two affidavits to support his motion for conditional certification, one from the plaintiff himself and one from another worker. 2016 U.S. Dist. LEXIS 77933, at *10 (E.D. La. June 15, 2016). The worker’s affidavit was identical to that of plaintiff, and defendants had no record of the worker ever being affiliated with any of the defendants. Due to the paucity of this factual record, the court declined to conditionally certify the collective action because it found that the record lacked “substantial allegations that potential members were together the victims of a single decision, policy, or plan.” Id.

Moreover, to the extent possible, you should present evidence highlighting differences among putative collective action members, focusing on facts relevant to the claims at issue to support an argument that such differences will require an individualized plaintiff-by-plaintiff analysis making certification improper. Although some courts decline to consider such arguments at the conditional certification stage, these types of arguments can set the stage for decertification arguments later in the case. These arguments can be particularly effective if the employer can show that even the claims of the named plaintiffs cannot be resolved collectively due to differences in their experiences.

The employer should also develop facts that putative collective action members were not all subject to a common policy, practice, or plan. For example, if plaintiffs seek to certify an opt-in class of employees who work at multiple locations (including, potentially, locations across a region or nationally), focus on relevant practices and policies that vary by region, by location, or by manager. To the extent possible, the employer should also present evidence that putative collective action members did not share similar job requirements. For example, you may be able to develop evidence of individualization concerning the day-to-day experiences of plaintiffs and potential opt-ins.
For more information on opposing conditional certification in an FLSA collective action, see Opposing Motions for Conditional Collective Action Certification and Making Decertification Motions under FLSA Section 216(b).

**Step Four: Playing Defense with the Opt-in Notice in a Hybrid Action**

If the court grants conditional certification, notice will be sent to all potential opt-in plaintiffs. You should make it clear in the notice that the defendant denies the allegations of the complaint. You should also insist that the notice highlight the court’s neutrality and that no decision on the merits of the plaintiffs’ claims has been reached. The notice should also indicate that potential opt-ins are not required to use plaintiffs’ counsel and are free to hire their own attorneys to represent them in the case.

Once the opt-in notice is court approved, the notice must be disseminated, typically by plaintiffs. Plaintiffs may seek to disseminate notice through text message, email, or posting at defendant’s facilities. However, many courts have held that notice by first class mail is sufficient. See, e.g., Gonzalez v. Scalinatella, Inc., 2013 U.S. Dist. LEXIS 168540, at *13 (S.D.N.Y. Nov. 25, 2013) (first-class mail sufficient and requiring no production of telephone numbers or e-mail addresses); Hallissey v. American Online, Inc., 2008 U.S. Dist. LEXIS 18387, at *10-*13 (S.D.N.Y. Feb. 19, 2008). Thus, the defendants should object to dissemination of notice through any medium other than first class mail.

**Step Five: Maximizing Opportunities for Decertification in Second Phase Discovery**

If conditional certification of the FLSA collective action is granted, you will want to extend discovery to as many putative collective action members as possible to develop facts for an FLSA decertification motion and to oppose Rule 23 certification. You should consider the unique facts of your case in determining how many opt-in plaintiff or putative class members from whom to seek discovery. For example, in a relatively small opt-in collective action, you should consider seeking discovery from all, or substantially all, opt-ins. You can argue that, because these individuals affirmatively chose to join the action, defendants should have the right to develop facts against these individuals’ claims as well. On the other hand, in a large putative Rule 23 class involving hundreds or thousands of potential class members, it may be more appropriate and efficient to seek discovery from a percentage of the putative class at this stage. See, e.g., Reich v. S. New England Telecomms. Corp., 121 F.3d at 61; 67–68 (2.6% of a 1,500 member class deposed); Scott, 300 F.R.D. at 192 (parties agreed to depositions of 10% of the class and court permitted discovery of an additional 2.5%); Morangelli v. Chemed Corp., 922 F.Supp.2d 278, 283 (E.D.N.Y. 2013) (parties agreed to discovery on 9% of the 432 opt-in plaintiffs). In either case, the defendant should insist on having the ability to select the opt-ins who will be subject to discovery. Having the plaintiff select the opt-ins subject to discovery, or even a random selection of opt-ins subject to discovery, can prejudice the defendant’s ability to defend the case and prevent the defendant from securing evidence necessary to defeat class certification.

The employer should also consider seeking permission to send written discovery (even if a limited number of interrogatories and document requests) to all members of the opt-in class. The answers given in this limited written discovery can assist the defendant in selecting opt-ins for deposition discovery. This approach can also help limit the number of opt-ins in the case. If any opt-ins fail to respond to discovery, the defendant can subsequently move to dismiss those opt-ins from the case.

Moreover, this phase of discovery is typically used by the parties to generate evidence for Rule 23 certification briefing. Much of this Rule 23 discovery will overlap with evidence used for the FLSA decertification briefing, with a goal of demonstrating that it would be improper for plaintiffs’ claims to be tried collectively. However, by obtaining this Rule 23 discovery in a hybrid case, the employer gains an important strategic advantage that it does not have in a standalone FLSA case. In an FLSA case, courts will typically only consider evidence related to
the named plaintiffs and the members of the opt-in class (i.e., those who affirmatively chose to join the case). By contrast, in a hybrid action, the court will consider not only evidence related to the named plaintiffs and the opt-ins, but also putative Rule 23 class members who did not join the case during the FLSA opt-in period. The group of putative Rule 23 class members who did not opt into the FLSA collective—who are often employer-friendly and/or can provide evidence rebutting plaintiff’s wage claims—can be a fertile ground for declarations for defendant to rebut plaintiffs’ Rule 23 certification arguments. This leads to one important advantage for an employer in a hybrid action that does not exist in a FLSA collective action: the court will consider a category of strong, employer-friendly evidence at the decertification briefing stage that would not be available in an FLSA collective action.

The employer must also be mindful of seeking the appropriate information during discovery. Critically, the employer should serve an interrogatory asking for the plaintiff’s trial plan for fairly adjudicating claims on a class or collective basis. This trial plan can be used in class certification briefing to argue that class certification is inappropriate. See, e.g., Espenscheid v. DirectSat USA LLC, 705 F.3d 770, 773, 777 (7th Cir. 2013).

Later, if an FLSA collective action is not decertified or a Rule 23 class is certified, it may be appropriate to request additional discovery on other issues not covered by earlier discovery, such as damages.

For more information on managing discovery in non-hybrid wage and hour class or collective actions, see Discovery Strategies for Employers in Wage and Hour Class and Collective Actions. For sample discovery documents to use in hybrid misclassification actions, see Document Requests (Defendant to Plaintiff) (FLSA Administrative Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), Document Requests (Defendant to Plaintiff) (FLSA Executive Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), Interrogatories (Defendant to Plaintiff) (FLSA Administrative Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action), and Interrogatories (Defendant to Plaintiff) (FLSA Executive Employee Exemption Misclassification Collective Action or Hybrid Collective/Class Action).

**Step Six: Briefing FLSA Decertification and Rule 23 Certification**

Factually, FLSA decertification and Rule 23 certification often deal with similar issues. Here, defendants will use all of the previously collected factual evidence to show that plaintiffs (i) are not similarly situated, as is required to support decertification of an FLSA collective, and (ii) cannot satisfy the Rule 23 requirements for class certification. The key here is demonstrating that plaintiffs’ claims cannot be tried collectively or on a classwide basis because doing so would be unfair to the employer.

For instance, the employer should attempt to demonstrate that, while some class members may have colorable claims, others do not. Thus, application of the same substantive legal standard can yield different results for different people. Similarly, the employer can argue that, as a result of the variation in experiences of the putative class members, the application of the legal analysis to each class member’s claims will differ (even if the liability determination is the same), precluding class certification.

The employer should further consider arguing that to allow a claim to proceed on a class or collective basis inhibits its ability to mount a defense, therefore infringing on its due process rights. See Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567 (E.D. La. 2008). In *Johnson*, the court initially denied defendant’s motion for FLSA decertification, but after going to trial, the court came to the conclusion that it could not “confidently adjudicate plaintiffs’ claims or Big Lots’ defense on the merits” on a collective basis. Id. at 579. The court found that “[s]uch diversity in individual employment situations inhibits Big Lots from proving its statutory exemption defense as to all 936 opt-in plaintiffs on the basis of representative proof.” Id. This case highlights the importance of developing facts about plaintiffs’ and potential opt-ins’ individual responsibilities and day-to-day duties.
Hybrid actions typically lend themselves to arguments against certification that cannot be made in a standalone FLSA action or a standalone Rule 23 class action, often focusing on the Rule 23 superiority analysis. For example, an employer can argue that the availability of the FLSA opt-in class may mean that a state-law wage and hour class is not “superior” to an FLSA collective action. See, e.g., Muecke v. A-Reliable Auto Parts and Wreckers, Inc., 2002 U.S. Dist. LEXIS 11917, at *6 (N.D. Ill. June 21, 2002). The employer can also argue that, where there is a low number of opt-ins, this also demonstrates a lack of superiority given that most putative class members already affirmatively declined to join the action. And, where the dollar value of each class member’s claim is significant, this tends to show that resolution of FLSA and state law claims is better suited for an individual action rather than a class action.

For more information on making a decertification motion in an FLSA collective action, see Opposing Motions for Conditional Collective Action Certification and Making Decertification Motions under FLSA Section 216(b). For more information on opposing class certification in Rule 23 class actions, see Opposing Class Certification in Rule 23 Wage and Hour Class Actions.

Step Seven: Moving for Summary Judgment in Hybrid Actions

Summary judgment is a key issue in hybrid actions, both in terms of the timing and scope. As discussed above, it is preferable for the employer to hold an early phase of discovery and follow this phase with summary judgment briefing on the named plaintiffs’ individual claims. This allows the court to test plaintiffs’ claims before the parties undergo the burden and expense of fulsome class discovery. Moreover, prior to second phase discovery, the employer should seek permission during the Rule 26 meet-and-confer process to move for summary judgment on the individual claims of opt-ins after the conclusion of class certification discovery. This allows the employer to highlight in detail, at the FLSA decertification / Rule 23 certification briefing stage, the claims of certain opt-ins. This is advisable for employers for multiple reasons. First, it allows the employer to cherry pick opt-ins who may have the weakest claims and have them dismissed. Second, moving for summary judgment as to the individual claims of opt-ins assists with the class certification arguments. By detailing the claims of particular plaintiffs in a summary judgment brief (in a way that cannot generally be accomplished in Rule 23 briefing), the employer can further paint the picture of contrasts between opt-ins who have stronger claims versus opt-ins who have weaker claims. This contrast further highlights that class certification is not proper.

Employers should also consider whether to move for summary judgment as to other issues in subsequent phases of the litigation. For example, in certain cases the employer may consider moving for summary judgment on a classwide basis. But this strategy should be carefully considered, and such a summary judgment motion should be filed only after class certification briefing is complete and a decision on class certification is issued. This is because a classwide motion for summary judgment can inadvertently undermine the employer’s certification argument that claims cannot be tried on a classwide basis. Likewise, the employer may consider moving for summary judgment as to particular claims, defenses, and damages issues to limit the scope of the any potential recovery.

For more information on drafting and filing summary judgment motions in non-hybrid class or collective actions, see Navigating Strategies for Filing and Drafting Summary Judgment Motions in Wage and Hour Class and Collective Actions and Wage and Hour Class and Collective Actions Summary Judgment Motion Checklist (Filing and Drafting).

Dismiss Opt-Ins Whose Claims Are Barred by the Statute of Limitations

Filing a complaint alone tolls the statute of limitations of the state law claims of the Rule 23 putative class members but not the FLSA claims of the putative collective action members. American Pipe & Constr. Co. v. Utah,
414 U.S. 538, 551–52 (1974). The statute of limitations for plaintiffs in a collective action is only tolled once they file their notice of consent forms. 29 U.S.C. § 256(b). Thus, the named plaintiffs can toll their claims upon filing the complaint, so long as they simultaneously file opt-in consent forms. 29 U.S.C. § 216(b); but see Frye v. Baptist Mem. Hosp., Inc., 495 Fed. Appx. 669, 675 (6th Cir. Aug. 21, 2012) (the filing of a complaint alone without a separate opt-in form does not toll the running of the FLSA statute of limitations for the named plaintiff). If a named plaintiff did not file a separate opt-in consent form, consider moving to dismiss the named plaintiff’s claims as time-barred.

The putative collective action members, on the other hand, must wait to file their notices of consent until after the court approves the opt-in notice, which does not occur until much later in the litigation process. As such, some courts will toll the statute of limitations for putative collective action member on equitable grounds during the pendency of the lawsuit to prevent the statute of limitations from expiring. See, e.g., Abadeer v. Tyson Foods, Inc., 2010 U.S. Dist. LEXIS 136978, *15 (M.D. Tenn. Dec. 14, 2010) (tolling the statute of limitations for the potential opt-ins for 120 days after granting conditional certification). If the statute of limitations is not tolled and renders any of the opt-ins’ claims untimely, be sure to move to dismiss those individuals from the litigation.

**Step Eight: Utilizing Case-Management Tools before Trial**

**Timing and Scope of Phased Discovery**

As discussed above, in a hybrid action, defendants should pursue phased discovery. The first phase should focus on the named plaintiffs’ individual claims as well as issues related to the FLSA conditional certification motion. Not only does this result in a cost savings for the employer, but it also enhances the employer’s chances for success. The employer can test the named plaintiffs’ individual claims early in the case, with the potential of having the case dismissed early via a successful summary judgment motion. This also gives the employer time to conduct its fact investigation and gather evidence to oppose the conditional certification motion.

Subsequent phases should focus on discovery related to FLSA decertification and Rule 23 class certification and, after the class certification decision, damages and other trial issues.

**Bifurcation of Liability and Damages Phases of Trials**

If a hybrid action proceeds to trial, it may be economical to move to bifurcate the liability and damages phases of trial under Federal Rule of Civil Procedure 42(b). Fed. R. Civ. P. 42(b). By trying the liability phase separately from damages, you may have the opportunity to reduce damages for plaintiffs with less valuable claims, even if those plaintiffs’ claims are based on the same policies or practices as other more valuable claims that establish liability. Some courts have also used this method as a way to deal with individual defenses raised with respect to certain plaintiffs but not others in collective actions. Maynor v. Dow Chem. Co., 2008 U.S. Dist. LEXIS 42488, at *26 (S.D. Tex. May 28, 2008).

**Bellwether Trials or Test Cases**

If a class or collective action fails to be certified or has been decertified, but the plaintiffs are successful in using intervention or joinder to proceed as a group with multiple plaintiffs, the parties may want to conduct “bellwether trials” or test cases. Parties use bellwether trials for informational purposes and to “provide a basis for enhancing prospects of settlement or for resolving common issues or claims.” In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997); William B. Rubenstein, Newberg on Class Actions §11.11 (5th ed. 2013). “The more representative the test cases, the more reliable the information about similar cases will be.” Manual for Complex Litigation (Fourth) §22.315 (2004) (CY022 ALI-ABA 1205).
Yet, if a putative class has failed certification, it may be difficult to find a representative plaintiff who could actually provide reliable information about the value of the remaining cases. Bellwether trials can also be problematic because they “are often exponentially more expensive for the litigants and attorneys than a normal trial.” Eldon E. Fallon et. al., Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2366 (2008) (citing the example of In re Vioxx Products Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005)). The outcome of the selected bellwether trials can have implications for the resolution of a large number of cases. Therefore, “parties tend to heavily litigate all motions in the bellwether trial, making them highly expensive and time consuming for all of the parties and the court.” Rubenstein, Newberg on Class Actions § 11.12. Parties must weigh the high cost of litigating bellwether trials against the potential probative value to determine whether it could be useful in the particular factual circumstances of the case.

**Step Nine: Settling Hybrid Actions**

**General Settlement Considerations in a Hybrid Action**

Depending on the phase of litigation, you may have a wide range of options available for reaching an amicable settlement of the hybrid action. The timing and scope of a settlement in a hybrid action will depend greatly on the facts of the particular case. For example, if an employer’s initial fact investigation reveals potential difficulties in litigating the claims, the employer may seek an early settlement to avoid the burden and cost of litigation. That said, in many cases, an employer will have to litigate a case and conduct discovery to generate sufficient leverage to convince plaintiffs that exploring settlement is the best approach.

Prior to Rule 23 certification, you may want to propose an FLSA settlement that contemplates payment to named plaintiffs and FLSA opt-ins but not Rule 23 putative class members. You may also be able to make a settlement offer to named plaintiffs alone. The benefit of these types of settlements generally is that they come at a lower dollar cost than a settlement involving a full putative Rule 23 class. Additionally, the employer can obtain the releases from the employees who are most motivated to assert claims: the named plaintiffs and the opt-ins. On the other hand, this approach creates uncertainty and a risk that a putative class member may file his or her own case—including a copycat class action lawsuit. Since both FLSA and Rule 23 settlements face scrutiny from the court, you should keep the fairness factors outlined above in mind as you negotiate with the opposing party.

In negotiating a settlement in a hybrid action, the employer should consider, among other things:

- **Common fund or claims made settlement.** The employer must determine whether to seek a claims made or a common fund approach. In a common fund approach, the parties negotiate a total settlement amount, which includes an allocation to class members, attorneys’ fees, and costs. In a claims made settlement, the payout is determined based upon the number of individuals who submit claim forms. The common fund is the preferred approach for employers, since negotiating a single number yields certainty in the total settlement amount.

- **Attorneys’ fees.** The parties must also typically negotiate over the plaintiffs’ counsel’s attorneys’ fees. See Smith v. Am. Greetings Corp., 2016 U.S. Dist. LEXIS 66247, at *19 (N.D. Cal. May 19, 2016) (finding that a “clear sailing provision [in which defendant agrees not to oppose plaintiffs’ application for attorneys’ fees] does not signal the possibility of collusion where, as here, Class Counsel’s fee will be awarded by the Court from the same common fund as the recovery to the class.”). It is generally permissible to negotiate fees as a percentage of a common fund or to reach agreement on a specific amount in fees separate from the fund. In either case, the employer should seek cost certainty on the amount of fees to be paid. The employer, in reaching agreement on the fees amount, should be clear that, procedurally, the employer will not oppose a fee request for up to that amount (and seek reverter, or redistribution to the class, of any amounts unawarded by
the court).

- **Changes to company practices.** Many settlements of hybrid actions include changes to company policies going forward, whether negotiated as part of the settlement or taken unilaterally by the employer. This can be a critical step to mitigate risk of a follow-up lawsuit. This is particularly common in an exemption misclassification case, where employers often consider whether to reclassify a position from exempt to non-exempt, or make changes to the position at issue (such as restructuring positions to give employees additional exempt duties), to minimize the risk of future lawsuits.

- **State law subclasses.** To ensure compliance with the Rule 23(a) adequacy requirement, the employer should typically insist on a separate named plaintiff who has worked for the employer in the state for which there is a subclass.

- **Excessive opt-out provision.** Employers should consider seeking a provision whereby the employer has a right to void the agreement if too many putative class members opt out of the settlement. The parties can negotiate over the exact number that triggers the employer’s right to void.

- **Service payments.** The employer should also consider whether to permit service payments to the named plaintiffs, which are extra incentive payments to the class representatives for their role in the lawsuit. In exchange for the service payment, the employer should secure a general release (which is typically broader than a class release covering only claims that have been, or could have been, asserted in the lawsuit).

- **Arbitration and class action waiver provision.** Employers should also consider requiring current employees to sign an agreement requiring the employee to (i) go to arbitration, rather than court, to assert any wage claims, and (ii) waive the right to participate in a class or collective action of wage claims. To ensure that the waiver is enforceable, the employer should provide independent consideration for the clause by giving class members an additional payment (beyond the settlement share) in exchange for signing the agreement with the arbitration provision and class action waiver.

- **Reversion of funds.** The employer can also seek reversion of any unclaimed settlement amounts. Employers generally should not agree to an approach in which unclaimed funds are redistributed to participating class members. This can create an unfair windfall for these class members.

For sample hybrid action settlement agreements, see Settlement Agreement (Hybrid Wage and Hour FRCP 23 Class Action and FLSA Section 216(b) Collective Action) and Settlement Agreement (FLSA Hybrid Action), LexisNexis(R) Forms FORM 629-14.21.1.

For information on settling non-hybrid wage and hour class or collective actions, see Settling Rule 23 Wage and Hour Class Actions and FLSA Claims Resolution Checklist (Employer).

**Drafting the Hybrid Settlement Notice**

The settlement class notice should clearly explain, at a minimum, the basic terms of the settlement; the attorneys’ fees sought; who falls within the settlement class; the procedures and deadline for submitting a claim form, opting out of the settlement, and objecting to the settlement; and the scope of the release. The parties should also clearly explain how each class member’s settlement share is calculated as well as the date and time of the fairness hearing. The notice must also explain the consequences of participating (i.e., waiver of claims) and the consequences of opting out.

Critically, the notice should explain the release of both FLSA and state law claims. As the FLSA and Rule 23 classes often encompass many of the same individuals, the notice should indicate that the class members must provide affirmative consent if they want to either join the FLSA settlement class or leave the Rule 23 settlement.
class. The notice should indicate that if they do nothing, they will release their state claims in exchange for a settlement sum but will not release or receive payment for their federal claims.

The parties should ensure that the language of the notice is clear and leaves no doubt as to the benefits of the settlement, and the deadlines and procedures for participating in, objecting to, and opting out of the settlement. Include the complete language of the release in the notice itself so that employees cannot argue later that they did not understand what claims they were releasing by accepting the settlement.

**Hybrid Action Releases**

Defendants should exercise care when drafting releases to ensure court approval of settlements, particularly in relation to putative class members who, under Rule 23, waive claims by failing to opt out (even if they do not affirmatively participate in the settlement). A key question is whether such class members can release FLSA claims, because such class members do not opt into the case under 29 U.S.C. § 216(b). Many courts have held that a Rule 23 class release can properly include a waiver of FLSA claims. See, e.g., Kuncl v. International Business Machines Corp., 660 F. Supp. 2d 1246 (N.D. Okla. 2009). Obtaining such a release is critical for the employer, who should pursue the broadest release of both state and federal claims possible in any settlement. Failure to do so can yield a situation where the employer pays class members to settle state law claims, but allows them to pursue FLSA claims in the future. Such an approach is generally not preferable for the employer.

In addition, as part of any settlement including FLSA claims, the employer should obtain a signature from participating collective action members to reflect their consent to join the lawsuit. This will ensure that the technical requirements of 29 U.S.C. § 216(b) are met. This consent can take multiple forms. For example, a claim form could include language indicating consent to participate under 29 U.S.C. § 216(b). Another approach is to mail putative class members settlement checks directly and include language on the back of the check indicating that, by negotiating the check, the individual consents to join the case.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect the views or opinions of the law firm with which they are associated.
**Craig Friedman**  
**Partner, Jones Day**

Craig Friedman, whose practice focuses on employment law, is a leader in the defense of employment class actions including wage-and-hour litigation. He has secured victories around the nation in employment class actions, including for clients such as Publix Super Markets, Dick’s Sporting Goods, and The Scott Fetzer Company.

Beyond class actions, Craig represents employers in a broad range of labor and employment matters. This includes lawsuits brought under the Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Employment Retirement Income Security Act of 1974, and various state laws. On behalf of The Scotts Company, Craig successfully argued before the United States Court of Appeals for the Second Circuit that the lower court properly dismissed claims of race, gender, and disability discrimination. In addition, he was recognized as a recommended attorney by *Legal 500* for workplace counseling and for ERISA litigation.

Active in the Atlanta legal community, Craig is a member of the board of directors of the Labor and Employment Section of the Atlanta Bar Association. He is also past president of the Executive Committee of Georgia Appleseed’s Young Professionals Council and previously served on Georgia Appleseed’s board of directors. Craig also has served on the Leadership Council of Arts For Learning, Woodruff Arts Center, a nonprofit organization that provides educational arts programming to Georgia students.

**Brent Knight**  
**Partner, Jones Day**

Brent Knight has nearly 20 years of experience advocating for employers in class action labor and employment law matters. Brent has represented clients in state courts, federal courts, and before administrative agencies throughout the United States on claims brought pursuant to the Employee Retirement Income Security Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and a variety of state law counterparts, including extensive experience defending claims brought under the California Labor Code.

Much of Brent’s work is at the cutting edge of labor and employment law, impacting not only his clients’ businesses but setting precedent for employers nationwide. For instance, Brent has successfully defended several cases involving claims that McDonald’s was a joint employer of its franchisee’s employees under both state and federal law. He also successfully defended overtime claims at trial under California’s Private Attorneys General Act (PAGA). And he regularly advises clients regarding the enforceability of noncompetition agreements throughout the country, navigating the constantly evolving area of restrictive covenants. Representative clients in recent public matters include McDonald’s, Publix Super Markets, Abbott Laboratories, Service Corporation International, and CrossCountry Mortgage.

Brent is a member of the Board of Directors of the Chicago Appleseed Fund for Justice, a nonpartisan, independent research and advocacy organization that seeks to promote social justice by proposing solutions to barriers and inequities affecting vulnerable populations within our court systems. He also belongs to the Illinois State Bar Association and the American Bar Association.

---

Learn more

LEXISNEXIS.COM/PRACTICE-ADVISOR

This document from Lexis Practice Advisor®, a comprehensive practical guidance resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Lexis Practice Advisor includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit lexisnexis.com/practice-advisor. Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.