Opposing Motions to Decertify FLSA Collective Actions

A Practical Guidance® Practice Note by Matthew C. Helland, Nichols Kaster, PLLP

Matthew C. Helland
Nichols Kaster, PLLP

This practice note provides an overview of the Fair Labor Standards Act (FLSA) certification and decertification process, focusing on strategies for defeating a defendant's motion to decertify an FLSA collective action. If your FLSA collective action is at the decertification stage, you have likely litigated through most (or all) of the discovery period and are preparing for dispositive motion practice and trial. Defeating a decertification motion is often a key step in pushing a case toward resolution.

A successful decertification opposition will convince the judge that the case can, and should, be tried on a group-wide basis. Decertification motions present a mix of practical and legal considerations, and advocates opposing them must emphasize the judicial economy and fundamental fairness in resolving like-claims together instead of forcing opt-in plaintiffs to start from scratch, litigating individually in dozens of different jurisdictions (or as hundreds of separate cases in the same jurisdiction). In the end, it is often the party advocating the most practical path forward that will prevail on an FLSA decertification motion.

This practice note discusses the following key decertification issues:

- Overview of FLSA Collective Action Certification
- Opposing FLSA Decertification with Policy Arguments and Pragmatic Solutions
- Plaintiff's Burden of Proof at Decertification
- Plaintiffs May Rely on Representative Proof to Avoid Decertification
- Opposing Decertification in Specific Types of FLSA Cases
- Responding to Arguments about Fairness and Procedural Concerns
- Other Strategic Considerations

For resources on wage and hour claims regarding class and collective action certification, see Wage and Hour Claims and Investigations Resource Kit — Class and Collective Action Certification.

For more pro-employee guidance on FLSA collective actions, see Certification of Class and Collective Wage and Hour Actions under the FLSA and Rule 23 (Employee), Class and Collective Actions: Identifying Individuals and Building a Case for Certification (Employee), and Deposition Preparation of Members of FLSA Collective and Class Actions (Employee).

For additional guidance on FLSA collective actions, see Answers, Motions to Dismiss, and Other Potential Responses to Wage and Hour Class and Collective Action Complaints, Notice Requirements for FLSA Section 216(b) Collective Actions, Conditional Collective Action Certification and Decertification Motions under FLSA Section 216(b), and Settlements of FLSA Section 216(b) Wage and Hour Collective Actions.

Overview of FLSA Collective Action Certification

The FLSA provides that an action may be maintained by one or more employees on behalf of themselves and other "similarly situated" employees. 29 U.S.C. § 216(b). When advocating for a case to be tried as a collective action, you are arguing that the employees in the group are "similarly situated."

Most courts utilize a two-step approach to determine whether the plaintiffs in an FLSA collective action are similarly situated. Under this framework, courts first determine whether plaintiffs are similarly situated for purposes of sending notice to potential opt-in plaintiffs informing them of their right to join the case. Then, after discovery, courts utilize a stricter standard of "similarly situated," often upon a defendant's motion for decertification, to determine whether the case will be tried as a collective action on behalf of all opt-in plaintiffs.

Although this general approach to FLSA certification and decertification has been accepted by most courts for years, you should pay careful attention to the case law in your circuit. Specifically, the two-step framework has been adopted in some form by the:

- Second Circuit (Myers v. Hertz Corp., 624 F.3d 537, 544–45 (2d Cir. 2010))
- Third Circuit (Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 243 (3d Cir. 2013))
- Sixth Circuit (White v. Baptist Meml. Healthcare Corp., 699 F.3d 869, 877 (6th Cir. 2012))
- Eleventh Circuit (Morgan v. Fam. Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008))

The Ninth Circuit questioned the concept of "certifying" an FLSA collective action but nonetheless endorsed the two-step approach to distributing notice and determining suitability for collective treatment at trial. Campbell v. City of Los Angeles, 903 F.3d 1090 (9th Cir. 2018).

The Fifth Circuit, however, has rejected the two-step framework, requiring instead that courts identify the facts and legal considerations that will drive the "similarly situated" analysis and then direct initial discovery accordingly. Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 441 (5th Cir. 2021). A motion to distribute notice must be based on all available evidence.

Opposing FLSA Decertification with Policy Arguments and Pragmatic Solutions

Courts utilizing the two-step approach to FLSA certification typically look to three factors on a motion for decertification:

1. Disparate factual and employment settings of the individual plaintiffs
2. The various defenses available to the defendant which appear to be individual to each plaintiff
3. Fairness and procedural considerations

See, e.g., Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1103 (10th Cir. 2001).

These three decertification factors lend themselves to flexible application by the courts and leave room for each party to advocate that their approach is the most sensible one. In opposing a motion for decertification, you should emphasize that plaintiffs only need to be similar, not identical, and that Congress designed the FLSA to allow employees to pool their resources for collective resolution of their rights. Courts generally reject application of the class certification factors outlined in Rule 23 of the Federal Rules of Civil Procedure, although the Seventh Circuit has suggested in dicta that the standards should be similar. Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013). It generally works to your advantage to focus on the pliable, three-factor decertification analysis, avoiding the more rigid Rule 23 analysis.

Decertification Factor 1 – Disparate Factual and Employment Settings

When considering the disparate factual and employment settings, courts often look for similarity in plaintiffs' job titles or job duties, work locations, and management or reporting structures. Courts also consider whether the

policies and practices at issue are common or variable among the group. In opposing decertification, you should highlight commonalities wherever they exist, always emphasizing the efficiency of resolving factual and legal issues in one case rather than several.

Decertification Factor 2 – Are the Employer's Defenses Unique to Each Plaintiff?

Defendants will often argue that a court must decertify an FLSA collective action because their defenses are unique as to each plaintiff. To counter this argument, you should highlight the defenses that are common among the plaintiffs and argue that any isolated, unique defenses pale in importance as compared to the key legal issues driving the case. Courts have recognized that individualized defenses alone do not warrant decertification where "sufficient common issues or job traits otherwise permit collective litigation." Monroe v. FTS USA, LLC, 860 F.3d 389, 404 (6th Cir. 2017). In cases where the defense is common but the proof is allegedly unique, such as in exemption misclassification cases (discussed below in the section entitled "Misclassification Cases (Exemption)"), you should focus on the common evidence that will drive the analysis.

Decertification Factor 3 – Fairness and Procedural Considerations

The third factor—fairness and procedural considerations—provides wide latitude for you to emphasize the statutory purpose of the FLSA's collective action mechanism and the judicial economy to be gained by resolving similar claims in one trial. You should be prepared, however, to address any manageability concerns, as the prospect of a large, unwieldy trial will be at the top of the court's mind. It is your job to explain exactly how the case will be tried, and why the court should keep the case together rather than decertifying the collective action and sending plaintiffs to file individually, or in smaller groups, across the country.

For more guidance on this decertification factor, see Responding to Arguments about Fairness and Procedural Concerns below.

Second Circuit's Different Decertification Standard

This discussion assumes the district court will follow the majority, three-factor approach to decertification. You should be aware, however, that the Second Circuit disapproved of the three-factor approach, finding that it focused more on how plaintiffs (and their claims) are dissimilar, rather than whether plaintiffs are "similarly situated." Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 517 (2d Cir. 2020). In the Second Circuit, the decertification inquiry now rests on whether plaintiffs "share one or more similar questions of law or fact material to the disposition of their FLSA claims." Id.

Although the standard is different, much of the strategy discussion in this practice note still applies in the Second Circuit—as long as you conform the arguments to the new standard. And if your case is outside the Second Circuit, you might borrow helpful language from the Second Circuit's analysis to ensure the district court focuses on similarities, not differences.

Plaintiff's Burden of Proof at Decertification

Plaintiffs have the burden of establishing—at all phases of the litigation—that they are similarly situated. However, courts differ as to plaintiffs' burden of proof at the decertification stage. Some courts apply a preponderance of the evidence standard. Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 537 (3d Cir. 2012).

Others require "substantial evidence" that plaintiffs are similarly situated. See, e.g., Blair v. TransAm Trucking, Inc., 309 F. Supp. 3d 977, 1001 (D. Kan. 2018); White v. 14051 Manchester Inc., 301 F.R.D. 368, 374 (E.D. Mo. 2014) (quoting Martin v. Citizens Fin. Grp., Inc., 2013 U.S. Dist. LEXIS 43084, at *3 (E.D. Pa. Mar. 27, 2013)); Creely v. HCR ManorCare, Inc., 920 F. Supp. 2d 846, 857 (N.D. Ohio 2013); Frye v. Baptist Mem'l Hosp., 2010 U.S. Dist. LEXIS 101996, at *2 (W.D. Tenn. Sept. 27, 2010), aff'd, 495 F. App'x 669 (6th Cir. 2012); Brooks v. BellSouth Telecomms., Inc., 164 F.R.D. 561, 566 (N.D. Ala. 1995), aff'd, 114 F.3d 1202 (11th Cir. 1997).

Still others incorporate the summary judgment standard into the decertification stage. Campbell v. City of Los Angeles, 903 F.3d 1090 (9th Cir. 2018).

No matter the standard, you should remember that plaintiffs need not prevail on the merits to survive a decertification motion. You should therefore take great care to preserve the daylight between merits questions and certification questions.

For example, you can highlight common evidence addressing the defendant's defenses, but should remind the court that the question on decertification is not who wins at trial, but whether the court can resolve important legal or actual questions efficiently. In some cases, merits inquiries merge with the decertification analysis—for example, when there are factual disputes as to whether a particular policy existed, and if it did, whether the policy applied to the entire FLSA collective. In those situations, you may argue that decertification is inappropriate where plaintiffs have presented sufficient evidence to proceed to trial, and where the evidence allows for efficient resolution of the dispute.

Plaintiffs May Rely on Representative Proof to Avoid Decertification

Plaintiffs in FLSA collective actions should always look for ways to establish their case—on summary judgment, at decertification, and at trial—through policy documents, corporate testimony, and other common proof. Often, however, plaintiffs must also rely on representative evidence to establish they are similarly situated and to ultimately prove their case at trial. Representative evidence comes in many forms, including expert reports, employee testimony, surveys, and aggregated payroll data.

There is a long tradition of representative testimony in FLSA cases, going back to early Department of Labor litigation. In some cases, only a handful of plaintiffs testified on behalf of hundreds. These cases stand for the proposition that plaintiffs in FLSA cases are not bound to the strict confines of statistically significant sampling. FLSA plaintiffs have been successful using representative proof to establish the number of uncompensated hours worked. It is more difficult to establish other factual issues—such as job duties essential to the exemption analysis—through representative proof. This area is sure to be a litigation battleground for years to come, so you should make an early determination of whether your case will rely on representative proof. If so, you should raise this issue early and often with the defendant and the judge.

In seeking representative discovery, you should ask the court to order that the representative plaintiffs for discovery purposes will also be the representative plaintiffs at trial. This alleviates ambiguity regarding the appropriate scope of trial witness. Some judges will refuse to limit discovery to a representative sample or will set a limit on discovery without opining whether the limit is sufficient or representative. While these discovery orders can be frustrating, you can use them to your advantage down the road. If, for example, the judge allows 100 depositions and the defendant only takes 50, you can argue that the individualized testimony from plaintiffs must not be necessary to adjudicate plaintiffs' claims. Defendant's threat to call hundreds of plaintiffs at trial often fizzles when it must pay for hundreds of depositions.

Opposing Decertification in Specific Types of FLSA Cases

Although FLSA cases all typically seek the same types of relief—unpaid minimum or overtime wages, plus liquidated damages—different types of FLSA cases give rise to different strategies and concerns at decertification. When litigating through discovery and preparing to oppose decertification, you should consider the unique issues presented in your case.

Misclassification Cases (Exemption)

Cases where the employer has misclassified employees as exempt present their own unique challenges. These cases can be great for opposing decertification, especially when the employer utilizes standard job descriptions and dictates employees' workflow through policies and procedures. Identifying helpful information in discovery is critical. Fruitful areas of inquiry in these cases might include:

- Job descriptions
- Policy and procedure manuals
- Checklists, guidelines, and workflow documents
- Audits or compliance review of plaintiffs' work
- Standardized performance review forms with metrics
- Distribution list emails from local, regional, or national management instructing plaintiffs regarding job functions
- Records of employee discipline for deviating from policies or procedures
- Performance-based compensation structures
- Deposition testimony from management

Defendants moving for decertification in exempt misclassification cases will almost certainly argue that every employee performed the job differently. On some level, there will be truth to that argument; no two people are alike and most every job involves some measure of personal expression. The key to defeating this argument is to focus on the aspects of job that drive the exemption analysis and highlight the similarities among plaintiffs with respect to those tasks—always reminding the judge that the standard is "similarly situated," not "identical."

For detailed information on wage and hour exemptions, see White Collar and Sales Exemptions (FLSA), Motor Carrier Exemption and Other Exemptions to Overtime Requirements Only under the FLSA, and Non-White Collar Exemptions to Minimum Wage and Overtime Requirements under the FLSA.

For detailed information on state exemption requirements, see the Exempt vs. Non-Exempt column in Wage and Hour State Practice Notes Chart.

Misclassification Cases (Independent Contractors)

Independent contractor misclassification cases also involve unique arguments at the decertification stage. In these cases, defendants typically focus on plaintiffs' alleged independence in the way they performed their job and on the putative employer's relative lack of control. Again, there will likely be differences among plaintiffs, but your task is to identify the similarities. Often these similarities can be found in the independent contractor agreement itself.

Independent contractor agreements usually disclaim any employment relationship and affirm an independent contractor relationship, but they nevertheless contain direct evidence of the employer's control. Helpful provisions that may appear in these independent contractor agreements include:

- Exclusivity clauses, non-compete agreements, and other provisions preventing the worker from freely engaging in trade
- Policies and procedures regarding the performance of the work
- Reporting structures and required permissions
- Common pay structures

The key to successfully opposing decertification in an independent contractor misclassification case is to identify the key pieces of evidence on the merits and show how this evidence is common to all workers.

For more resources on independent contractors, see Independent Contractor Resource Kit.

Off-the-Clock Cases

Cases where plaintiffs are classified and paid as non-exempt, but not paid all wages due to them, are often called "off-the-clock" cases. However, there are as many different types of off-the-clock cases as there are exemption misclassification cases, and each variation presents unique issues at the decertification stage.

For example, an employer may have a common policy of rounding the time clock to the employees' detriment, but the question on the merits (and at decertification) is whether the unrecorded time qualifies as work time. In these cases, you may explore the employer's expectations of employees at the beginning and the end of the work shift. Is there a mandatory handoff meeting between shifts? Are employees required to open software programs or respond to emails prior to the start of their shift? If the employer required certain pre-shift activities of all employees, the employee may survive a decertification motion.

Other cases involve an "unofficial policy" that differs from the employee handbook. For example, an employer's handbook may mandate that employees record all their work time, but the unofficial policy from management is that employees must work until the job gets done and only record eight hours a day. In these cases, defendants may argue that the alleged "unofficial policy" resulted from a few rogue managers deviating from the employer's policy. To oppose decertification, you might argue that the existence or nonexistence of the unofficial common policy is a common question suitable for trial.

Cases involving an "unofficial common policy" to work off-the-clock might also involve questions as to the amount or extent of off-the-clock work. Defendants may argue that plaintiffs' disparate work routines make collective treatment impossible. You can respond by focusing again on important facts that are similar across the group, perhaps arguing that any minor variances in work routines and work hours are inconsequential because all plaintiffs perform substantially similar tasks at similar times in their shift. You can also argue that differences in schedules or start and stop times go to potentially individualized damages, which should not be sufficient, on their own, to warrant decertification.

Lastly, defendants may argue that individualized testimony is required to determine whether each plaintiff's supervisor "knew or should have known" about the off-the-clock

work. You can combat this argument by focusing on the "should have known" standard. Common evidence showing an employer "should have known" about off-the-clock work might include production reports, communications regarding staffing concerns, and studies of how long the job is expected to take. You should also seek evidence of actual knowledge by supervisors. Enough evidence of actual knowledge by some supervisors could be sufficient to satisfy the "should have known" standard as to all plaintiffs. These cases are especially well-suited for a collective treatment, where "me too" evidence is probative on the merits and certification.

For information on timekeeping and off-the-clock work policies and practices, see Timekeeping Policies and Practices under the FLSA and Timekeeping Policy (Long Form with Acknowledgment). For an employee time record template, see Employee Time Record.

Cases Where Plaintiffs Work at Different Locations under Decentralized Management

Defendants will often argue that decertification is warranted because plaintiffs have different work locations and report to decentralized management. You should not accept the premise that decentralized management requires decertification as a matter of course. Instead, you should search for—and emphasize—the common threads running across management.

Ask:

- Were regional managers subject to the same policies, procedures, and performance reviews?
- Was there common training?
- What are the common policies?

As with many arguments on decertification, the key to success is identifying the common policies and emphasizing their importance to resolving the case on the merits.

Responding to Arguments about Fairness and Procedural Concerns

The third prong of the decertification analysis—fairness and procedural considerations—provides ample room for you to argue the policy and purposes behind the FLSA and its collective action mechanism. These can be powerful arguments when paired with pragmatic solutions for efficiently trying the case.

Courts have long emphasized the FLSA's remedial goal: combating the twin evils of overwork and underpay. Any discussion of fairness should begin and end with the policy and purpose behind the FLSA. Forcing FLSA plaintiffs to litigate individually or in small groups, especially when damages are low, frustrates the FLSA's purpose.

The collective action mechanism confirms the FLSA's remedial goals. By allowing plaintiffs to join together, Congress intended that plaintiffs would pool their resources to lower the individual costs of litigation. Given the FLSA's remedial purpose, a collective action trial is the fairest way to resolve a large group of disputed claims. Moreover, the collective action mechanism remains outside the structures of Rule 23 and traditional class actions. Because every FLSA plaintiff affirmatively chooses to join the case, the traditional concerns about preserving the rights of absent class members are not present in a collective action.

When discussing procedural considerations, you should emphasize the burden on the judicial system of breaking a collective action into dozens of different cases to be refiled across the country. The implicit message in this argument is that a judge should not saddle their peers with dozens of cases that could just have easily been handled in one. Of course, this argument depends on you presenting a workable trial plan. You cannot expect the judge to be pragmatic about trial if you are not ready to do the same.

The defendant's arguments about fairness and procedure will likely focus on defendant's alleged desire to present individual defenses as to each and every plaintiff. As detailed below, there are several ways to combat this argument.

Defendant's Behavior in Discovery

First, you can point to a defendant's behavior in discovery. How many plaintiff depositions did the defendant take? If there was a cap on depositions, did the defendant take its full allotment? If a defendant argued for unlimited discovery and then only took a handful of depositions, you can argue that the individualized testimony must not be as important as the defendant asserts.

Evidence Defendant Presented on Summary Judgment

Second, you can focus on the evidence a defendant presented on summary judgment. Did the defendant seek judgment as to the entire collective? Did its motion focus on common policy documents and corporate testimony? If so, you can argue that the common evidence at summary

judgment will also be the most important testimony at trial. Of course, this strategy becomes more difficult if you rely on individualized plaintiff testimony to oppose summary judgment.

Representative Proof in FLSA Trials

Third, you should look to the long history of representative proof in FLSA trials to argue that the defendant does not have a right to an individualized presentation on each plaintiff. U.S. Supreme Court authority provides that, where an employer fails to maintain accurate records of hours worked, plaintiffs may establish damages by a just and reasonable inference. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). You can utilize this concept in arguing there is no need for a person-by-person examination of the evidence.

At the end of the day, the arguments about fairness and procedural considerations come down to the FLSA's remedial policy and purpose, the collective action mechanism, and your plan to try the case based on representative proof of common evidence, such that judicial economy counsels in favor of one trial, rather than many. If you can show the judge that the case can be tried fairly and efficiently, you should be able to survive decertification.

Other Strategic Considerations

This section addresses additional key strategies you should consider in connection to decertification and final certification of FLSA collective actions.

Moving for Final Certification If the Defendant Does Not Move for Decertification

While the court's final analysis of the "similarly situated" inquiry usually comes on a defendant's motion to decertify the collective, sometimes defendants choose not to move for decertification. When this happens, you are left to decide whether to move affirmatively for final FLSA collective action certification. The law is murky in this area.

For example, it appears FLSA plaintiffs are not required to move for final certification in the Ninth Circuit, where the court opined that the terms "certification" and "decertification" are misnomers under the FLSA's collective action mechanism. Campbell v. City of Los Angeles, 903 F.3d 1090, 1101–02 (9th Cir. 2018).

There is less guidance in other circuits, however. No plaintiffs' lawyer likes filing unnecessary motions, especially motions assuming a burden that might not exist. One solution is to address the issue in the scheduling order. But if you get to the end of discovery and the order does not dictate your requirements, you should review the case law in your jurisdiction for guidance about whether you must affirmatively move for final certification.

Stipulating to Decertification

Lastly, you should not assume that opposing decertification is always the right strategy. Sometimes, discovery will show that a case is not amenable to group-wide treatment, but instead could be tried as separate regional or smaller group cases. In these cases, you should consider stipulating to decertification. This strategy gives you some control over the timing of decertification and subsequent refiling of separate cases. If there will be a delay between dismissal and refiling, you should secure a tolling agreement to ensure plaintiffs do not suffer any prejudice.

Defendants often place too much value on their decertification motion, expecting that a large percentage of plaintiffs will simply disappear after decertification. If you have established and maintained relationships with opt-in plaintiffs throughout the litigation, you can turn a potential weakness into a strength by agreeing to decertification and refiling the vast majority of plaintiffs in smaller group actions around the country. This strategy is resource-intensive and requires an established network of local counsel, but plaintiffs-side FLSA firms have employed it with great success. Simply refiling the decertified claims sometimes leads to settlement.

If you do refile claims after decertification, you should consider getting new consent forms from plaintiffs. A defendant may argue that a consent form for the original collective action is insufficient to express a plaintiff's consent to join a second case. Setting aside the ultimate success of that argument, it is probably better to be safe than sorry, and it makes good sense to confirm the next litigation steps with plaintiffs in any event. Plus, the plaintiff's signature on the new consent form confirms to the defendant that decertification has not ended the case—it has simply fractured the war into several expensive battles.

Matthew C. Helland, Partner, Nichols Kaster, PLLP

Matthew C. Helland is an experienced and tenacious litigator who has fought for workers' and consumers' rights throughout his career. Matt serves as the managing partner of Nichols Kaster's San Francisco office, where he focuses his practice on class and collective wage and hour, discrimination, labor trafficking, and consumer cases filed in California and throughout the country. Handling both large class actions and individual matters throughout this career, Matt has developed a record of success in significant and complex litigation.