

**STATE LAW WAGE/HOUR CLASS ACTIONS:
ALIVE AND WELL IN FEDERAL COURT**

The Fair Labor Standards Act (“FLSA”) provides workers certain protections, but state laws frequently provide even greater protections. For example, many state laws provide that an employee must be paid for each hour he or she worked, even for hours less than 40 hours per week – something that it is particularly important in off-the-clock cases.¹ In addition, some states such as California and Colorado, have overtime protections after a worker has worked a certain number of hours in a day, instead of only on a weekly basis. California’s exemption standards are more favorable to workers than the FLSA, since California looks to how the employee spends 50% of his or her time, instead of using the primary duty test used under the FLSA. California also has a more favorable method of calculating overtime damages than does the FLSA. Procedurally, state law claims are not limited by the requirement in 29 U.S.C. § 216(b) that to participate in an FLSA collective action one must opt in; instead, state law claims can be certified under Rule 23 as opt out classes.

Accordingly, particularly after the passage of the supplemental jurisdiction statute 28 U.S.C. § 1367, which created jurisdiction over pendant parties in addition to pendant claims and in cases involving employers with workers in multiple states, plaintiffs began alleging state classes asserting state law wage/hour claims together with FLSA collective actions. *See, e.g., Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448 (D. Del. 2001) (certifying Rule 23 state law

¹ For example, in *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448 (D. Del. 2001), the employer was alleged to have scheduled workers to work approximately 36 hours per week, but required them to spend additional time donning, doffing, and cleaning sanitary and protective equipment. The workers were only able to recover for the hours worked between 36 and 40 hours per week under state law. Similarly, in the various off-the-clock cases against Wal-Mart, *see, e.g., Barnett, et al. v. Wal-Mart Stores, Inc.*, No. 03-2-15301-0 SGA (King County Sup. Ct.), workers can recover for hours worked under 40 hours per week under state law.

classes together with FLSA collective action); In re Farmers Ins. Exam. Claims Reps. Overtime Pay Litigation, 2003 WL 23669376 (D. Ct.) (same); Ansoumana v. Gristidede's Operating Corp., 201 F.R.D. 81, 91 (S.D.N.Y. 2001). Defendants responded to such “hybrid” collective actions/class actions in two ways: (1) they argued that courts should decline to exercise supplemental jurisdiction over state law claims; and (2) they asserted that opt out state law classes are inconsistent with the opt in nature of an FLSA collective action. The jurisdiction argument, which had met a mixed reception in the courts, was dealt a death blow by the recent enactment of the Class Action Fairness Act, which creates federal court jurisdiction over state law wage/hour class actions if any of the defendants and class members are diverse and the aggregate amount of the action exceeds \$5 million. The “inconsistent with the FLSA” argument has been roundly rejected by the courts to address it.

I. FEDERAL COURT JURISDICTION OVER STATE LAW WAGE/HOUR CLAIMS.

Before the enactment of the Supplemental Jurisdiction Statute in 1990, federal courts had jurisdiction over pendant claims, but not pendant parties. As a result, if a plaintiff alleged a FLSA collective action with pendent state law classes, the federal court had jurisdiction over the state and federal claims of the persons who opted in to the FLSA collective action but not over the members of the proposed state law class who did not. The federal court did have jurisdiction over all members of the proposed state law class if a federal claim not requiring opting in, such as a claim under ERISA, was alleged.

In 1990, 28 U.S.C. § 1367 created supplemental federal court jurisdiction over “all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . .” The statute expressly created jurisdiction over

prudent parties: “Such supplemental jurisdiction shall include claims that include the joinder or intervention of additional parties.”

The supplemental jurisdiction statute, however, was permissive, not mandatory, in certain circumstances. The statute provided that a court “may decline to exercise supplemental jurisdiction . . . if (1) the claim raises a novel or complex issue of state law; (2) the claim substantively predominates and the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for deciding jurisdiction.”

In *DeAsencio v. Tyson Foods*, 342 F.3d 301, 311-12 (3d Cir. 2003), the Third Circuit found that it was appropriate for the district court to decline supplemental jurisdiction over a state wage hour claim where the state wage claim raised many complicated issues not presented by the FLSA claim and was offered late in the case. Other courts, however, continued to accept supplemental jurisdiction over state law wage/hour claims after *DeAsencio*. See, e.g., *McLaughin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304 (D. Mass. 2004).

The recent enactment of the Class Action Fairness Act (“CAFA”) closes that debate. CAFA provides that “the district courts shall original jurisdiction over any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000 . . . and any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d).

Although CAFA only applies to actions commenced after its enactment, “the addition of a new defendant or any other step sufficiently distinct that courts would treat it as independent for jurisdictions purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number” *Knudsen v. Liberty Mut. Ins. Co.*, 200 WL 1399059 (7th Cir.).

II. THE FLSA DOES NOT PREVENT COURTS FROM ALLOWING WORKERS TO PURSUE RELATED CLAIMS IN A SINGLE, EFFICIENT LAWSUIT BY CERTIFYING RULE 23 OPT-OUT CLASSES IN CONJUNCTION WITH FLSA OPT-IN ACTIONS.

The argument that workers may never assert a Rule 23 class in any “action” that also includes an FLSA opt-in claim has been consistently rejected. All courts to explicitly consider the issue have found that FLSA opt-in claims may be pursued within lawsuits that also allege Rule 23 opt-out claims under state or federal law.

The courts to consider the issue expressly² have found that the FLSA’s “opt-in” provisions do *not* prevent enforcement of similar state wage and hour laws through traditional opt-out class actions. *See, e.g., McLaughin*, 224 F.R.D. at 308 (“Nothing in the [FLSA] limits available remedies under state law”); *Beltran-Benitez v. Sea Safari Ltd.*, 180 F. Supp. 2d 772, 774 (E.D. N.C. 2001) (Denying defendant’s motion to dismiss state law claims because the FLSA does not prohibit Rule 23 opt-out class actions for related state law claims; noting that judicial economy is served by trying these claims together); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778, 781-782 (E.D. N.C. 1998) (“While § 216(b) does prohibit opt-out class actions, it does so only for FLSA claims, and does not impact a state law-based claim”); *Webster v.*

² Numerous courts have implicitly rejected the argument by certifying Rule 23 state law classes with an FLSA collective action. *See, e.g., In re Farmers Ins. Exch. Claims Reps. Overtime Pay Litigation*, 2003 WL 23669376 (D. Or. 2003) (certifying Rule 23 class to assert state law wage and hour claims in conjunction with FLSA claims); *Scott v. Aetna Services Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (same); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 91 (S.D. N.Y. 2001) (same); *O’Brien v. Encotech Contr. Services, Inc.*, 203 F.R.D. 346 (N.D. Ill. 2001) (same); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448 (D. Del. 2001) (same); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 U.S. Dist. LEXIS 17832; 142 Lab. Cas. (CCH) P34, 179 (N.D. Ill. 2000) (same); *Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351, 354 (S.D. N.Y. 1999) (same); *Kelley v. SBC, Inc.*, 1998 U.S. Dist. LEXIS 18643, 1998 WL 928302 (N.D. Cal. 1998) (same); *Ramirez v. Nutrasweet Co.*, 1996 U.S. Dist. LEXIS 13462 (granting class certification under Rule 23 for common law breach of contract claims where plaintiff had also brought FLSA claims); *Leyva v. Buley*, 125 F.R.D. 512, 514 (E.D. Wash. 1989) (granting class certification on state wage and contract claims where plaintiffs had also sued for wage violations under the FLSA).

Bechtel, Inc., 621 P.2d 890, 902-03 (Sup. Ct. Alaska 1980) (FLSA’s opt-in provisions do not pre-empt the use of opt-out procedures to enforce state overtime laws).

The misinterpretation of the FLSA that would prevent state law claims in conjunction with an FLSA claim stems from the removal of the word “action” from the context of the section in which it is found. Section 216(b) provides, in relevant part, that “An *action to recover the liability prescribed in either of the preceding sentences* may be maintained against any employer. . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such *action* unless he gives his consent in writing to become such a party...” 29 U.S.C. §216(b) (emphasis added). In context, the word “action” refers to the collective, or representative action on behalf of others similarly situated to recover under the FLSA itself, and not to other causes of action that are part of the same case or controversy and may be tried together.

There is no precedent for the argument that when Congress amended the FLSA in 1947 to require that all FLSA plaintiffs file individual consents-to-join “the action,” it meant that the FLSA plaintiffs had to file consents-to-join with respect to the entire court case, even for claims unrelated to the FLSA but properly joined in the same lawsuit, such that Rule 23 opt-out causes of action can never be alleged in the same lawsuit that alleges FLSA violations. Such a result would be extremely inefficient and contrary to public policy.

CONCLUSION

After CAFA, it is clear that federal courts can , and should, exercise jurisdiction over hybrid actions consisting of both an FLSA collective action and state law wage claims.