

# Class Action

COMMENTARY

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## Concurrent Wage-and-Hour Class and Collective Actions in Federal Court: Courts Around The Country Agree to Disagree

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Wage-and-hour class-action litigation is an increasingly prevalent part of federal court dockets throughout the United States. Many of these actions involve state law and federal claims in the same case. Around the country, federal courts have struggled with the question of whether the different procedures for state and federal wage-and-hour class actions should prevent a plaintiff from bringing both sets of claims in the same action. This article attempts to provide a framework for this ongoing debate by categorizing representative cases on the subject based both on how the courts have ruled and on how they have justified their rulings.

### Introduction

The federal Fair Labor Standards Act establishes basic wage-and-hour standards for workers throughout the United States. But 48 states, Puerto Rico and the District of Columbia have adopted at least some of their own wage-and-hour laws, setting their own (sometimes equivalent) standards for how employers must treat their workers.<sup>1</sup> Congress specifically planned for states to create their own wage-and-hour laws and included a "savings clause" in the FLSA to that purpose. It states: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." 29 U.S.C. § 218.

In 1947 Congress amended the FLSA with regard to the procedure for class actions alleging violations of its provisions. It added 28 U.S.C. § 216(b), which provides that no

employee may be part of a class action against her current or former employer unless she affirmatively joins the suit. This is often called "opting in" to the lawsuit, and thus the Section 216(b) requirements have come to be known as the FLSA's "opt in" standard. FLSA cases on behalf of a class of people are sometimes called "collective actions" rather than "class actions."

Typically, class actions brought to vindicate the rights established by state wage-and-hour laws are "opt out" cases, in which employees, if included within the definition of the class as set out in a class-action complaint alleging violations of the state law, are considered class members unless they affirmatively exclude themselves from the class. Of the 50 states and territories that have adopted their own wage-and-hour laws, only the District of Columbia, Indiana and Oklahoma specifically have chosen an opt-in procedure for class actions.<sup>2</sup>

Because the FLSA and state wage-and-hour laws tend to cover much of the same ground, workers who sue their employers for wage-and-hour violations on a class-action basis often include both state law and FLSA claims in their complaints. Where the state law employs an opt-out class-action procedure, this results in cases that allege both an opt-out and an opt-in class, which often consist of the same workers.<sup>3</sup> When such cases are brought in federal court, many employers have argued, the state law claims should be dismissed and should not be entertained by the federal court. The response of federal courts to such arguments has been decidedly mixed.

Class actions alleging concurrent FLSA and state wage-and-hour law violations are too numerous to count. No

definitive line of cases has emerged, and the sheer volume of cases addressing this subject makes it impossible to put them into a finite number of categories. For the most part, though, the legal arguments relied on by courts that have ruled against concurrent FLSA and state law class actions fall into three distinct categories:

- Allowing concurrent FLSA and state law claims frustrates the purpose of FLSA's opt-in requirement;
- State law opt-out classes tend to be larger than FLSA opt-in classes, and thus the state law claims "predominate" for purposes of supplemental jurisdiction; and
- The seemingly opposing opt-out and opt-in procedures will confuse potential participants and create insurmountable manageability problems. Courts approving such concurrent claims, in addition to responding to some or all of these arguments, often assert that concerns of judicial economy and overall efficiency militate in favor of entertaining the state law claims.

U.S. Magistrate Judge Geraldine Soat Brown of the Northern District of Illinois, speaking only of that district, captured the voluminous and scattered state of the case law on this issue:

The simultaneous certification of a Rule 23 class for state law claims together with [an] FLSA collective action has been the subject of a number of opinions *within this district*, with judges expressing differing views of the issue." *Riddle v. Nat'l Sec. Agency*, 2007 WL 2746597, \*9 (N.D. Ill. 2007) (emphasis added).

### Concurrent FLSA and State Law Claims and the Purpose of 29 U.S.C. § 216(b)

Another case in the Northern District of Illinois, *McClain v. Leona's Pizzeria*, 222 F.R.D. 574 (2004), captures the basic objections some courts express to concurrent FLSA and state-law wage-and-hour claims in federal court. In that case the plaintiff alleged violations of the FLSA and Illinois' minimum-wage law, which employs an opt-out class-action procedure. *Id.* at 575-576. The court declined to certify the plaintiff's opt-out state law claims under Federal Rule of Civil Procedure 23.

Defendants typically question the propriety of concurrent opt-out and opt-in classes at the pleading stage, through a motion to dismiss, and at the class-certification stage. Like in many of the cases holding that such concurrent

claims are improper, the *McClain* court called on two different but related concepts to support its decision not to entertain the state law opt-out claims: the discretion given to federal courts by 28 U.S.C. § 1367(c) to decline to exercise supplemental jurisdiction over related state law claims, and Rule 23(b)(3)'s requirement that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

The *McClain* court held that Rule 23 class certification of the state law claims was not the "superior method" because "[t]he FLSA's opt-in provision directly contrasts with Rule 23's opt-out scheme and demonstrates Congress' intent to ensure that parties with wage-and-hour claims under the FLSA take affirmative steps to become members of a class seeking redress of those claims in federal court." *McClain*, 222 F.R.D. at 577. The court then called upon supplemental-jurisdiction principles to support its decision, saying that "allowing *McClain* to use supplemental state law claims to certify an opt-out class in federal court would undermine Congress' intent to limit these types of claims to collective actions." *Id.*

This has been described as a "quasi-preemption" analysis. *Woodard v. FedEx Freight East*, 2008 WL 471552, \*8 (M.D. Pa. 2008). Other courts have expressed the same sentiment using different language. See, e.g., *Ellis v. Edward D. Jones & Co.*, 2007 WL 4426615, \*12 (W.D. Pa. 2007) (the state law claim "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."); *Lindsay v. Gov't Employees Ins. Co.*, 355 F. Supp. 2d 119, 121 (D.D.C. 2004) ("There are 'powerful policy considerations' that led Congress to amend the FLSA to require employees wishing to join FLSA actions to affirmatively opt in via individual written consents."); *Leuthold v. Destination Am.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004) ("the policy behind requiring FLSA plaintiffs to opt in to the class would largely 'be thwarted if a plaintiff were permitted to backdoor the shoehorning in of unnamed parties through the vehicle of calling upon similar statutes that lack such an opt-in requirement.'") (quoting *Rodriguez v. The Texan*, 2001 WL 1829490, \*2 (N.D. Ill. 2001); *Jackson v. City of San Antonio*, 220 F.R.D. 55, 60 (W.D. Tex. 2003) (combining opt-in and opt-out claims "would [flout] the congressional intention that FLSA claims proceed as an opt-in scheme.").

On the other hand, many courts have found this analysis to be "unpersuasive." *Beltran-Benitez v. Sea Safari*, 180 F. Supp. 2d 772, 774 ("FLSA's prohibition of Rule 23 class actions does not bar the application of Rule 23 to a separate cause of action in the same complaint."). While there is no doubt that FLSA claims must be pursued through an opt-in procedure, this should not be an issue where the opt-in and opt-out procedures are applied to distinct causes of action. "[W]hether Rule 23's class-action requirements can be applied to a plaintiff's FLSA-based claims is not

### Why have courts ruled *against* concurrent FLSA and state law actions?

- Frustrates the purpose of FLSA's opt-in requirement.
- State law claims "predominate" for purposes of supplemental jurisdiction because state law opt-out classes tend to be larger than FLSA opt-in classes.
- Opt-out and opt-in procedures will confuse potential participants and create insurmountable manageability problems.

### Why have courts ruled *in favor of* concurrent FLSA and state law actions?

- Concern for judicial economy and efficiency.
- To prevent plaintiffs from losing state law claims because of removal.

the issue here. The plaintiffs are not seeking to graft the requirements of Rule 23 onto their FLSA action. Instead, they seek to add a separate claim for violation of [Iowa state law], which would fall within the scope of the Rule 23 requirements." *Bartleson v. Winnebago Industries*, 2003 WL 22427817, \*4 (N.D. Iowa 2003); see also *Thorpe v. Abbott Labs.*, 534 F. Supp. 2d 1120, 1124 (N.D. Cal. 2008) ("the court is unpersuaded that permitting a separate suit to go forward on state law claims somehow undermines the Congressional intent in providing an opt-in class-action format under the FLSA ... the FLSA clearly indicates that it does not preempt stricter state law claims.").

Even cases that ultimately declined to entertain concurrent FLSA and state law claims have dismissed the "quasi-preemption" approach as inapplicable. See, e.g., *Neary v. Metro. Prop. & Cas. Ins. Co.*, 472 F. Supp. 2d 247, 251 (D. Conn. 2007) ("the FLSA does not preempt state wage-and-hour statutes ... and therefore the better-reasoned course is to dismiss class-action claims grounded in state wage-and-hour laws in the context of an FLSA action by declining to exercise supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367.").

### FLSA Collective Actions and Their Larger State Law Class-Action Counterparts

Under 28 U.S.C. § 1367(c)(2), "district courts may decline to exercise supplemental jurisdiction where ... the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." This gives rise to the second basic objection to concurrent FLSA and state law opt-out wage-and-hour claims: state law opt-out classes will "predominate" over the federal claims because they tend to be much larger than opt-in classes. As the *McClain* court stated, "we could very well be left 'with the rather incongruous situation of an FLSA "class" including only a tiny number of employees ... with a state law class that nonetheless includes all or nearly all of the companies' present or former employees.'" *McClain*, 222 F.R.D. at 577 (quoting *Muecke v. A-Reliable Auto Parts & Wreckers*, 2002 WL 1359411, \*2 [N.D. Ill. 2002]).

The 3rd U.S. Circuit Court of Appeals put it this way: "Predomination under Section 1367 generally goes to the type of claim, not the number of parties involved. But the disparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." *De Ascencio v. Tyson Foods*, 342 F.3d 301, 311 (3d Cir. 2003).

Courts on the other side of the issue dismiss these concerns in light of the fact that, essentially by definition, "Plaintiffs' FLSA claims and the state law claims derive from a common nucleus of operative facts." *Carnevale v. GE Aircraft Engines*, 492 F. Supp. 2d 763, 768. "The essential facts and issues" between the FLSA and state-law claims "are likely to be the same." *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 90 (S.D.N.Y. 2001). As a result, cases alleging concurrent FLSA and state-law claims satisfy the requirement of 28 U.S.C. § 1367(a) that supplemental jurisdiction be exercised when the claims are "so related ... that they form part of the same case or controversy under Article III of the United States Constitution." Class size does not matter, these courts say: "Predominance under Section 1367(c)(2) relates to the type of claim being brought rather than the size of the respective classes. ... Here, where the state law claims essentially replicate the FLSA claims, they plainly do not predominate." *Iglesias-Mendoza v. La Belle Farm*, 239 F.R.D. 363, 375 (S.D.N.Y. 2007). According to one district court, "[t]he clear weight of authority is in favor of exercising supplemental jurisdiction." *Goldman v. RadioShack Corp.*, 2003 WL 21250571, \*4 (E.D. Pa. 2003).

### Two Classes in One Case

Some courts have found that the complexity of simultaneous opt-in and opt-out classes requires dismissal of the state law opt-out claims. Again, the *McClain* court sums up the argument: "It may be confusing for a potential class member to receive a notice indicating that they must opt out of some claims and opt in to others." *McClain*, 222 F.R.D. at 577. The Eastern District of North Carolina said concurrent state law and federal classes "would undoubtedly confuse a jury." *Zelaya v. J.M. Macias*, 999 F. Supp. 778, 783 (E.D.N.C. 1998).

Other courts simply disagree, holding that competent counsel and well-drafted notices can obviate any confusion or manageability issues that could otherwise arise. See, e.g., *Ansoumana*, 201 F.R.D. at 95 ("there is little risk of jury confusion, and there is no greater risk than that present in other cases involving supplemental jurisdiction. Nor will any unmanageable problems likely arise in pretrial proceedings. Competent counsel will be able to draft appropriate notices, and they and the court should be able to manage this case fairly and efficiently."); *Kelley v. SBC*, 1998 WL 928302 (N.D. Cal. 1998) ("Even if two classes are created, this will neither alter the substance of the litigation nor unduly complicate the process."); *Torres v. Gristede's Operating Corp.*, 2006 WL 2819730, \*16 (S.D.N.Y. 2006) ("there is little reason to expect that the difficulties in managing this class action would be any greater than managing individual actions for the 300 Rule 23 class members."); *Salazar v. Agriprocessors Inc.*, 527 F. Supp. 2d 873, 885-886 (N.D. Iowa 2007) ("The court is well-equipped to manage a case involving a FLSA collective action and a state law class action."); *Brickey v. Dolencorp Inc.*, 2007 WL 2460613, \*1-2 (W.D.N.Y. 2007) ("the complexities of Rule 23 and FLSA hybrid actions are a challenge that the federal judiciary, and properly instructed juries, are generally well-equipped to meet."); *O'Brien v. Encotech Constr. Servs.*, 203 F.R.D. 346, 352 (N.D. Ill. 2001).

### Efficiency, Consistency and Access to the Courts

Courts that have approved concurrent FLSA and state law wage-and-hour claims in a single federal proceeding have not limited themselves to parrying the arguments from those courts holding the opposite view. Concerns of efficiency and access to justice have colored their decisions.

Because of the inherently related factual issues when one policy or practice of the employer gives rise to both state law and FLSA claims, many district courts have found that "judicial economy" is served by trying them together. *Id.* at \*5. For one, requiring plaintiffs to dismiss their state law claims only to refile them in state court would be a waste of the time and resources of the courts and the parties. See

*Ansoumana*, 201 F.R.D. at 89 (state law and FLSA claims "are best litigated in a single forum, and the proceedings already undertaken cause any separate actions in this and other forums to be wasteful and inefficient"); *O'Brien*, 203 F.R.D. at 352 ("If [plaintiffs] are denied the opportunity of filing a class suit for their state claims in this court, they could file a suit for these claims in state court. That result, however, would be inefficient. It would be desirable to concentrate all litigation related to plaintiffs' common set of facts in this forum.").

In addition, requiring plaintiffs to bring their claims in separate courts risks issue preclusion or inconsistent results. See *Ansoumana*, 201 F.R.D. at 93 ("the federal FLSA claims and the state Minimum Wage Act claims arise from the same nucleus of operative facts, are substantially related to each other, and naturally would be treated as one case and controversy. Indeed, it would be difficult to try them separately, for the findings in one case would tend to be preclusive as to the other or, if not preclusive, could expose the parties to inconsistent results."); *In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litig.*, 2003 WL 23669376, \*7 (D. Or. 2003) ("if the state law classes are not certified, there is a risk of inconsistent decisions and judgments.")

Finally, courts approving concurrent FLSA and state law claims have found that forcing state law putative class members to bring their own claims is bound to lead to wasteful or unjust results. "[T]here would be a great strain on judicial resources if thousands of claims were adjudicated individually, especially given the identical issues in this case." *Id.* Even if this waste of judicial resources were avoided, the result would be "a loss of guaranteed rights because many plaintiffs will not have the ability or means to file individual suits." *Ansoumana*, 201 F.R.D. at 91.

Implicit in many of these decisions is the contention that, because the state law claims often will be refiled in state court, dismissing state law claims from the federal action does nothing to alleviate the purported confusion about the concurrent opt-in and opt-out classes. In fact, because sending the state law claims to a state court removes the federal court's authority to monitor the notice to class members, such parallel cases may create more confusion by providing putative class- and collective-action members with two different notices from two different courts. "If the related FLSA and Minimum Wage Act claims were to be litigated in parallel fashion, in this court and in the New York Supreme Court, there would be great potential for confusion of issues; considerable unnecessary costs, inefficiency and inconsistency of proceedings and results; and other problems inherent in parallel class-action litigation." *Ansoumana*, 201 F.R.D. at 96. As the *Ansoumana* court put it, "Congress enacted Section 1367 to avoid such problems." *Id.*

## The Plaintiff's Choice of Forum

In at least one district, courts have found the procedural posture of a case to be significant: "The defendant's removal of what may potentially be a state class action has been considered a significant factor in determining whether the class mechanism is a superior method of adjudication." *Riddle*, 2007 WL 2746597 at \*9; see also *Acosta v. Scott Labor*, 2006 WL 271118, \*5 (N.D. Ill. 2006) ("a defendant's removal of a state class action significantly diminishes the merits of its challenge to the superiority of class certification under Rule 23[b][3]."); *Sorensen v. CHT Corp.*, 2004 WL 442638, \*11 (N.D. Ill. 2004) ("permitting defendants to remove [plaintiff's] state law claims to this court and object to class-action treatment of those claims arguably subverts the rights of unnamed class members."). This likely reflects the seeming injustice of having a putative class representative lose her state law claims purely as a result of removal, a process that is completely outside her control.

## Conclusion

Given the significant number of cases that have considered the propriety of concurrent FLSA and state-law claims in federal court, attorneys on either side of this issue will have substantial authority to cite in support of their contention. By framing this as an issue of efficiency and judicial economy, however, those advocating for

concurrent FLSA and state law claims may have more arguments at their disposal.

## Notes

<sup>1</sup> The only states that, in effect, have not adopted any of their own wage-and-hour laws are Iowa and Mississippi. Tennessee's wage-and-hour laws apply only to workers in "workshops and factories." Tenn. Code Ann. § 50-2-101.

<sup>2</sup> See also *Trezvant v. Fidelity Employer Servs. Corp.*, 434 F. Supp. 2d 40, 56-57 ("The wording of the [state] statute and the lack of class-action employee wage lawsuits in New Hampshire leaves a significant degree of doubt as to whether class actions are allowed.")

<sup>3</sup> It should be noted that many states have adopted their own wage-and-hour laws that apply only to those employers in the state who are not already covered by the FLSA. (Only enterprises "whose annual gross volume of sales made or business done is not less than \$500,000" are subject to the minimum wage and overtime provisions of the FLSA. 29 U.S.C. § 203[s][1][A][ii].) Thus, concurrent FLSA and state law wage-and-hour cases cannot exist against employers in those states.

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