

## Strategies for Responding to Efforts for Conditional or Final Class Certification in FLSA Cases

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# Whether to Combat Conditional Certification

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The threshold question of whether to contest conditional certification implicates a host of considerations, including:

- The plaintiffs' substantive claims – some FLSA claims are easier to conditionally certify than others
- Your jurisdiction – many courts follow the “lenient standard” for conditional certification, but not all
- The strengths and weaknesses of the plaintiffs' claims – the employer may want a collective action to achieve a more comprehensive settlement
- The potential size of the collective action if conditionally certified
- The defendants' appetite for litigation

# How to Combat Conditional Certification

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If the defendant chooses to contest conditional certification, the next question is how to do it

- Explore whether the parties can agree to pre-certification discovery and its parameters
- Generally, at this juncture plaintiffs may want to develop evidence of the defendant's policies and practices and defendants may want to conduct discovery from the named plaintiffs
- In the absence of an agreement, the parties may need to litigate these issues – know your court
- Many of these questions will be controlled by the nature of the FLSA claims in question
- Defendants should not rely exclusively on discovery at this juncture – develop the facts with a thorough investigation

# How and Whether to Conduct Pre-Conditional Certification Discovery

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## Whether to do it

- Consider jurisdiction and type of claim
- Delays and costs
- May or may not show similarly situated
- May narrow or expand the group
- May affect the conditional certification standard
- May aid settlement approval

# How and Whether to Conduct Pre-Conditional Certification Discovery **(continued)**

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## Options for discovery

- Depositions – named plaintiffs and more
- Depositions – 30(b)(6)
- Written discovery
- Questionnaires – options:
  - Samples versus all potential opt-ins
  - From plaintiffs' counsel only

# How and Whether to Conduct Pre-Conditional Certification Discovery **(continued)**

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## Options for discovery (continued)

- Questionnaires – pros and cons
  - Risk of good and bad information for both sides
  - Possible exclusion of nonresponsive persons
  - Delays
  - Perhaps help with settlement and court approval

## Other considerations:

- Rule 26(f) meeting and scheduling order – being clear as to plan
- Preserving right to conduct further discovery

# Dealing with Efforts for Both an Opt-In and Opt-Out Class

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In recent years, more plaintiffs in wage and hour cases are filing “hybrid” cases, which involve FLSA claims and state law wage claims. These cases introduce another layer of complication to wage and hour litigation, including:

- Vastly different certification standards – 29 U.S.C. §216 (b) versus Fed. R. Civ. P. 23
  - Defendants should vigorously defend their right to have the plaintiffs’ state law claims subjected to the stringent certification requirements of Rule 23
- The differences between opt-in procedures (FLSA) versus opt-out procedures (Rule 23) create special challenges in drafting notice(s) to the class

## Dealing with Efforts for Both an Opt-In and Opt-Out Class (continued)

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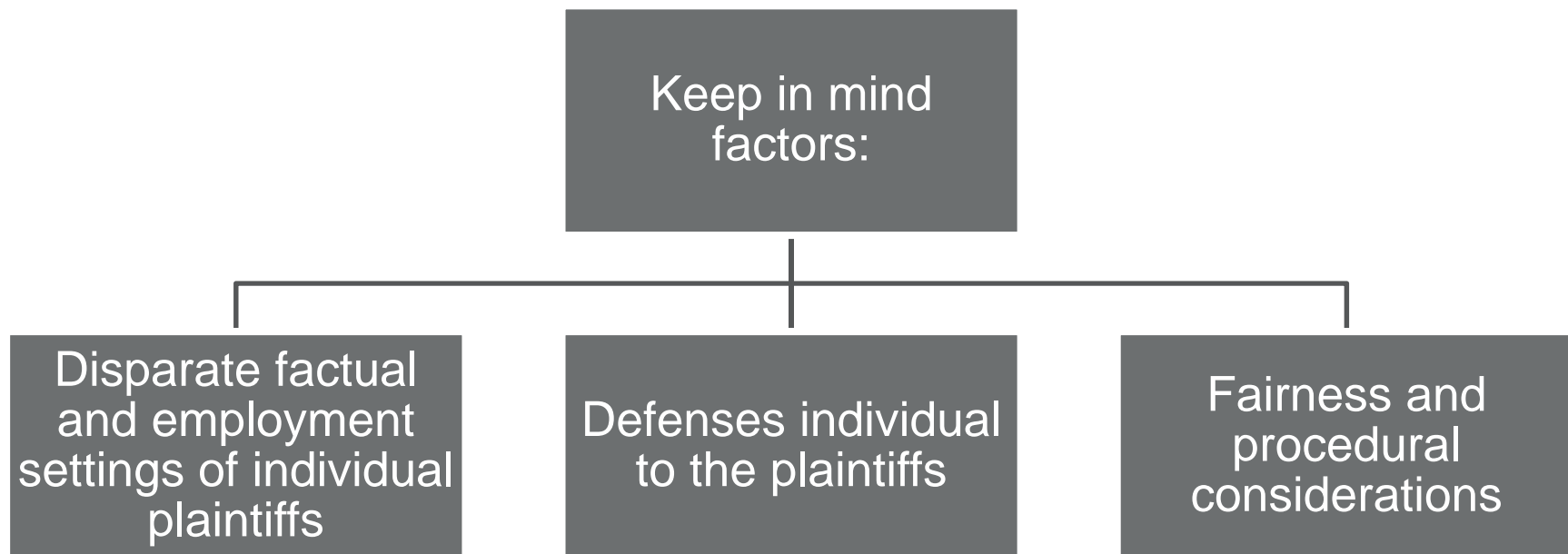
### Hybrid cases create other challenges, including:

- Statute of limitations differences – The relevant period for FLSA claims is usually 3 years back from when a plaintiff opts in, but the relevant periods for state law claims are often greater than 3 years
- Damages issues:
  - Liquidated damages are available for FLSA plaintiffs, but often are not available under state law
  - Pre-judgment interest is not available to FLSA plaintiffs, but often is available under state law
  - In hybrid cases, some plaintiffs may only have state law damages and others will have both state law and FLSA damages
- Trying a hybrid case to a jury presents even more daunting challenges – some of which may cut against the plaintiffs



# Conducting Discovery in View of Decertification

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# Conducting Discovery in View of Decertification

(continued)

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## Options for discovery

- Depositions – How many and how to complete?
- Interrogatories and document requests
- Questionnaires
- Written depositions
- Other discovery options

## Focus of discovery – Differences

- Supervisors, practices, job duties, locations, policies, timekeeping, potential damages

# Preparing Compelling Arguments to Defeat Certification or Obtain Decertification

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Defense counsel's plan for defeating conditional certification or later obtaining decertification should dominate the defendants' litigation strategy

If defeating certification in total is unrealistic, carefully consider all opportunities to limit the scope of the collective action or class

Before discovery even starts, consider whether the defendant can develop "decert. evidence"

- Caution – pre-cert. contact with potential class members

Design a discovery plan with decertification as a primary goal

Seize opportunities to advance decertification via motion practice

Consider when to move for decertification

Take advantage of decertification opportunities at trial

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# Questions?