IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 17-cv-02074-MSK-KMT

ERIN JOHNSON,
JOCELYN KLEIN, and
LAURA SCIARCON, individually and on behalf of others similarly situated,

Plaintiffs,

v.

COLORADO SEMINARY, aka University of Denver, d/b/a Fisher Early Learning Center,

Defendant.

ORDER ON PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY FLSA COLLECTIVE OR, IN THE ALTERNATIVE, TO PERMIT JOINDER, MOTION FOR JUDICIAL NOTICE TO POTENTIAL MEMBERS OF COLLECTIVE, AND MOTION TO TOLL FLSA STATUTE OF LIMITATIONS

THIS MATTER is before the Court on the Plaintiffs' Motion to Conditionally Certify FLSA Collective or, in the Alternative, to Permit Joinder, Motion for Judicial Notice to Potential Members of Collective, and Motion to Toll FLSA Statute of Limitations **(#12)**, the Defendant's Response **(#26)**, and the Plaintiffs' Reply **(#30)**.

JURISDICTION

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

BACKGROUND

The Defendant, Colorado Seminary, a/k/a University of Denver, d/b/a Fisher Early Learning Center ("FELC"), operates a child daycare facility in Denver, Colorado. It employs various caregivers who are responsible for the children placed in its care. Until December 2016,

it classified these caregivers as exempt employees who did not qualify for overtime pay. The Plaintiffs, Erin Johnson, Jocelyn Klein, and Laura Sciarcon, are current and former caregivers at FELC. They allege that FELC has failed to pay them for overtime hours they worked in violation of the Fair Labor Standards Act ("FLSA").

According to the Complaint **(#1)** and the Declaration of Laura Sciarcon **(#12-1)**, in November 2016, FELC's director emailed the caregivers, advising them that as of December 1, 2016, they would be eligible for overtime pay. Later, the director instructed the caregivers to document their overtime from June 1, 2014 through November 30, 2016 and indicated that they would receive overtime pay for that time. The Plaintiffs allege that they submitted the overtime that they worked from June 1, 2014 through November 30, 2016, but FELC failed to fully compensate them for those hours.

The Plaintiffs bring this action asserting claims under the FLSA and Colorado Wage Claim Act. After the Complaint was filed, the Court *sua sponte* bifurcated the FLSA claims from the state-law claims, staying all litigation concerning the state-law claims until the FLSA claims have been tried to completion or otherwise resolved.

The Plaintiffs now request that the Court (1) conditionally certify this action pursuant to 29 U.S.C. § 216(b), (2) compel FELC to produce the names, last known physical addresses, email addresses, telephone numbers, dates of employment, and dates of birth, and social security numbers, or if foreign nationals, passport numbers and home country addresses of all those who worked as caregivers from August 29, 2014 to the present, (3) approve their proposed notice and consent forms and authorize them to be mailed to potential opt-in plaintiffs, (4) order a 120 day opt-in period, (5) authorize them to send a reminder notice 45 days before the opt-in period ends, (6) designate Plaintiffs Erin Johnson and Jocelyn Klein to serve as class representatives, (7)

appoint the Plaintiffs' attorneys as class counsel, and (8) toll running of the statute of limitations from November 14, 2016 to the present as to each potential opt-in plaintiff.

ANALYSIS

A. The Plaintiffs' Request to "Certify" this Action as a Collective Action

The Plaintiffs ask the Court to "certify" this action as a collective action and authorize them to send notice to the following individuals:

> All individuals employed at the Fisher Early Learning Center at the University of Denver as child daycare caregivers at any time between August 29, 2014 and the present

FELC opposes the request based upon evidence disputing the merits of the Plaintiffs' claims. It also argues that the Plaintiffs are the only three employees who have a dispute as to whether they were not fully compensated for overtime that they worked.

The FLSA provides a unique procedural mechanism governing minimum wage and/or overtime violations. 29 U.S.C. § 216(b). Under Section 216 of the FLSA ("Section 216"), a minimum wage and/or overtime action "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." *Id.* This type of action is called a "collective action." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Plaintiffs may seek to "conditionally certify" a collective action, but conditional certification in a collective action is somewhat of a misnomer. *See Turner v. Chipotle Mexican Grill, Inc.*, 123 F.Supp.3d 1300, 1305-06 (D. Colo. 2015).

Conditional certification in an FLSA action is merely the vehicle by which a court authorizes a named plaintiff to give a *Hoffman-LaRoche*[1] type of notice to other employees or former employees. *Genesis Healthcare Corp.*, 569 U.S. at 75. The purpose of the notice is to

[1] *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989). *Hoffman-La Roche* was an Age Discrimination in Employment Act ("ADEA") case. The ADEA expressly incorporates the FLSA's enforcement provisions.

alert potentially aggrieved individuals that they can join the lawsuit by filing a written consent. *Hoffman- LaRoche*, 493 U.S. at 169-74. Giving this notice early in the case helps protect the rights of employees and former employees because filing of the consent tolls any statute of limitation. Consonant with the notice's limited purpose, the standard for court approval is lenient. A court need only find – based on the allegations of the complaint along with any supporting affidavits or declarations – that there are substantial allegations that individuals other than the named plaintiff(s) were victims of a single decision, plan, or policy of the defendant employer. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F. 3d 1095, 1102 (10th Cir 2001). In making this finding, the Court does not weigh evidence, resolve factual disputes, or rule on the merits of the plaintiffs' claims. *Torres-Vallejo v. Creativexteriors, Inc.*, 220 F. Supp. 3d 1074, 1091 (D. Colo. 2016). After discovery is completed, a court may be asked to determine whether the plaintiffs who "opt-in" are similarly situated pursuant to 29 U.S. C. § 216(b). Applying this standard, the Court only considers the Complaint and Declaration of Laura Sciarcon and not FELC's declarations. FELC's dispute of the factual basis of the Plaintiffs' claims is not proper at this stage of proceedings.

The Complaint and the Declaration of Laura Sciarcon allege that FELC had a policy classifying its caregiver employees as FLSA exempt. FELC has employed dozens of caregivers. In November 2016, FELC determined that the caregivers were actually non-exempt and entitled to overtime compensation. FELC requested that its caregivers submit their overtime hours from June 1, 2014 through November 30, 2016. As requested, the Plaintiffs submitted their overtime hours, but FELC did not fully compensate them.

The Complaint's allegations and Ms. Sciarcon's statements are sufficient to show that they and potentially other current and former caregivers are the victims of the policy

misclassifying them as exempt. This policy may have caused them not to be fully compensated for any overtime that they worked. Further, it appears that FELC has not fully compensated its caregivers, even after they submitted their overtime hours from June 1, 2014 through November 30, 2016. Thus, the Plaintiffs have made a sufficient showing that they should be allowed to send a *Hoffman-LaRoche* type of notice to the group of individuals described above.

B. Personal Information of Potential Plaintiffs

The Plaintiffs also request that the Defendants produce the names, last known physical addresses, email addresses, telephone numbers, dates of employment, and dates of birth, and social security numbers, or if foreign nationals, passport numbers and home country addresses of all those who worked as caregivers from August 29, 2014 to the present. FELC does not address this request.

A plaintiff seeking information about potential plaintiffs from a defendant must show why it is necessary to obtain the information. *See Greenstein v. Meredith Corp.*¸ 948 F. Supp. 2d 1266, 1271 (D. Kan. 2013). Personal information provided to employers is given with the expectation that the employer will keep it private. A court should order a defendant to disclose such information only if it is necessary to prosecute a Section 216 collective action. And the purpose of providing the personal information of potential plaintiffs is to provide them with notice of a pending collective action. Sending notice to potential plaintiffs' last known physical addresses or email addresses is reasonably necessary to provide them with notice. Mailing notices to a person's last known physical address has long been recognized as a reasonable means of providing notice. Further, people often maintain the same email address when they move from their physical locations, and so, email contact may be the most effective means of providing notice. When employees are foreign nationals, it is also helpful to have home country

addresses in the event that such employees have returned to their country of citizenship. However, the Plaintiffs have not shown why it is necessary for the Defendants to produce telephone numbers, dates of birth, social security numbers, and passport numbers.

Thus, absent further showing, the Court requires FELC to produce the names, dates of employment, last known physical addresses, home addresses in a foreign country, and email addresses of the individuals to whom notice should be sent. If difficulties arise, the Plaintiffs may request disclosure of other information that is reasonably calculated to providing potential plaintiffs with notice.

C. The Plaintiffs' Proposed Notice and Consent Forms

The Plaintiffs have submitted proposed notice and consent forms for the Court's review and have made several requests with regard to the manner of dissemination. The Court has a duty to ensure that such notice adequately advises potential opt-in plaintiffs of their rights and options pertaining to any potential FLSA claims they may have. *See Bryant v. Act Fast Delivery of Colo., Inc.*, No. 14-cv-00870-MSK-NYW, 2015 WL 3929663 at *5 (D. Colo. June 25, 2015)(internal citations omitted).

The *Hoffmann-La Roche* notice should describe the nature of the FLSA "collective action", the FLSA claim and remedies, and offer the recipient the opportunity to "opt-in" to the action by filing a consent. It should also advise recipients of their right to be represented by counsel for the original plaintiff, to obtain independent representation, or to participate *pro se*. It may also describe certain rights of an "opt-in" plaintiff (including the right not to be bound by a settlement that the original plaintiff advocates). It should explain that if the employee does not "opt-in" the action, the employee will not benefit from any recovery obtained therein, but the employee can pursue an independent action or otherwise assert a claim.

The Court has reviewed the Plaintiffs' proposed notice and consent forms. The proposed notice form adequately describes the individuals who may opt-in this action and apprises them of their rights and options. The consent form properly allows potential plaintiffs to join this action in the manner they deem appropriate. Thus, both the Plaintiffs' notice and consent forms are approved.

D. The Plaintiffs' Requested Disclosure Date and Opt-in Period

The Plaintiffs request that the Court (1) order the Defendant to disclose the contact information of potential plaintiffs within 14 days, (2) that potential opt-in plaintiffs be given 120 days to file their Consent to Join forms, and (3) that the Plaintiffs be allowed to send a reminder to potential opt-in plaintiffs 45 days before the opt-in period ends. FELC does not address these requests.

As to the deadline for FELC to disclose the information of potential plaintiffs, the Court deems it appropriate to give 28 days from entry of this order to do so. Notices will be sent within 28 days of disclosure by FELC. The opt-in period will run 120 days from the date the first notice is given. The Plaintiffs may also resend the approved notice and consent forms to potential plaintiffs a second time no later than 45 days before the end of the 120 day opt-in period.

E. The Plaintiffs Request to Designate Erin Johnson and Jocelyn Klein as Class Representatives and to Appoint Plaintiffs' Attorneys as Class Counsel

The Plaintiffs have requested that the Court designate Erin Johnson and Jocelyn Klein to serve as class representatives and to appoint Sawaya & Miller and Towards Justice as class counsel. Neither request can be granted because FLSA collective actions are not class actions. *See Genesis Healthcare Corp.*, 569 U.S. at 75. In an FLSA "collective action" every plaintiff, original or "opt-in", is free to pursue his or her individual claim. Although *Genesis* does not

delineate all of the implications of this, some are logically apparent. Arguably, each plaintiff can choose his or her counsel[2], accept or reject a settlement proposal, and decide to go to trial. In these respects, an "opt-in" plaintiff is no different from the original plaintiff who filed the Complaint. The "opt-in" plaintiff may choose to ride on the coattails of the original plaintiff or be represented by the counsel for the original plaintiffs, but he or she is not obligated to do so. *See Almanzar*, 175 F.Supp.3d at 279 n.3; 7B Charles Alan Wright, Arthur R. Miller, Fed. Prac. & Proc. § 1807 (3d ed. 2011).

There is no "class" requiring the appointment of class representatives or class counsel. If potential opt-in plaintiffs so desire, they may allow Ms. Johnson and Ms. Klein to make decisions on their behalf and may elect to be represented by Sawaya & Miller and Towards Justice. However, they are not obligated to do so. Thus, the requests to designate class representatives and appoint class counsel are denied.

F. Tolling of Limitations

Finally, the Plaintiffs request that the Court toll the running of the statute of limitations from November 14, 2016 to the present. FELC opposes the request, arguing that the Plaintiffs have not produced sufficient evidence to justify tolling limitations.

A plaintiff must commence[3] an action under Section 216 within two years after her claim accrues unless her employer acted willfully, which extends the time to commence an action to three years. 29 U.S.C. § 255(a). A claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Baker v. Bd. of Regents*, 991 F.2d 628, 632

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[2]*See Snively v. Peak Pressure Control, LLC*, 174 F. Supp. 3d 953, 962 (W.D. Tex. 2016); *Rosario v. Valentive Ave. Disc. Store, Co.*, 828 F. Supp. 2d 508, 520 (E.D.N.Y. 2011); *Benavides v. Serenity Spa NY Inc.*, 166 F. Supp. 3d 474, 486 (S.D.N.Y. 2016).

[3]An opt-in plaintiff in a Section 216 collective action commences an action upon filing of written consent with the court. 29 U.S.C. § 256(b).

(10th Cir. 1993). Under the FLSA, a plaintiff may qualify for equitable tolling if (1) the defendant prevented the plaintiff from bringing her claims "by some kind of wrongful conduct" or (2) "extraordinary circumstances beyond [the plaintiff's] control made it impossible to file the claims on time." *Cruz v. Maypa*, 773 F.3d 138, 146 (4th Cir. 2014)(internal quotations omitted). This determination must be made on a plaintiff by plaintiff basis. The named Plaintiffs do not have standing to request this for any potential plaintiff. Thus, this request is denied without prejudice.

CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** the Plaintiffs' Motion to Conditionally Certify FLSA Collective or, in the Alternative, to Permit Joinder, Motion for Judicial Notice to Potential Members of Collective, and Motion to Toll FLSA Statute of Limitations **(#12)**.

The Motion is **GRANTED** as follows:

1. The Plaintiffs are authorized to send *Hoffman-LaRoche* notice to the following individuals:

> All individuals employed at the Fisher Early Learning Center at the University of Denver as child daycare caregivers at any time between August 29, 2014 and the present

2. The Plaintiffs' proposed notice and consent forms are approved;

3. FELC shall disclose the names, dates of employment, last known physical addresses, any foreign addresses, and email addresses of the above-described individuals entitled to *Hoffman-LaRoche* notice to the Plaintiffs' counsel no later than 28 days after entry of this Order;

4. Notice to potential opt-in plaintiffs shall be given within 28 days after the Defendant's disclosure;

5. The potential opt-in plaintiffs shall have 120 days from the first date on which notice is

given to file their consent forms; and

6. The Plaintiffs' counsel may resend the approved notice and consent to join forms no later than 45 days before the close of the 120 day opt-in period to potential opt-in plaintiffs.

The Motion is **DENIED** as follows:

1. FELC is not required to produce the telephone numbers, dates of birth, social security numbers, or passport numbers of caregivers who were employed by FELC from August 29, 2014 to the present;

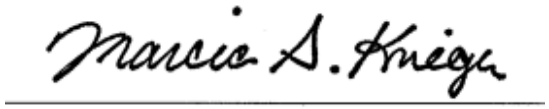
2. The Court denies the Plaintiffs' request to designate Erin Johnson and Jocelyn Klein to serve as class representatives;

3. The Court denies the Plaintiffs' request to appoint attorneys as class counsel; and

4. The Court denies the request to toll running of the statute of limitations from November 14, 2016 to the present date for any plaintiff, without prejudice.

DATED this 20th day of November, 2017

BY THE COURT:



Marcia S. Krieger
United States District Court