

**THE FAIR LABOR STANDARDS ACT
COLLECTIVE ACTIONS UNDER §216(b)**

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Faced with record unemployment levels during the Great Depression, Congress enacted The Fair Labor Standards Act, 29 U.S.C. §216(b) in 1938. Enacted during the height of the Great Depression, the legislation was intended to prevent wage exploitation of vulnerable workers by setting a minimum wage, to promote fair competition in interstate commerce by equalizing labor costs and to generate jobs by encouraging employers to hire more workers rather than extending the hours of current workers¹.

As originally enacted, the FLSA created a cause of action for any employee individually or on behalf of others who are “similarly situated.”² The Portal-to-Portal Act of 1947 amended the statute to prevent outside agents from suing on behalf of employees. It also required employees to file a written consent to join the class action, known as an “opt-in” requirement. Both changes created a procedure consistent with the first version of Rule 23 of the *Federal Rules of Civil Procedure* which went into effect the same year as the FLSA in 1938.³ In 1966, Rule 23 was amended to bind class members unless they affirmatively opted *out* of membership in a class. The changes included the addition of the four factors for consideration before class certification that protect the class members subject to res judicata without being present: numerosity, commonality, typicality, and

¹ See, e.g. 29 U.S.C. §202(a); *Dunlop v. Carriage Carpet Co.*, 548 F. 2d 139 (6th Cir. 1977).

² FLSA of 1938, ch. 676, 16(b), 52 Stat. 1060, 1060.

³ Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-in to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 *Geo. L.J.* 119, 129-130 (1982)

adequacy of representation.⁴ The Advisory Committee Notes specifically mentions that the altered rule does not affect the contrary opt-in default found in §216(b) that remains in effect today.⁵

The Age Discrimination in Employment Act (ADEA) was enacted a year after the revision to Rule 23. The ADEA incorporates language from the FLSA for procedure in handling class action suits, leaving one to wonder if congressional intent was to specifically maintain a procedure separate and distinct from the recently altered Rule 23 governing other civil actions. Congress later passed the Equal Pay Act (EPA) in 1980, again incorporating language from the FLSA. Since claims under the EPA can also be litigated as violation of Title VII, many proceeded under the standard Rule 23 framework and its inclusion of more claimants through its opt-out provision as discussed below. Because of the incorporation of FLSA language in the ADEA without an alternative, much of the controlling case law for FLSA developed in ADEA factual situations.⁶

Current Differences between Rule 23 and §216(b) Actions

Terminology: Rule 23 contains the heading “Class Actions.” Cases litigated under FLSA are more accurately described as “collective actions” since there is not a representative of a class, but actually many plaintiffs who have actively been involved in the litigation. The subtle difference in terminology reminds practitioners of the different nature and procedure followed in this seemingly similar litigation.

Default Membership in Class: The most dramatic difference is in how the group of claimants are assembled. Rule 23 is designed to start with a large number of potential members in the class, and then use factors to trim the size of the class or require outright denial of membership. This is

⁴ *Fed. R. Civ. P. 23(a)*.

⁵ *Advisory Committee's Note*, 39 F.R.D. 69, 104 (1966).

⁶ *See e.g. Hoffman-La Roche v. Sperling*, 493 U.S. 165, 169-174 (1989).

known as an “opt-out” procedure: by default you are in and bound by any result obtained unless you take affirmative action to distance yourself from the litigation.

Section 216(b) is the opposite, relying on an affirmative “opt-in” to the litigation before potential claimants enter an action. Written consent is required; simply being a named plaintiff on the complaint that initiates the suit is *not* necessarily sufficient.⁷ The difference is dramatic: starting with everyone and whittling down creates a larger class on average than starting with no one (even named plaintiffs) and bearing the burden of attracting participants individually.

Statute of Limitations: Rule 23 provides for the statute of limitations to toll upon filing of the first complaint. Section 256 of FLSA provides that tolling only occurs after plaintiffs have filed their written opt-in consent with the court. This may force counsel to press more quickly for court-directed notice to potential class members since the statute of limitations continues to loom without tolling. (Court-directed notice is a process described more fully below.) The ADEA does not adopt this particular language from the FLSA, thus the circuits are split as to whether ADEA claims are subject to tolling after the first consent is filed.

Procedure for Class Certification: Because of the monetary risk involved with the certification of a large class of claimants and the threat of extended litigation, class certification is vitally important under both Rule 23 and §216(b).

1. **Rule 23:** Rule 23 class certifications involve four relevant factors: the class must be so numerous that joinder is impracticable, questions of law or fact must be common to the class, claims or defenses of representative class members must be typical of the group as a

⁷ See Fourth Circuit unpublished opinion, *In Re: Food Lion, Inc., Fair Labor Standards Act “Effective Scheduling” Litigation*, 1998 U.S. App. LEXIS 11809. (dismissing six named plaintiffs for failure to file written consent with court before expiration of statute of limitations)

whole, and the representative parties must adequately protect the interests of the entire group.⁸ The Supreme Court has directed trial courts to engage in a “rigorous analysis” and review of the listed factors.⁹

2. **Section 216(b):** The text of § 216(b) does not define “similarly situated” employees that may join together in an action. Courts have gradually moved into a three part process: (1) initial certification, (2) notice and opportunity to opt-in, (3) decertification review.

- **Initial Certification under a Lenient Analysis:** Some circuit courts rely solely upon allegations of class-wide discrimination in a complaint to conditionally certify a class. Courts within the Fourth Circuit are marginally more stringent, requiring only a “preliminary factual showing that a similarly situated group of potential plaintiffs exists.”¹⁰
- **Notice:** Notice is a procedural issue within the discretion of the trial court.¹¹ After this preliminary showing, the defendant is often in possession of the means to best reach potential class participants. Courts often order discovery for just this purpose and set a time limit for opt-in consent forms to be filed. Notice given under court supervision also allows plaintiff’s counsel to avoid accusations or the appearance of barratry when attempting to reach potential claimants.¹²
- **Decertification:** The low barrier for provision or conditional certification of a FLSA class merely postpones the traditional battle over class certification that

⁸ *Fed. R. Civ. P.* 23(a).

⁹ *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

¹⁰ *D’Anna v. M/A-Com, Inc.*, 903 F. Supp. 889 (D. Md. 1995).

¹¹ *Hoffman-La Roche*, 493 U.S. 165.

¹² *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

practitioners experienced with Rule 23 appreciate and expect. It is at this stage that the important argument over whether group members are “similarly situated” occurs. Fourth Circuit courts have allowed discovery of the entire opt-in class before reaching a decision on this issue.¹³

Interlocutory Appeals: Rule 23 acknowledges the importance of the class certification result. The monetary risk that results from the certification of a large class of claimants, or conversely the effective end to litigation resulting from a total rejection of a class, have significant and immediate influence on whether a case is settled or dismissed. Paragraph (f) of Rule 23 was amended in 1998 to provide for interlocutory appeals.¹⁴ No such provision exists under § 216(b)

Settlement: Rule 23(e) requires approval from the court for all settlements or dismissals, including notice of the proposals for the same being given to all members of the class. FLSA actions under § 216(b) also require approval of the judge¹⁵, but proponents of a settlement do not need to certify a “settlement class” as under *Amchem Prods., Inc. v. Windsor*, 521 US 591 (1997).

¹³ See e.g. *Reich v. Southern Md. Hosp., Inc.* 43 F.3d 949, 951 (4th Cir. 1995).

¹⁴ *Fed. R. Civ. P.* 23(f).

¹⁵ *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945).