

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SARAH SILVA,
Plaintiff,
v.
FIRST TRANSIT, INC.,
Defendant.

Case No. [20-cv-02285-JSW](#)

**ORDER GRANTING IN PART
MOTION FOR CIRCULATION OF
NOTICE**

Re: Dkt. No. 4

Now before the Court for consideration is the motion for circulation of notice to be issued to similarly situated employees, filed by Plaintiff Sarah Silva (“Silva”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it **HEREBY GRANTS IN PART** Silva’s motion for circulation of the notice.

BACKGROUND

On April 3, 2020, Silva filed a collective action and putative class action, claiming that her employer First Transit, Inc. (“First Transit”)’s policies and practices violate the Fair Labor Standards Act, 29 U.S.C. section 201, *et seq.* (the “FLSA Claim”), as well as wage and hour standards under California law.

Silva alleges that she worked as an hourly paratransit driver for First Transit in Oakland, California. (Compl. ¶ 7.) First Transit routinely scheduled Silva to work an eight-hour split shift where her workday would be interrupted by an extended unpaid period between one to four hours. (*Id.* ¶ 15.) During these split-shift breaks, Silva alleges First Transit required her and other paratransit drivers to perform work, but that First Transit did not track their time doing these

1 activities and did not pay them the corresponding wages. (*Id.* ¶¶ 15-19.) She further alleges First
2 Transit also required her and other paratransit drivers to work through their meal and rest periods
3 but did not pay them for each meal and rest period missed. (*Id.* ¶ 20.)

4 The putative class as defined in the complaint is comprised of:

5 All individuals who are currently employed or have been employed,
6 by First Transit, Inc[.] as a Paratransit Driver with the State of
7 California and have been assigned a split-shift schedule at any time
8 within the preceding 4-years from the date of filing the complaint
9 through the date of entry of judgment (the “Class Period”).

8 (*Id.* at ¶ 32).

9 On June 16, 2020, First Transit filed a partial motion to dismiss or to stay this matter.
10 (Dkt. No. 23.) On March 1, 2021, after some delay, this Court granted the motion and dismissed
11 all but Silva’s claim for failure to pay overtime in violation of 29 U.S.C. section 207. (Dkt. No.
12 37.)¹

13 In support of her current motion for conditional certification of an opt-in class under the
14 FSLA and circulation of notice, Silva declares that, based on her experience:

15 First Transit maintains common compensation, hours of work,
16 overtime, scheduling and timekeeping policies and procedures for all
17 Paratransit Drivers who work a split-shift schedule that include:

- 18 a. providing Paratransit Drivers with daily manifests
19 showing scheduled customer drop-offs and pick-ups and
20 split-shift breaks;
- 21 b. regularly scheduling Paratransit Drivers for split-shift
22 breaks between one and four hours long;
- 23 c. taking Paratransit Drivers “off-the-clock” during split-
24 shift breaks to avoid tracking their work-related activities;
- 25 d. requiring Paratransit Drivers to return their bus to their
26 depot at the start of their split-shift breaks;
- 27 e. requiring or allowing Paratransit Drivers to perform
28 unpaid work-related activities during split-shift breaks
that included: completing paperwork, checking their

¹ The parties dispute whether equitable tolling should apply in this matter considering the delays caused by the worldwide Covid-19 pandemic and, in particular, the Court’s time required to resolve First Transit’s motion to dismiss. The Court will only offset the time it took to resolve the motion (from July 14, 2020 to March 1, 2021) at this stage without prejudice to Plaintiffs’ renewal of possible further equitable tolling at a later stage in this case.

1 schedules, trying to schedule additional rides, planning
 2 their routes, talking to managers and supervisors, cleaning
 and maintaining their buses and cleaning the depot; and

- 3 f. failing to pay Paratransit Drivers any wages for work done
 during split-shift breaks.

4 (Dkt. No. 43-3, Declaration of Sarah Silva (“Silva Decl.”), ¶ 2.)

5 Opt-in plaintiffs Ivory Alexander, Jasmine Henry, and Tanya Joseph – all of whom
 6 submitted declarations in support of this motion – were also full-time, hourly-paid paratransit
 7 drivers in Hartford, Connecticut, Louisville, Kentucky, and Oakland, California, during the
 8 relevant class period who witnessed the same or similar practices. (Dkt. No. 43-4, Declaration of
 9 Ivory Alexander (“Alexander Decl.”), ¶¶ 1-2; Dkt. No. 43-5, Declaration of Jasmine Henry
 10 (“Henry Decl.”), ¶¶ 1- 2; Dkt. No. 43-6, Declaration of Tanya Joseph (Joseph Decl.”), ¶¶ 1- 2.)

11 The Court shall address additional facts as necessary in the analysis.

12 ANALYSIS

13 Silva now moves for conditional certification of an opt-in class under the FLSA and asks
 14 the Court to issue notice to putative class members made up of

15 All individuals who are currently employed or have been employed
 16 by First Transit, Inc. as a full-time, hourly Paratransit Driver and who
 have been assigned a split-shift schedule during the maximum
 17 limitations period.

18 and to issue her proposed form of notice. (Dkt. No. 43-1, Motion Ex. A.)²

19 A. Applicable Legal Standards.

20 Employees may bring a collective action on behalf of other “similarly situated” employees
 21 based on alleged violations of the FLSA. 29 U.S.C. § 216(b). A collective action under the FLSA
 22 is “fundamentally different,” from class actions brought pursuant to Federal Rule of Civil
 23 Procedure 23. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). By way of
 24 example, potential members of a collective action under the FLSA must “opt-in” to the suit by
 25 filing a written consent with the Court in order to benefit from and be bound by a judgment. *See*
 26 *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 528 (9th Cir. 2013); *Leuthold v.*
 27 *Destination America, Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004). Employees who do not opt in

28 ² The Court shall address additional issues regarding the proposed notice in Section C, *infra*.

1 may bring a subsequent private action. *Leuthold*, 224 F.R.D. at 466 (citing *EEOC v. Pan Am.*
2 *World Airways, Inc.*, 897 F.2d 1499, 1508 n.11 (9th Cir. 1990)). In addition, “‘conditional
3 certification’ does not produce a class with independent legal status or join additional parties to the
4 action. The sole consequence of conditional certification is the sending of court approved written
5 notice to employees.” *Genesis Healthcare*, 569 U.S. at 75 (citing *Hoffmann-La Roche Inc. v.*
6 *Sperling*, 493 U.S. 165, 171-72 (1989)); *see also Campbell v. City of Los Angeles*, 903 F.3d 1090,
7 1101 (9th Cir. 2018) (quoting *Symczyk*, 569 U.S. at 75).

8 Courts “may authorize the named FLSA plaintiffs to send a notice to all potential plaintiffs
9 and may set a deadline for those potential plaintiffs to join the suit.” *Leuthold*, 224 F.R.D. at 466;
10 *see also Hoffmann*, 493 U.S. at 172. The determination of whether a collective action is
11 appropriate is within the Court’s discretion. *See Harris v. Vector Marketing Co.*, 716 F. Supp. 2d
12 835, 837 (N.D. Cal. 2010) (citing *Adams v. Inter-Con Security Sys., Inc.*, 242 F.R.D. 530, 535
13 (N.D. Cal. 2007)). The “‘near-universal practice’ that courts use to determine whether claims
14 under the FLSA should proceed in a collective is the two-step certification process.” *Droesch v.*
15 *Wells Fargo Bank, N.A.*, No. 20-cv-06751-JSC, 2021 WL 1817058, at *2 (N.D. Cal. May 6,
16 2021); *see also Harris*, 716 F. Supp. 2d at 837 (citations omitted); *Leuthold*, 224 F.R.D. at 466-
17 67; *Adams*, 242 F.R.D. at 536; *Woods v. Vector Marketing Corp.*, No. 14-cv-00264-EMC, 2015
18 WL 1198593, at *2 (N.D. Cal. Mar. 16, 2015) (citing cases).

19 This motion concerns only the preliminary or provisional stage of certification for the
20 purpose of providing notice to potential class members. *See Campbell*, 903 F.3d at 1109. A court
21 may approve preliminary certification upon the showing by a plaintiff that all potential proposed
22 class members are “similarly situated.” *See id.* at 1101 (quoting *Adams*, 242 F.R.D. at 535 (citing
23 29 U.S.C. § 216(b)); *Herrera v. EOS IT Management Solutions, Inc.*, No. 20-cv 01093-LHK, 2020
24 WL 7342709, at *3 (N.D. Cal. Dec. 14, 2020) (“an initial ‘notice stage’ determination of whether
25 potential opt-in plaintiffs exist who are similarly situated to the representative plaintiffs, and thus
26 whether a collective action should be certified for the purpose of sending notice of the action to
27 potential collective action participants.”) (internal citation and quotation marks deleted).

28 Plaintiffs are only required to “make substantial allegations that the putative class members

1 were subject to a single illegal policy, plan or decision.” *Leuthold*, 224 F.R.D. at 468; *see also*
 2 *Adams*, 242 F.R.D. at 536. “Under this lenient standard, the plaintiffs must show that there is
 3 some factual basis beyond the mere averments in their complaint for the class allegations.” *Id.*
 4 (internal quotes and citation omitted); *see also Morton v. Valley Farm Transport, Inc.*, No. 06-cv-
 5 02933-SI, 2007 WL 1113999, at *2 (N.D. Cal. April 13, 2007) (burden is “not heavy” and
 6 requires plaintiffs to merely show a “reasonable basis for their claim of class-wide” conduct)
 7 (internal quotes and citation omitted); *Stanfield v. First NLC Financial Serv., LLC*, No. 06-cv-
 8 03892-SBA, 2006 WL 3190527, at *2 (N.D. Cal. Nov. 1, 2006) (plaintiffs “must be generally
 9 comparable to those they seek to represent”).

10 Courts usually grant conditional class certification at this stage. *Adams*, 242 F.R.D. at 536
 11 (“The usual result is conditional class certification.”); *see also Stanfield*, 2006 WL 3190527, at *2
 12 (“The standard is lenient, and conditional collective action is usually granted.”). Under this first
 13 step, courts do not consider the merits of the claims. *Benedict v. Hewlett-Packard Company*, No.
 14 13-cv-00119-LHK, 2014 WL 587135, at * 11 (N.D. Cal. Feb. 13, 2014) (“the notice-stage is not
 15 the appropriate time for a court to evaluate the merits of plaintiffs’ FLSA claims”); *Adams*, 242
 16 F.R.D. at 539. At the preliminary certification stage, “substantial allegations, supported by
 17 declarations or discovery, that the putative class members were together the victims of a single
 18 decision, policy or plan,” generally is sufficient to obtain conditional certification. *Lewis v. Wells*
 19 *Fargo & Co.*, 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009) (citation and internal quotation marks
 20 omitted).

21 **B. The Court Grants the Motion for Circulation of Notice.**

22 In this case, the Court has reviewed the pleadings as well as the declarations provided
 23 by Silva in support of her current motion and finds that they contain sufficient allegations that the
 24 putative Plaintiffs are subject to the same or similar unwritten terms and conditions that may
 25 support an FLSA violation. (*See* Compl. at ¶¶ 1, 13-20, 24, 49; Motion at 3-5; Silva Decl. at ¶¶ 2,
 26 4-11; Alexander Decl. at ¶¶ 2, 4-9; Henry Decl. at ¶¶ 2, 4-9; Joseph Decl. at ¶¶ 2, 4-10.)
 27 Accordingly, the Court concludes that Silva has put forth sufficient evidence to show a single,
 28 although unwritten, policy relating to the conditions of employment for split-shift full-time

1 paratransit drivers who are allowed to perform unpaid, off-the-clock work during their split-shift
2 breaks.

3 First Transit argues that their written policy contained in the employee handbook requires
4 all employees to record their hours worked and prohibits the kind of unpaid, off-the-clock work
5 that Silva contends violates the FLSA. (*See* Dkt. No. 44-1, Declaration of Brian W. Cox, ¶ 4, Ex.
6 A (Employee Handbook) at 28-29, 31.) However, the “existence of written policies setting forth
7 proper rules for the payment of overtime does not itself immunize an employer from a finding that
8 [it] willfully violated the FLSA.” *See, e.g., Lockhart v. County of Los Angeles*, 2013 WL
9 12119555, at *3 (C.D. Sept. 9, 2013) (“an employer’s written, FLSA-compliant overtime policy
10 will not necessarily insulate it from liability when, in practice, its employees actually work
11 overtime and are not compensated.”); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-cv-
12 00715-SC, 2008 WL 793838, at *4 (N.D. Cal. Mar. 24, 2008) (“An employer’s responsibility
13 under the FLSA extends beyond merely promulgating rules to actually enforcing them.”).

14 First Transit also provides declarations in support of the proposition that each of their
15 facilities operates independently. (*See generally* Dkt. No. 45.) However, the argument concerning
16 actual payment of overtime hours or the existence of a policy applicable to any particular facility
17 goes to the merits of the case. Without delving into the merits of Silva’s FLSA claim, the Court is
18 satisfied that the record demonstrates that the issue could be resolved by way of common proof.
19 “Courts have emphasized that a fairly lenient standard is used at the first step because a court does
20 not have much evidence at that point in the proceedings – just the pleadings and any declarations
21 submitted.” *Harris*, 716 F. Supp. 2d at 837; *see also Adams*, 242 F.R.D. at 536. The parties have
22 not yet begun to engage in discovery and the Court has not yet held a case management
23 conference. In light of the lenient standard to be applied at this stage of the proceedings, the Court
24 finds that Plaintiff has made a sufficient showing that the proposed class of plaintiffs are similarly-
25 situated and that notice should be issued.³

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27 ³ In the alternative, First Transit argues that the Court should deny Silva’s motion for conditional
28 certification because the Court does not have personal jurisdiction over claims of out-of-state
paratransit drivers. (Dkt. No. 44, Opp. Br. at 14-16 (citing out-of-circuit cases and analysis of
application of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017))). This Court

1 The second step of the certification process follows the close of discovery at which point
 2 the party opposing the conditional collective action may move to decertify the collective action.
 3 *Droesch*, 2021 WL 1817058, at *3 (citing *Leuthold*, 224 F.R.D. at 467). “[T]he Court then
 4 determines the propriety and scope of the collective action using a stricter standard.” *Id.* (citing
 5 *Stanfield*, 2006 WL 3190527, at *2; *see also Campbell*, 903 F.3d at 1119 (applying a “substantial
 6 evidence” standard to the decertification determination). In particular, the Court may consider:
 7 “(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various
 8 defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and
 9 procedural considerations.” *Leuthold*, 224 F.R.D. at 467. At that point, “the court may decertify
 10 the class and dismiss the opt-in plaintiffs without prejudice.” *Id.* If First Transit wishes to move
 11 to decertify the class, they are free to do so at the appropriate time. *See id.*

12 **C. The Court Grants in Part the Motion to Issue Notice.**

13 Plaintiffs’ proposed form of notice and opt-in forms are attached as Exhibits A and B to
 14 the motion. (Docket Nos. 43-1, 43-2.) First Transit raises seven objections to the proposed class
 15 notice plan. The parties agree to the standard proposed 60-day notice period. The Court shall
 16 address the remaining six objections in turn.

17 **1. Access to Plaintiffs’ contact information**

18 First Transit argues that, in order to protect the privacy of potential members of the class,
 19 the Court should order that it provide all contact information for the putative class members only
 20 to a third-party administrator, paid for by Plaintiffs’ counsel, instead of providing that information
 21 directly to counsel. The Court finds this request unfounded based on the record and overrules the
 22 objection. First Transit shall serve the class list on Plaintiffs’ counsel regardless whether they may
 23 choose later to retain a third-party administrator to manage logistics of class notice in this case.

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 27 finds this contention unpersuasive. *See, e.g., Swamy v. Title Source, Inc.*, No. 17-cv-01175-WHA,
 28 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) (holding that, like the majority of courts in
 this district, “*Bristol-Myers* does not apply to divest courts of personal jurisdiction in FLSA
 collective actions.”).

1 **2. Plaintiffs' potential discovery obligations**

2 First Transit contends that notice should inform potential opt-in plaintiffs that they have an
3 obligation to appear in the forum to testify. Although it would be premature to decide that every
4 party plaintiff would have to travel to California to testify, the Court finds that the notice should
5 be more informative regarding Plaintiffs' possible discovery obligations. Accordingly, the Court
6 GRANTS IN PART First Transit's request. The Court requires that the notice shall indicate that
7 while the suit is proceeding, any opt-in plaintiff may be required to respond to written questions,
8 sit for a deposition, and/or testify in court (assisted by Plaintiffs' counsel). *See Lewis*, 669 F.
9 Supp. 2d at 1133.

10 **3. Liability for court costs & Plaintiffs' counsel fees**

11 First Transit contends that the notice should inform potential opt-in plaintiffs that they
12 could be liable for court costs and a percentage of Plaintiffs' counsels' fees. Plaintiffs contend
13 that this type of notice in a multi-state, multi-party lawsuit may pose a significant risk of chilling
14 class participation. However, without any indication that Plaintiffs' portion of any possible award
15 would be reduced by counsels' fees and court costs, the Court concludes that the notice may be
16 confusing. *See, e.g., Stanfield*, 2006 WL 3190527, at *5. Accordingly, the Court GRANTS IN
17 PART First Transit's request. Plaintiffs shall modify the notice to set out that approved court
18 costs and counsels' fees (without any specific percentage delineated as that has not yet been
19 determined) may be subtracted from the overall recovery obtained for potential class members.
20 *See Lewis*, 669 F. Supp. 2d at 1133.

21 **4. Representation by other counsel**

22 First Transit contends that the notice and consent form should be amended to more clearly
23 indicate that opt-in plaintiffs can choose their own counsel. The Court finds the provisions in the
24 notice and consent forms adequately provide this information and the objection is overruled.

25 **5. Defense counsel's contact information**

26 First Transit contends that the notice should include contact information for its own
27 counsel. However, courts in this district have routinely rejected this request and have named only
28 the Plaintiffs' counsel in the preliminary notice. *See, e.g., Lewis*, 669 F. Supp. 3d at 1132. The

1 Court finds this practice satisfactory and overrules the objection.

2 **CONCLUSION**

3 For the foregoing reasons, the Court GRANTS the motion for circulation of notice. The
4 Court GRANTS IN PART Plaintiffs' requests related to the form of notice.

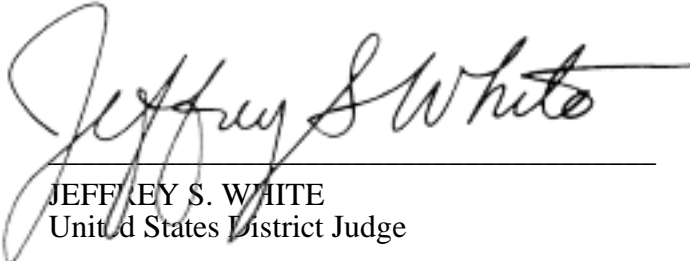
5 By no later than 10 days from of the date of this Order, Plaintiffs shall e-file the revised
6 form of notice required by this Order. The Court admonishes counsel for both parties to meet and
7 confer to resolve any possible differences in specific language but to adhere closely to the Court's
8 prescribed revisions.

9 By no later than 30 days of the date of this Order, First Transit shall produce contact
10 information to Plaintiffs' counsel.

11 Barring any further issues, by no later than 60 days from date of this Order, Plaintiffs shall
12 provide notice.

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14 **IT IS SO ORDERED.**

15 Dated: July 7, 2021

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18 JEFFREY S. WHITE
19 United States District Judge

United States District Court
Northern District of California

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