IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN MARTINEZ, individually and on behalf of similarly situated individuals, Plaintiff, v. JOHN MUIR HEALTH, Defendant.	Case No. 17-cv-05779-CW ORDER GRANTING PLAINTIFFS' NOTICE OF MOTION FOR CIRCULATION OF NOTICE PURSUANT TO 29 U.S.C. § 216(B) (Dkt. No. 24)

Plaintiff Karen Martinez, on behalf of a putative class, brings this Fair Labor Standards Act (FLSA) action against Defendant John Muir Health. Plaintiff moves for conditional certification of the putative class for purposes of distributing notice of the opportunity to opt in to this action. Defendant filed an opposition and Plaintiff filed a reply. On April 17, 2018, the parties appeared for a hearing. The Court hereby GRANTS in part Plaintiff's motion for conditional certification and ORDERS distribution of a modified notice to the conditionally certified class.

FACTUAL BACKGROUND

Defendant is a health care service headquartered in Walnut Creek, California, serving primarily Contra Costa County and the surrounding communities. Declaration of Thomas DeCarlo (DeCarlo Decl.) ¶ 2. Defendant operates two acute care hospitals located

in Walnut Creek and Concord, California. Id. Defendant has thousands of employees, including a wide range of non-exempt, hourly paid employees such as case managers, registered nurses, nurse's assistants, mental health therapists, respiratory therapists, surgery technicians, food service employees, gift shop employees, lab couriers, secretaries, housekeepers, and receptionists. Id. ¶¶ 3-4.

Plaintiff was employed by Defendant as an hourly paid, non-exempt case manager from May 1, 1997 to February 19, 2016 and was paid $79.97 per hour at the time of her resignation. Declaration of Karen Martinez (Martinez Decl.) ¶ 3. As a case manager, she worked with doctors, nurses and aides, physical and occupational therapists, and others to coordinate the discharge of a patient. Id. ¶ 4. Her duties also included contacting insurance companies to provide them with patients' information and obtain authorization for patients' care, equipment, and facilities. Id. During her employment, Plaintiff received the following bonuses, which she alleges were non-discretionary: (1) a "Success Sharing Bonus," which is a yearly bonus given to all non-exempt employees based on Defendant's financial success for the year; (2) a "Certification Bonus," which is a yearly bonus given to all non-exempt employees whose job positions require a certification credential; and (3) a "Top Range Bonus," which is a yearly bonus given to all non-exempt employees who are at the top of the pay scale and no longer receive yearly base rate wage increases. Id. ¶ 13. Plaintiff believes that these bonuses were not included in her regular rate of pay for purposes of calculating her overtime rate. Id.

Plaintiff's regular work schedule was 8:00 am to 4:30 pm. Id. ¶ 5. She and other employees were required to clock in and out using an electronic system called KRONOS for purposes of timekeeping and payroll. Id. ¶ 6. She alleges that, beginning in fall 2013, Defendant instituted cost-cutting measures that increased the employee-to-patient ratio and, as a result, the employees' workload. First Amended Complaint (FAC) ¶ 17. To meet the new standards, Plaintiff and other employees were required to work after clocking out of KRONOS. Id.; see also Martinez Decl. ¶¶ 5, 7, 9-10, 12; Declaration of Theresa Combong (Combong Decl.) ¶¶ 9-11, 13; Declaration of Tanya Fonville (Fonville Decl.) ¶¶ 5, 8, 11; Declaration of Mariam Gomez-Artiga (Artiga Decl.) ¶ 8; Declaration of Greta Scholachman (Sholachman Decl.) ¶ 12; Declaration of Blanca Moran (Moran Decl.) ¶¶ 5, 12-14. For example, Plaintiff and other employees would clock out at the end of the workday but would continue to input patient notes into an electronic system called EPIC and provide medical information to insurance companies using an electronic system called MIDAS. Martinez Decl. ¶¶ 7-9; Combong Decl. ¶¶ 9-13; Fonville Decl. ¶ 11; Artiga Decl. ¶ 9; Sholachman ¶¶ 7-9, 12; Moran Decl. ¶¶ 8-12, 14. Both EPIC and MIDAS track the times at which employees enter data into those systems. Martinez Decl. ¶¶ 7, 9. According to Plaintiff, Defendant's management discouraged case managers from taking too much overtime by telling them, for example, that they had poor time management skills, that they were taking too much overtime, and that they should not take overtime unless they requested permission to do so early in the day. Id. ¶ 10. Other employees corroborate

Plaintiff's account. Scholachman Decl. ¶ 10; Moran Decl. ¶ 13.

Plaintiff alleges that, despite knowing that Plaintiff and other employees were performing work off the clock and without compensation, Defendant failed to prevent the performance of such work. FAC ¶ 26. Plaintiff alleges that Defendant knew that employees such as she were working without compensation because Defendant's agents witnessed them doing so at Defendant's facility and because Defendant's own electronic systems showed that employees were working off the clock. Id. ¶ 20, 22.

Plaintiff filed this suit on October 6, 2017. Docket No. 1. After Plaintiff filed suit, Defendant began calling current employees into "interrogation session[s]," where it presented employees with a letter requesting them to waive their claims, in exchange for a net sum of $1,000 per employee. Id. ¶ 29; see also FAC, Ex. 4. The letters do not provide the amount of overtime owed each employee. See id. Plaintiff alleges these letters violate the FLSA. FAC ¶ 30.

Plaintiff's FAC alleges nine causes of action: (1) failure to pay overtime wages in violation of the FLSA, 29 U.S.C. § 207; (2) failure to pay minimum wages for all hours worked; (3) failure to pay overtime wages for all hours worked; (4) failure to provide meal and rest breaks; (5) failure to provide accurate wage statements; (6) failure to timely pay all wages due; (7) recovery under the California Private Attorney General Act (PAGA); (8) interfering with court process by failing to disclose amounts due in negotiating individual settlements; and (9) unfair business practices. Id. ¶¶ 43-104.

On December 15, 2017, Defendant moved to dismiss Plaintiff's

FAC. Docket No. 14. On February 27, 2018, before the hearing on Defendant's motion to dismiss, Plaintiff filed the instant motion for circulation of notice pursuant to 29 U.S.C. § 216(b). Docket No. 24. On March 28, 2018, the Court denied Defendant's motion to dismiss with respect to all causes of action except the eighth cause of action, which the Court dismissed with leave to amend to renew "if Plaintiff timely joins a named co-plaintiff who suffered the injury described in the eighth cause of action." Docket No. 31 at 11-12.

On March 29, 2018, Plaintiff filed consents to joinder signed by the following individuals: Plaintiff Martinez, Elizabeth Bates, Theresa Combong, Tanya Fonville, Miriam Gomez-Artiga, and Blanca Moran. Docket No. 32.

LEGAL STANDARD

The FLSA authorizes employees to bring a collective action on behalf of themselves and employees who are "similarly situated." 29 U.S.C. § 216(b). In contrast to class actions brought pursuant to Federal Rule of Civil Procedure 23, an employee shall not be a plaintiff to such action unless he or she files written consent to become such a plaintiff. See id. If a potential plaintiff does not opt in, then he or she is not bound by the outcome of the suit and may bring a subsequent private action. Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004).

"The court may authorize the named FLSA plaintiffs to send notice to all potential plaintiffs and may set a deadline for those potential plaintiffs to join the suit." Adams v. Inter-Con Sec. Sys., Inc., 242 F.R.D. 530, 535 (N.D. Cal. 2007) (internal

quotation marks omitted). "To certify a FLSA collective action, the court must evaluate whether the proposed lead plaintiffs and the proposed collective action group are 'similarly situated' for purposes of § 216(b)." Leuthold, 224 F.R.D. at 466. The plaintiff bears the burden of making this showing. Id. The majority of courts apply a "two-step approach involving initial notice to prospective plaintiffs followed by a final evaluation of whether such plaintiffs are similarly situated." Id. (collecting cases). Under the first step, the court decides, "based primarily on the pleadings and any affidavits submitted by the parties, whether the potential class should be given notice of the action." Id. This initial determination is made under "a fairly lenient standard" because of the limited amount of evidence before the court and "typically results in conditional class certification." Id. at 467 ; see also Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009). Under the second step, once discovery is complete and the case is ready to be tried, the court considers whether the class should remain certified, usually on a motion for decertification by the defendant. Lewis, 669 F. Supp. 2d at 1127. In this second step, the court utilizes "a stricter standard for 'similarly situated'" and "reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant which appear to be individual to each plaintiff; fairness and procedural considerations; and whether the plaintiffs made any required filings before instituting suit." Id.

DISCUSSION

I. Conditional Certification

"For conditional certification at this notice stage, the court requires little more than substantial allegations, supported by declarations or discovery, that 'the putative class members were together the victims of a single decision, policy, or plan.'" Russell v. Wells Fargo & Co., 2008 WL 4104212, at *2 (N.D. Cal. Sept. 3, 2008) (quoting Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)). This showing is not equivalent to the showing required by Federal Rule of Civil Procedure 23, which is considerably more stringent. Id. at *3 (citing Thiessen, 267 F.3d at 1105). For an FLSA collective action, all that the plaintiff needs to show "is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." Id.

Plaintiff seeks conditional certification of two classes: (1) the FLSA Off the Clock Class and (2) the FLSA Regular Rate Class.[1] Motion at 2. The Court will analyze each of these proposed classes in turn.

A. FLSA Off the Clock Class

Plaintiff proposes the following definition for her FLSA Off the Clock Class:

[1] Plaintiff originally requested conditional certification of an "FLSA Release Class," but abandoned this request in light of the Court's dismissal without prejudice of Plaintiff's eighth cause of action. Reply at 11. Plaintiff seeks to reserve the right to renew this request if her underlying claim is renewed. Id.

> All nonexempt hourly paid employees employed by Defendant who worked off the clock as demonstrated by the comparison between the EPIC and/or MIDAS electronic systems and KRONOS timekeeping system at any time during the period of October 13, 2013 through the date of judgment after trial.

Id. Plaintiff contends that there is a factual and legal nexus that binds her claims and those of potential class members: Defendant's policy of discouraging employees from taking overtime, which caused Plaintiff and other employees to clock out of KRONOS and continue working in EPIC and MIDAS without pay.

Defendant argues that Plaintiff's theory of liability with respect to the FLSA Off the Clock Class applies only to employees who are engaged in patient care. Plaintiff agrees. Thus, the Off the Clock Class definition shall be modified so that it is limited to patient care employees.

Defendant next contends that even if the class definition is limited to patient care employees, there is no unified policy that affects the entire proposed class. Defendant states that its policies instruct employees to record accurately and completely in KRONOS their time worked and disavow working off the clock, citing its Timekeeping Policy and Employee Handbook. Declaration of Leslie Yewell (Yewell Decl.) ¶ 2, Exs. 1-2. Defendant argues that Plaintiff's claims depend on the actions of individual managers, making them inappropriate for conditional certification. See Opp. at 9-12 (citing West v. Border Foods, Inc., 2006 WL 1892527, at *9 (D. Minn. July 10, 2006) (denying conditional certification "where different individual restaurant managers allegedly used varying means to deprive the Plaintiffs of proper compensation for his or her overtime hours"); Velasquez v. HSBC Fin. Corp., 266 F.R.D. 424, 430 (N.D. Cal. 2010)

("Plaintiffs have not met their light burden of showing they were the victims of a single decision, policy, or plan whereby sales targets were set so high that AEs were required to work overtime without compensation.").

Plaintiff does, however, allege a common practice of discouraging overtime resulting from Defendant's cost-cutting measures and substantial increase in the employee-to-patient ratio. See FAC ¶ 17. Plaintiff and other employees allege that Defendant's management used the same tactics to discourage overtime: scolding employees for taking too much overtime, telling them they should not take overtime, and telling them they could not take overtime unless they requested permission to do so early in the day. Martinez Decl. ¶ 10; see also Scholachman Decl. ¶ 10; Moran Decl. ¶ 13. Moreover, Plaintiff's allegations are supported by the Employee Handbook proffered by Defendant, which states:

> As a general rule, overtime work is discouraged; however John Muir Health may assign overtime if circumstances require the performance of additional work. All overtime hours must have prior authorization by the supervisor or department director. Employees who work unauthorized overtime will be subject to discipline, up to and including termination.

Lewell Decl., Ex. 2. Plaintiff has shown the requisite factual and legal nexus between her claims and the potential class, and thus conditional certification of the FLSA Off the Clock Class is warranted.

Defendant spends considerable time arguing that there is a presumption that employees who are clocked out are doing no work and that Plaintiff cannot prove that Defendant knew or should have known that the off-the-clock work was occurring, which is

essential for liability. Opp. at 12. These arguments go to the merits of Plaintiff's claims and are inappropriate at this stage in the litigation.

Defendant also contends that the FLSA Off the Clock Class "is an improper fail-safe class that cannot be ascertained without first making a determination on the merits of Plaintiff's claims." Id. at 16. Defendant raises the concern such a class definition permits plaintiffs to "circumvent res judicata": "either the class members win or, by virtue of losing, they are not in the class and therefore not bound by the judgment." Id. quoting (Alhassid v. Bank of Am., N.A., 307 F.R.D. 684, 694 (S.D. Fla. 2015)). While Defendant's concern may be relevant to a Rule 23 class action, it is not relevant here, where plaintiffs must opt in to the FLSA collective action. Individuals who opt in will necessarily be bound by the litigation. Moreover, if Defendant succeeds in proving its defense that it did not know and should not have known that employees were working off the clock, then Defendant would have no liability to the proposed class who "worked off the clock." Thus, the proposed class definition is not "fail-safe."

B. FLSA Regular Rate Class

Plaintiff proposes the following definition for its FLSA Regular Rate Class:

> All nonexempt hourly paid employees employed by Defendant who received a non-discretionary bonus at any time during the period of October 13, 2013 through the date of judgment after trial.

Motion at 2.

Defendant argues that the class definition is overbroad and

unascertainable because it includes all employees "who received a non-discretionary bonus." Plaintiff's FAC mentions only three types of bonuses: (1) the "Success Sharing Bonus," (2) the "Certification Bonus," and (3) the "Top Range Bonus." Defendant's argument is persuasive. The class definition should be limited to the three types of bonuses identified in the FAC, which should be inserted in the class definition in place of "non-discretionary bonus." Plaintiff's claims with respect to these three types of bonuses provide the requisite factual and legal nexus to the claims of the potential plaintiffs.

Defendant challenges that Plaintiff has not shown that the three bonuses were non-discretionary and thus required to be included in the employees' regular rate. Defendant contends that the "Success Sharing Bonus" is entirely discretionary. Defendant additionally contends that the "Top Range Bonus" was included in Plaintiff's regular rate, providing Plaintiff's wage statement in support. Opp. at 17-18 (citing DeCarlo Decl. ¶ 5). Again, the Court declines to resolve questions of liability at this stage, particularly because Defendant may bear the burden of proof on this issue, see Mitchell v. Cty of Monterey, 2011 WL 7479161, at *8 (N.D. Cal. May 12, 2011), and no discovery has occurred. Defendant's arguments do not provide a reason to deny conditional certification. The parties should, however, meet and confer to determine whether any of Defendant's contentions have merit and whether any of the bonuses should be excluded from the class definition.

In sum, the Court finds that conditional certification is warranted for both of Plaintiff's proposed classes. Plaintiff

has shown that there is a factual and legal nexus that binds her claims and those of potential class members for both of the proposed classes, as modified by the Court. Notice from the Court is particularly appropriate here because Defendant has already communicated with potential plaintiffs about the lawsuit. Marino v. CACafe, Inc., No. 16-CV-6291 YGR, 2017 WL 1540717, at *2 (N.D. Cal. Apr. 28, 2017) (noting that "unsupervised communications between an employer and its workers present an acute risk of coercion and abuse."). Bypassing notice "might deprive some plaintiffs of a meaningful opportunity to participate." Leuthold, 224 F.R.D. at 468.

II. Content of the Notice

As a preliminary matter, the notice is not written in a manner that can be understood easily by a lay person. The parties are directed to meet and confer to rewrite the notice in plain language, minimizing any legal jargon.

Additionally, Defendant raises six objections to the content of the notice proposed by Plaintiff.

A. Scope of Classes

Defendant contends that the notice should not be distributed to Plaintiff's proposed classes because they are overbroad. The scope of the classes has been discussed above. The FLSA Off the Clock Class is limited to employees who have used MIDAS and EPIC and therefore does not apply to non-patient care employees. For purposes of clarity, the definition shall be amended to make clear that it applies to patient care employees only. As for the FLSA Regular Rate Class, this definition should be limited to the three types of bonuses alleged in Plaintiff's complaint, unless

the parties agree otherwise.

B. Language of Plaintiff's Allegations

Defendant takes issue with Plaintiff's description of the lawsuit. Specifically, Defendant objects that the bolded statement below is inflammatory:

> Specifically, Plaintiff claims that John Muir (1) unlawfully required employees to work without compensation by having them clock out of the KRONOS timekeeping system but continue working and charting in the EPIC and MIDAS systems; (2) failed to include nondiscretionary bonuses in the calculation of overtime pay resulting in a failure to pay employees for work over 40 hours in a workweek and at the incorrect overtime rate[;] and (3) **engaged in a campaign to mislead employees into accepting unpaid back wages and having them sign settlement and release agreements without providing the full disclosure of how much each employee may be actually owed.**

Docket No. 24, Ex. A (Notice) at 2.

Defendant is correct that the notice should not appear weighted in favor of either party. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989) ("In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality" and "must take care to avoid even the appearance of judicial endorsement of the merits of the action."). But the notice makes clear that the bolded statement is merely a claim made by Plaintiff. And the next paragraph states that "Defendant denies Plaintiff's claims and denies that it is liable for any damages resulting from this lawsuit." Id. Read as a whole, the notice does not create the appearance that the Court favors Plaintiff. In an abundance of caution, however, the bolded statement shall be revised to state: "misled employees into accepting unpaid back wages and signing settlement and release agreements without

providing the full disclosure of how much each employee may be actually owed."

C. Representation by Other Counsel

Defendant asserts that the notice should be amended to inform potential class members of their right to consult any attorney that they choose. Plaintiff does not object to informing potential class members of their right to consult with an attorney of their own choosing to decide whether to opt in to the action; Plaintiff objects to informing potential class members that they have a right to retain another attorney to represent them in this action. Accordingly, the notice shall inform potential class members that they have a right to consult with an attorney of their own choosing with respect to this matter, and no more. The parties shall insert the following sentence at the end of the section entitled "Your Right to Participate in This Lawsuit" (Notice at 3): "You have the right to consult with an attorney of your own choice with respect to this matter."

D. Deadline to Opt In

Defendant states that the notice should include a deadline to opt in to this action, which should be set forty-five days from receipt of the notice. Plaintiff agrees to a deadline, but argues that the deadline should be set ninety days from receipt of the notice. A deadline of sixty days from receipt of the notice should provide ample time for potential plaintiffs to receive the notice and opt in. Accordingly, the notice shall make clear that any potential plaintiffs must send their Consent to Join form to the Claims Administrator by a specific date sixty

days from the potential plaintiffs' estimated receipt of the notice. This will ensure that potential plaintiffs are aware of the actual date by which they must respond to opt in to the lawsuit. For example, the section about potential class members' right to participate in this action may be modified as follows:

> If you want to join this lawsuit, you must send the Consent to Join form to the Claims Administrator ~~so the attorneys prosecuting this case have time to file it with the Federal Court~~ by **[specific date sixty days from the potential plaintiffs' estimated receipt of the notice]**. If you do not return the "Consent to Join" form ~~in time for it to be filed with the Federal Court~~ **by this date**, you may not be able to participate in this lawsuit.

E. Limitations Period

Defendant argues that the notice should only be sent to individuals who were employed within a three-year period prior to the date that the notice is sent rather than October 13, 2013. Defendant contends this is appropriate because the statute of limitations is three years from the date that the class member chooses to opt in. See Grayson v. K Mart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996). Plaintiff disagrees, arguing that notices should not be withheld based on a potentially mistaken view on the statute of limitations. The Court agrees with Plaintiff that distribution of the notice should not be overly limited at this point. Thus, the notice should be distributed to the classes as defined above. As for the notice itself, the section on the statute of limitations should be revised so that it is more understandable. The section may advise potential plaintiffs that the law may limit the period of time for which they may recover back pay.

F. Notice Caption

Defendant contends that the notice should not be on pleading paper, arguing that it may appear to be a judicial endorsement. Plaintiff does not oppose this, but asserts that the notice should include the caption so that potential plaintiffs will know that it pertains to an actual case. The Court agrees that the notice should not be on pleading paper. The caption should have the case name and number, but should not include Plaintiff's attorneys' names, which instead may appear in the body of the notice.

III. Distribution of Class List

The parties appear to agree that a third-party administrator should distribute Plaintiff's proposed notice. In a footnote, Defendant urges that it "should only be required to provide names and mailing addresses to the third party administrator, which protects employees' privacy and effectuates Plaintiff's goal of providing notice to potential class members." Opp. at 24. The Court sees no reason to withhold the potential class members' names and mailing addresses from Plaintiff's counsel. Such information may be relevant to certification. See Perez v. Safelite Grp. Inc., 553 F. App'x 667, 669 (9th Cir. 2014), as amended on denial of reh'g and reh'g en banc (Mar. 7, 2014).

CONCLUSION

The Court GRANTS Plaintiff's motion for conditional certification (Docket No. 24) of the following modified classes:

> **FLSA Off the Clock Class:** All nonexempt hourly paid patient care employees employed by Defendant who worked off the clock as demonstrated by the comparison between the EPIC and/or MIDAS electronic systems and KRONOS timekeeping system at any time during the period of October 13, 2013 through the date of judgment after

trial.

FLSA Regular Rate Class: All nonexempt hourly paid employees employed by Defendant who received the Success Sharing Bonus, the Certification Bonus, or the Top Range Bonus at any time during the period of October 13, 2013 through the date of judgment after trial.

The Court orders the parties to meet and confer to rewrite the notice, as discussed in the previous section, and to submit a revised notice in PDF and Word format for the Court's review and final approval by May 1, 2018. If the parties cannot agree on the language of the notice, then they shall submit competing versions and a redline of the two versions. Once the Court finally approves the notice, the parties shall jointly arrange for distribution of the notice through a third-party administrator.

Counsel is ordered to communicate with their counterparts in the Contra Costa county case, Norman Erickson v. John Muir Health et al., Case No. CIVMSC18-00307, and attempt to coordinate the cases in order to avoid duplication or inefficiency. By May 1, 2018, the parties shall file a joint letter about the status of the Contra Costa county case, which shall include the following information: the judge assignment, the case schedule, and any overlap between the Contra Costa county case and this one.

Defendant shall provide the potential class members' names and mailing addresses to Plaintiff within fourteen days of this order.

IT IS SO ORDERED.

Dated: April 20, 2018

CLAUDIA WILKEN
United States District Judge