UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Jason Patzfahl, *On behalf of himself and those similarly situated*, Plaintiff, v. FSM ZA, LLC, *et al.*, Defendants.	Case No. 2:20-cv-1202 Judge Lynn S. Adelman

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION TO SEND NOTICE TO SIMILARLY SITUATED EMPLOYEES

This is a wage and hour lawsuit filed on behalf of pizza delivery drivers who work at Defendants' Toppers Pizza franchise stores. Plaintiff Jason Patzfahl alleges that Defendants' pizza delivery drivers are all employed according to the same terms: they receive minimum wage minus a tip credit for all hours worked while completing deliveries, they drive their own cars to deliver Defendants' pizzas, and they are reimbursed for their automobile expenses on a per-mile basis that is less than the IRS standard business mileage rate. Plaintiff claims that these employment terms result in a violation of the Fair Labor Standards Act. *See, e.g., Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 WL 5725043, *7 (S.D. Ohio Nov. 5, 2019) (granting summary judgment to delivery drivers raising the same claims at issue here).

Plaintiff asks the Court to authorize notice of this lawsuit be sent to all individuals who worked for Defendants as delivery drivers at any time within the three years prior to the filing of the Complaint and the date of the Court's Order who:

(1) were reimbursed a per-delivery reimbursement rate or a per-mile reimbursement rate that was less than the IRS standard business mileage rate,

(2) were paid minimum wage minus a tip credit for the hours they worked on the road making deliveries.

The Court has a "reasonable basis" for authorizing notice to be sent to Defendants' delivery drivers. Courts have routinely authorized notice to be disseminated to similarly situated delivery drivers in similar pizza delivery driver cases based on a similar record. *See, e.g., Young v. Rolling in the Dough, Inc.*, No. 17-cv-7825, 2018 WL 1240480, at *2 (N.D. Ill. Mar. 8, 2018). (authorizing notice to two separate Domino's Pizza franchise operations who owned 15 store locations based on declaration of named plaintiff); *Brandenburg v. Cousin Vinny's Pizza, LLC*, 2017 WL 3500411 (S.D. Ohio Aug. 15, 2017) (authorizing notice to seventeen store location based on declaration of named plaintiff); *Thomas v. Papa John's International,* No. 1:17-cv-411, 2019 WL 4743637 (S.D. Ohio Sep. 29, 2019) (authorizing notice to nine stores based on declaration of named plaintiff); *Parker v. Battle Creek Pizza, Inc.*, No. 1:20-cv-277, 2020 WL 4345010, *3 (W.D. Mich. Jul. 24, 2020) (authorizing notice to multiple locations based on declaration of named plaintiff).

1. Case Background & Posture

To operate its business, Defendants need automobiles to deliver their pizzas. Instead of maintaining a fleet of cars themselves, Defendants require their minimum-wage delivery drivers to

supply safe, functioning, insured cars to use at work. Plaintiff claims that Defendants must fully reimburse for the automobile expenses they incur while delivering pizzas, because those expenses are incurred for the company's benefit. But, Plaintiff claims that Defendants have failed to fully reimburse the delivery drivers as required by law, and that under-reimbursement cuts into the delivery drivers' minimum wages, and results in a violation.

On August 6, 2020, Plaintiff filed his Complaint asserting these claims under the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*., and Wisconsin Statute § 104.01, *et seq*., and § 109.01, *et seq*. Doc. 1. Plaintiff's FLSA claims are filed as a collective action, meaning similarly situated employees must opt in to become parties to the action in order to participate. 29 U.S.C. § 216(b). Plaintiff's Wisconsin law claims are filed as a class action pursuant to Fed. R. Civ. P. 23.

Plaintiff now seeks to notify all of Defendants' delivery drivers of the pendency of this case. Plaintiff makes this request at the start of the case, before any discovery has been completed, because the statute of limitations continues to run on the FLSA claims of his absent co-workers until they return a consent to join form in this case. 29 U.S.C. § 216(c). And, therefore, putative opt in plaintiffs' claims are deteriorating with each pay period that passes. *See, e.g., Nehmelman v. Penn Nat. Gaming, Inc*., 790 F.Supp.2d 787, 792 (N.D. Ill. 2011) (explaining that the FLSA treats each pay period as a separate violation).

This case is well-suited for the FLSA collective action process. There are very few facts in dispute. Plaintiff anticipates that Defendants will *acknowledge* that (1) Defendants pay delivery drivers a tipped wage rate while on the road, (2) Defendants do not record their delivery drivers' actual automobile expenses (*e.g.*, gas and repair receipts), and (3) Defendants reimburse on the per-mile basis that is less than the IRS standard business mileage rate. In other words, this is not a

case where—like an off-the-clock claim, for example—there is a question as to whether all of the employees are subject to the challenged practice, and therefore it is not clear if it is appropriate to notify all of the employees. On the contrary, Plaintiff expects there will be no dispute that the challenged policy applies to all delivery drivers. Indeed, the individuals Plaintiff seeks to notify (delivery drivers paid a per-mile rate less than the IRS rate) can only be identified by reference to Defendants' payroll and compensation records.

2. Background of Plaintiff's Legal Claims

Plaintiff's claims arise under the Fair Labor Standards Act. Under the FLSA, employers cannot require minimum wage employees to supply "tools of the trade" to be used at work when the cost of such tools drops the employees' wages below minimum wage. The Code of Federal Regulations explains:

> Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

29 C.F.R. § 531.35. In the pizza delivery driver context, the delivery drivers' cars and associated expenses are considered "tools of the trade". *Hatmaker*, 2019 WL 5725043, *2. And, because the delivery drivers are paid a tipped wage rate while on the road making deliveries, Defendants must fully reimburse for these expenses, or a minimum wage violation will be triggered. *Id.*; *see also Meetz v. Wisconsin Hospitality Group*, 2017 WL 3736776, *5 (holding that employers claiming a tip credit

cannot retroactively claim a greater tip credit, or count tips in excess of the tip credit claimed as an offset against their minimum wage obligation).

Typically, under the FLSA, employers are required to reimburse for "tools of the trade" down to the penny, and keep records of those expenses and reimbursement payments. "As a general principle, employers are not permitted to 'guess' or 'approximate' a minimum wage employee's expenses for purposes of reimbursing the expenses." *Hatmaker*, 2019 WL 5725043, *3. "This would result in some employees receiving less than minimum wage, contrary to the FLSA mandate. Instead, as a general proposition, the FLSA requires employers to pay back the actual expenses incurred by the employees." *Id.*

But, "[i]n the pizza delivery context, determining and maintaining records of each employee's actual expenses is a cumbersome task for the employer." *Id.* As a result, instead of requiring traditional compliance, the Department of Labor Field Operations Handbook explains that employers employing minimum wage delivery drivers have an alternative. "[E]ither (1) keep records of actual expenses and reimburse for them or (2) reimburse drivers at the IRS standard business mileage rate." *Id.* This standard achieves the purposes of the FLSA by providing employers and employees with clear rules to follow:

> The Department's rule for pizza delivery drivers results in clarity for both delivery drivers and their employers. Employers can choose to take on the task of tracking delivery drivers' actual expenses or pay a set per-mile reimbursement rate. A neutral arbiter—the IRS—creates, monitors, and updates the rate, and it favors neither employers nor employees. Both employers and employees can readily access the rate. Moreover, employers, employees, and courts can precisely determine whether an employer is complying with the employer's minimum wage obligations. This can be done at relatively low litigation cost, likely through a motion for judgment on the pleadings or at summary judgment.

Hatmaker, 2019 WL 5725043, *6.[1]

3. Legal Standard for Sending Notice of FLSA Action.

Section 216(b) of the FLSA empowers Plaintiff to maintain an action for unpaid wages on behalf of himself and similarly situated employees:

> An action to recover the liability prescribed [under the FLSA] may be maintained against one employer in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to [a class] action unless he gives consent in writing to become such a party and such consent is filed in the court in which the action is brought.

29 U.S.C. § 216(b).

Before a similarly situated employee may become a party plaintiff to this lawsuit for purposes of their FLSA claims, he or she must file a written consent with the Court. *Id*. This distinct "opt-in" structure heightens the need for employees to "receiv[e] accurate and timely notice concerning the pendency of the collective action." *Hoffman La-Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The statute therefore vests district courts with "discretion to implement 29 U.S.C. § 216(b)…by facilitating the notice to potential plaintiffs." *Id*. at 169.

"The critical inquiry in determining whether a court should exercise its discretion to authorize the sending of notice to potential plaintiffs is whether the representative plaintiff has shown that she is similarly situated to the potential class plaintiffs." *Meetz*, 2017 WL 3736776, *2

[1] *See also, e.g., Brandenburg v. Cousin Vinny's Pizza,* No. 3:16-cv-516, 2018 WL 5800594, *4 (S.D. Ohio Nov. 5, 2018) ("Because the vehicles owned by the delivery drivers are considered 'tools of the trade,' 29 C.F.R. § 531.35, and required by Cousin Vinny's as a condition of being hired as a delivery driver, there needed to be an adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost, in order to avoid a decrease in the minimum wage and overtime paid."); *Zellagui v. MCD Pizza, Inc.,* 59 F.Supp.3d 712, 716 (E.D. Pa. 2014) ("When minimum wage law requires an employer to reimburse an employee for using the employee's vehicle for the benefit, the employer should reimburse the employee at the IRS per mile rate or keep detailed records of the employees' expenses to justify another reimbursement rate."); *Young*, 2020 WL 969616, *1 (quoting *Hatmaker*); *Salmon v. Glass Family Pizza, Inc.*, AAA No. 01-19-0001-9554 (Feb. 5, 2020) (arbitrator holding that pizza companies must either reimburse actual expenses or the IRS mileage rate).

(quoting *Austin v. CUNA Mut. Ins. Soc'y*, 232 F.R.D. 601, 605 (W.D. Wis. 2006)). "Generally, in order to determine whether the representative plaintiff is 'similarly situated' to potential opt-in plaintiffs, this Court follows a two-step certification approach." *Id.* (citations omitted).

"In the first stage, the court examines whether the plaintiff has demonstrated a 'reasonable basis' for believing he is similarly situated to potential class members." *Id.* (citing *Miller v. ThedaCare Inc.*, No. 15-cv-506, 2016 WL 4532124, at *3 (E.D. Wis. Aug. 29, 2016)). "The plaintiff must make 'at least a modest factual showing' that collective action is appropriate." *Id.* "To establish that factual support, the plaintiff may present affidavits, declarations, deposition testimony, or other documents that demonstrate some factual nexus between the plaintiff and the proposed class or a common policy that affects all the collective members." *Id.* (citations omitted). At the first stage, "the court does not consider the merits of a plaintiff's claims, or witness credibility." *Young v. Rolling in the Dough, Inc.*, No. 17-cv-7825, 2018 WL 1240480, at *2 (N.D. Ill. Mar. 8, 2018). If the class is conditionally certified, notice may be sent to other potential class members, and discovery may proceed. *Meetz*, 2017 WL 3736776, *2-3.[2]

"At the second step, which usually arises on the defendant's motion for decertification, the court must determine whether the plaintiffs who have opted in are, in fact, similarly situated." *Meetz*, 2017 WL 3736776, *3 (citations omitted). "In this phase, the court assesses whether

[2] Courts often refer to this type of motion as a "Motion for Conditional Certification," but, in reality, nothing is being "certified" if the Court grants Plaintiff's request. "The term conditional certification is actually a misnomer." *Essex v. Children's Place, Inc.*, No. CV15-5621, 2016 WL 4435675, *4 (D.N.J. Aug. 16, 2016). Conditional certification of an FLSA matter does not produce a class with independent legal status and is not necessary "for the existence of a representative action under the FLSA." *Id.* (quoting *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011)). Rather, "[t]he sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Symczyk v. Genesis Healthcare Corp.*, 133 S. Ct. 1523, 1530 (2013) (internal quotations omitted).

continuing as a collective action provides efficient resolution in one proceeding of common issues of law and fact." *Id.* (citing *Hoffman–La Roche*, 493 U.S. at 170).

Because Plaintiff's Motion addresses the first stage, the Court's analysis should be limited solely to whether Plaintiff has made a "modest factual showing" that he and other of Defendants' delivery drivers are "similarly situated" with respect to Defendants' reimbursement policies. *See, e.g., Meetz*, 2017 WL 3736776, at *2.

4. Argument

4.1. Defendants' delivery drivers are similarly situated.

Plaintiff has made a modest factual showing that other delivery drivers exist who have been subjected to the same terms of employment and compensation. The delivery drivers complete essentially the same job duties. The delivery drivers are paid minimum wage minus a tip credit for all hours worked on the road making deliveries. The delivery drivers drive their own cars for work, but, Defendants do not reimburse them for their actual expenses or at the IRS standard business mileage rate.

First, Plaintiff's declaration explains that he learned from his manager, Keith, that all of the delivery drivers were paid a tipped wage rate. Declaration of Jason Patzfahl ("Patzfahl Decl."), attached as Exhibit 1, ¶ 9. Additionally, Plaintiff discussed compensation and other terms of employment with other delivery drivers at Defendants' Toppers Pizza stores, and confirmed that they were all compensated according to the same terms, including being paid at a tipped wage rate. *Id.*

Second, Plaintiff's declaration explains that all of the delivery drivers are required to provide cars to use at work. He witnessed his co-workers using their own cars to complete deliveries, not cars provided by the company. *Id.* at ¶¶ 10-11.

Third, Plaintiff's declaration explains that Defendants did not collect records of his actual automobile expenses, nor did he ever see Defendants collect such records from other delivery drivers. *Id.* at ¶¶ 12-13. Keith told Plaintiff that the only document Defendants would need from Plaintiff was related to proof of insurance. *Id.* at ¶ 14.

Finally, Plaintiff's declaration explains that all of the delivery drivers were reimbursed a per-delivery reimbursement rate that was less than the IRS rate. Id. at ¶¶ 16-18. Plaintiff was paid $1.00 per delivery until late 2019 and $2.00 per delivery after that. *Id.* Plaintiff also learned from conversations with coworkers that other delivery drivers were reimbursed according to those terms as well. *Id.*

Defendants will presumably claim that the "reasonable approximation" standard allows them to reimburse their delivery drivers on a per-mile basis at a rate less than the IRS standard business mileage rate. Obviously, Plaintiff disagrees. But, *even if* the reasonable approximation standard were to apply, the case would still be well-suited for collective action adjudication because all of the delivery drivers have been subject to the same reimbursement methodology—the question would simply be whether that methodology amounts to a reasonable approximation. *See, e.g., Meetz*, 2017 WL 3736776, *5 ("Nor do variations between individual members of the putative class defeat conditional certification at this step, as Defendants contend they should."); *Smith v. Pizza Hut, Inc.*, No. 09-cv-01632, 2012 WL 1414325, *6 (D. Colo. Apr. 21, 2012) (certifying nationwide collective where reimbursement rates varied from region to region and holding "the

mere possibility that some members of the proposed class may have different damages (or no damages at all) is not reason to refuse to notify all potential class members in the first instance"); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09-cv-1335, 2011 WL 4089251, *4 (E.D. Mo. Sept. 14, 2011) ("That the reimbursement methodology Papa John's used might vary over time and from location to location, does not mean that the named Plaintiff and the putative class members are not similarly situated."); *Darrow v. WKRP Management, LLC*, No. 09-cv-01613, 2012 WL 638119 (D. Colo. Feb. 28, 2012) ("However, the existence, effect, and predominance of these individual questions and defenses would be relevant only at the second stage of collective action certification, and are not appropriate considerations at the notice stage inquiry.").

The facts provided in Plaintiff's declaration exceed the "modest factual showing" Plaintiffs must make to prevail on this Motion. Courts have consistently permitted notice to be sent to employees in similar pizza delivery cases. *See, e.g., Meetz,* 2017 WL 3736776, *5; *Young*, 2018 WL 1240480, *4; *Thomas,* 2019 WL 4743637; *Brandenburg,* 2017 WL 3500411; *Parker,* 2020 WL 4345010, *3; *Waters v. Pizza to You, LLC*, 2020 WL 1129357 (S.D. Ohio Mar. 9, 2020); *Redus v. CSPH, Inc.,* No. 3:15-cv-2364, 2017 WL 2079807 (N.D. Tex. May 15, 2017); *Sullivan v. PJ United, et al.,* No. 7:13-cv-01275, Dkt. 80 (N.D. Ala. Mar. 13, 2017); *Drollinger v. Network Global Logistics, Inc.,* No. 16-cv-00304, Dkt. 76 (D. Colo. Jan. 18, 2017); *Tegtmeier v. PJ Iowa, LC,* 208 F.Supp.3d 1012, at *3-21 (S.D. Iowa Sept. 21, 2016); *Bellaspica v. PJPA, LLC*, 3 F.Supp.3d 257, 260 (E.D. Pa. Mar. 11, 2014); *Smith*, 2012 WL 1414325; *Darrow*, 2012 WL 638119; *Perrin*, 2011 WL 4089251; *Wass v. NPC Int'l., Inc.*, No. 09-cv-2254, 2011 WL 1118774 (D. Kan. Mar. 28, 2011); *Bass v. PJCOMN Acq. Corp.*, No. 09-cv-01614, 2010 WL 3720217 (D. Colo. Sept. 15,

2010); *Luiken v. Domino's Pizza, LLC,* No. 09-cv-516, 2010 WL 2545875 (D. Minn. June 21, 2010).[3]

4.2. Court-authorized notice is appropriate in this case.

The Supreme Court instructs that notice should be "orderly, sensible, and not otherwise contrary to statutory commands." *Hoffman-LaRoche Inc.*, 493 U.S. at 170. The Court intentionally left significant discretion to oversee notice in the district courts' hands: "We confirm the existence of the trial court's discretion, *not the details of its exercise*." *Id*. (emphasis added).

Plaintiff asks the Court to authorize the proposed notice attached as Exhibit 2 to be disseminated to the delivery drivers who have worked for Defendants at any time in the three years before the complaint through regular U.S. mail and e-mail. *See* Exhibit 2 (proposed notice); Exhibit 3 (proposed email). To facilitate sending the notice, Plaintiff requests that the Court direct Defendants to produce a computer-readable list of the names, last known addresses, telephone numbers, e-mail addresses, date of employment and job title for all persons employed as delivery drivers who are reimbursed a per-mile reimbursement rate that is less than the IRS standard business mileage rate at Defendants' Toppers Pizza locations during the three years prior to the filing of this action within fourteen (14) days of the order granting Plaintiff's Motion.

4.3. The Opt In Period should be sixty days.

Plaintiff asks the Court to set an opt in period of sixty days from the date the Notice goes out in the mail.

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[3] To further illustrate the point, courts also consistently grant contested class certification motions of similar claims under the more-stringent standard of Fed. R. Civ. P. 23. *See Brandenburg*, 2018 WL 5800594; *McFarlin v. The Word Enterprises, LLC*, No. 16-cv-12536, 2017 WL 4416451 (E.D. Mich. Oct. 5, 2017); *Bass v. PJ COMN Acq. Corp.,* No. 09-cv-01614*,* 2011 WL 2149873 (D. Colo. Jun. 1, 2011); *Perrin v. Papa John's Int'l, Inc.* ("*Perrin II*"), 2013 WL 6885334 (E.D. Mo. Dec. 31, 2013); *Oregal v. PacPizza, LLC,* Case No. C12-01454 (Sup. Ct. of Contra Costa Cnty. May 8, 2014); *Behaein v. Pizza Hut, Inc.,* Case No. BC541415 (Sup. Ct. of L.A. Cnty. Jul. 15, 2015).

In Plaintiff's counsel's experience, sixty days allows sufficient time for notices to be sent and for employees to consider whether they want to opt in. It also allows time for notices that are sent to the wrong address to be returned as undeliverable and re-sent to an updated address. Finally, it allows the parties and the Court to set a reasonable schedule for the rest of the case without unnecessary delay.

The opt in period, however, should not be considered a hard deadline. The purpose of sending notice is to provide each individual employee with an opportunity to assert their own claim as part of the group. As the Supreme Court explained, "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, see *Hoffmann–La Roche Inc., supra,* at 171–172, 110 S.Ct. 482, who in turn become parties to a collective action only by filing written consent with the court, § 216(b)." *Symczyk II*, 133 S. Ct. at 1530. In other words, the employees' claims are not dependent on any "certification," or on the named plaintiff. Each opt in plaintiff's claim stands on its own two feet. *See, e.g., Buckles v. EUBA Corp.*, No. 3:18-cv-355, 2019 WL 4645915, *3 (S.D. Ohio Sept. 24, 2019) (finding that opt in plaintiff's claims could continue even after named plaintiff's claims were compelled to arbitration); *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1274-76 (11th Cir. 2018) (holding that opt in plaintiffs' became party plaintiffs by filing their consent form, and was not dependent on a finding of "conditional certification").

It makes sense, then, that the only "deadline" that should apply to an employee's right to assert their claim should be the statute of limitations that applies to them. If an employee returns their claim form after the close of the opt in period, they should be permitted to join the case so

long as the case has not progressed so far that inclusion of the late opt in would somehow prejudice Defendants. If the individual is not permitted to be included in the case, they are free to assert their claims in a separate lawsuit. The intent of *Hoffman-LaRoche* is served by treating the opt in period as a "soft" deadline, and permitting late opt ins to join the case so long as it will not prejudice Defendants.

4.4. Plaintiff reserves the right to seek authorization from the Court to send another round of Notice.

As Plaintiff understands it, Defendants have not yet corrected the compensation and reimbursement policies challenged by this lawsuit. Until Defendants correct their policies, new employees will be subject to the policy but will not have received notice of this lawsuit.

Accordingly, to the extent that Defendants' policy remains in place after the Court grants the present Motion, Plaintiff may seek permission at a later stage in the case to send notice to any newly hired employees who are subject to this policy but did not work for Defendants yet when the Court authorized the first round of notice. This will allow for the most efficient adjudication of these claims.

5. Conclusion

For the foregoing reasons, Plaintiff respectfully requests the Court to (1) authorize Plaintiff to send notice of this action to the delivery drivers who have worked at Defendants' Toppers Pizza stores dating back three years prior to the filing of the complaint, (2) approve the Plaintiff's proposed notices and methods of disseminating notice, (3) order Defendants to provide name and contact information for all potential opt-in plaintiffs within 14 days of the Court's order, and (4) authorize a 60-day opt-in period.

Respectfully submitted,

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Counsel for Plaintiff

Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically. To the extent any parties do not yet receive notice of filings through the electronic filing system, I certify that they will be served with this Motion in accordance with the Federal Rules of Civil Procedure, and that, after service is complete, I will submit a certificate of service.

/s/ Nathan Spencer
Nathan Spencer