

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Kevin Faile, Louis C. Roman, Alan R. DePalma,
and Brian Scott Craton, all individually and on
behalf of all other similarly situated individuals,)

Plaintiffs,)

v.)

Lancaster County, South Carolina,)

Defendant.)

C.A. No. 0:10-cv-2809-CMC

**ORDER APPROVING NOTICE OF
SETTLEMENT TO CLASS**

This matter comes before the court on Plaintiffs’ consent motion to approve settlement of the above-captioned lawsuit. This is an action under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”), and the South Carolina Wage Payment Act, S.C. Code §§ 41-10-10, *et seq.* (“State Wage Act”), seeking backpay, liquidated damages and attorney’s fees for alleged failure to properly pay overtime, for time allegedly worked “off-the-clock,” and for the County’s exclusion of certain hours for sleeping. On August 25, 2011, the court certified a class under Fed. R. Civ. P. 23 to pursue the State Wage Act claim (“State Class Action”), and conditionally certified a collective action to pursue the FLSA claim (“FLSA Collective Action”). Dkt.No. 56.

The parties have informed the court that they have reached a settlement and join in requesting approval of that settlement. In addition, Plaintiffs ask the court to approve proposed allocations of settlement proceeds. Defendant does not oppose Plaintiffs’ proposed allocations.

The court makes the following findings of fact:

(1) Pursuant to the court’s previous order certifying the State Class Action and conditionally certifying the FLSA Collective Action, notices were mailed on or about August 30, 2011, to all individuals who might be entitled to relief under either the State Class Action or FLSA Collective

Action (collectively “Potential Class Members”). Notices were returned undeliverable for only five of the ninety-nine Potential Class Members. *See* Dkt. No. 84-1 at 17-18. Plaintiffs assert in their motion that, of those five, only one had “a potential claim for unpaid overtime or other compensation,” and that efforts are being made to contact this individual through his parents.¹ Defendant’s personnel office is also making efforts to locate the remaining four so that they may receive the settlement notice, even though it appears none of the remaining four would be entitled to any recovery.

(2) The initial notice sent to Potential Class Members was approved by the court and adequately informed Potential Class Members of their rights and obligations. *See* Dkt. No. 56. The notice explained that, to participate in the FLSA claim, potential members would be required affirmatively to opt-in to the lawsuit. Dkt. No. 56-1. It also explained that participation in the State Wage Act claim would be automatic if the individual did not affirmatively opt out by a specified deadline. *Id.* Forms for use in opting in or out were attached to the notice. Dkt. Nos. 56-2, 56-3). The court established a deadline of October 31, 2011, to file forms to opt in to the FLSA Collective Action or to opt out of the State Class Action.

(3) No opt-out forms were returned by October 31, 2011. Thus, all potential members of the State Class Action became class members for purposes of the State Wage Act claim.

(4) Three opt-in forms joining the FLSA Collective Action were filed after the notice and

¹ Given that this individual did not receive actual notice, it is not surprising that he did not opt in to the FLSA collective action. Even had he done so, it appears unlikely that he would have been entitled to much relief under the FLSA Collective Action given his dates of employment and the fact that the FLSA statute of limitations is only tolled when an individual opts in to the litigation. By contrast, it appears this individual is entitled to relief under the State Class Action as the statute of limitations was tolled as to that claim by filing of the action.

before the deadline. Another fifty-five individuals had opted in prior to issuance of the notice. Thus, for purposes of settlement, fifty-eight individuals will be treated as having timely joined the FLSA Collective Action. Each of these individuals is also a member of the State Class Action as none opted out of that aspect of that class.

(5) Potential Class Members of both the State Class Action and FLSA Collective Action are emergency medical technicians (“EMTs”) who generally work 24-hour shifts together every three days, largely unsupervised. While some have left that employment, most remain. Accordingly, the Potential Class Members have had substantial opportunities to speak with each other without management scrutiny. This is significant for purposes of notice given the active participation of the named Plaintiffs and additional class members through a Plaintiffs’ Steering Committee, which has taken an active role in advancing the litigation and in mediation.

(6) Plaintiffs submit that their expert’s highest calculation of potential damages was approximately \$2,169,000, of which approximately \$1,600,000 was attributable to the alleged improper exclusion of sleep time. The sleep-time issue was hotly contested by the parties. Plaintiffs also concede that this aspect of their case presented the greatest challenges both factually and legally.

(7) Plaintiffs further submit that the defense expert’s calculation of maximum potential damages was significantly lower, under \$334,000. The defense expert also concluded that some class members were actually overpaid. The significant differences between the damage calculations of the two sides are largely the result of different assumptions regarding how the hourly wage should be calculated, whether EMTs received unauthorized pay for short weeks, and whether Plaintiffs are entitled to any additional payment for sleep time.

(8) The Settlement Agreement provides that Defendant will pay various expenses, including the full cost of mediation, expenses relating to notices, and wage-related payments for any award of backpay (approximately 17% of amounts allocated to backpay). In addition, Defendants will pay \$1.5 million into a Settlement Fund. Plaintiffs' Steering Committee and counsel propose the Settlement Fund should be allocated as follows: \$500,000 to attorney's fees, \$35,000 to litigation costs, \$67,500 to incentive/service payments to the Named Plaintiffs and Plaintiffs' Steering Committee members for their assistance in advancing the case, and \$897,500 to payment of individual claims.

(9) Plaintiffs propose that the \$897,500 available for payment of individual claims be allocated as follows: (a) members of the State Class Action will receive full backpay for the off-the-clock work; (b) members of the FLSA Collective Action will, in addition, receive full backpay for alleged violation of 29 U.S.C. § 207(k) ("Section 7(k)")²; and (c) members of the FLSA Collective Action will receive a pro rata payment based on each member's individual portion of the Plaintiff's best-case-scenario calculation of backpay damages, compared with the total such damages for the entire opt-in class. The last category of payment compensates primarily for allegedly improper underpayment of sleep time. As noted above, the extent to which EMTs were entitled to compensation for sleep time was a hotly contested issue. The dispute as to this issue is of particular significance as Plaintiffs' damages calculations were greatly influenced by their assumptions relating

² Section 7(k) modifies the normal rules for overtime pay, allowing employers to pay overtime for certain public safety workers after they exceed 106 hours of work in a two-week pay-period, rather than requiring them to pay overtime under the standard rules (after 40 hours of work in a single week).

to sleep time.³

Preliminary Finding of Reasonableness. The court preliminarily finds that the proposed settlement is within the range of reasonableness and the current record supports sending notice of the proposed settlement to members of the State Class Action and FLSA Collective Action. This will afford members of both the State Class Action and FLSA Collective Action an opportunity to object or otherwise be heard. The court reserves a final determination on the reasonableness of the settlement and the proposed allocation of the settlement proceeds until after a Fairness Hearing.

Fairness Hearing. A Fairness Hearing is hereby scheduled for March 8, 2012 at 1:30 p.m. in Courtroom II of the Matthew J. Perry, Jr., Courthouse, 901 Richland St., Columbia, South Carolina 29201.

Notices and Cover Letters. Plaintiffs have submitted a proposed notice of class action settlement describing the terms of the proposed settlement agreement and apportionment, notifying the class of the members' right to submit comments or objections regarding the proposed settlement and providing a form for that purpose, and notifying the class of the date of the Fairness Hearing. Plaintiffs have also submitted proposed letters to each individual class member explaining what he or she may be entitled to receive (if anything) under the proposed settlement. The court has worked with counsel to modify the notice and cover letters and approves the same in the form attached to this order.

³ As noted above, Plaintiffs' highest potential damages calculation of approximately \$2,169,000 included \$1,600,000 for unpaid sleep time.

For the reasons set forth above, the court finds the proposed settlement to be within the range of reasonableness and directs the parties to complete the following actions.

(1) Within two business days of entry of this order, Defendant shall mail notices and cover letters (substantially in the form(s) attached to this order) to all members of the State Class Action and FLSA Collective Action. Defendant shall make additional efforts to deliver notices to the five individuals whose prior notices were returned undelivered.

(2) Within fourteen calendar days of entry of this order, Defendant shall file a status report addressing when notices were mailed, whether any have been returned undeliverable, and what efforts have been made to contact any individuals whose notices were returned. **To the extent it is necessary to include any personal information relating to any individual class member, that information shall be filed as a restricted-access attachment.**⁴

(3) Within two business days of entry of this order, Plaintiffs' counsel shall file a motion seeking approval of attorney's fees and costs from the settlement.

(4) Within two business days of entry of this order, Plaintiffs' counsel shall post the following documents on his law firm's website:

- (A) the Complaint (Dkt. No. 1);
- (B) the Answer (Dkt. No. 21);
- (C) the court's previous order approving notice and a copy of the notice (Dkt. No. 56 with attachments);
- (D) Plaintiffs' motion to approve the settlement and allocation (Dkt. No. 84) with

⁴ Before filing, counsel should contact the undersigned's case manager, Charles Bruorton, for filing instructions.

all attachments;

(E) Plaintiffs' Supplement to the motion for settlement approval (Dkt. No. 85);

(F) this order and the notice and attachments filed with it;

(G) Plaintiffs' counsel's motion for attorney's fees; and

(H) A prominent notice of the date and place of the Fairness Hearing and deadline for filing objections, comments, requests to be heard and appearances of counsel.

(5) Plaintiffs' counsel shall also post the following on his website within two business days of entry:

(A) any updates to this order or changes to the schedule or hearing date, time and location;

(B) any orders on Plaintiffs' motion to approve the settlement and allocation and Plaintiffs' counsel's motion for attorney's fees; and,

(C) any other documents or information as subsequently directed by the court.

(6) No later than February 27, 2012, any member of the State Class Action or FLSA Collective Action who desires to file a comment or objection, to be heard at the fairness hearing, to be represented by an attorney other than Plaintiffs' counsel (or to proceed *pro se*) must submit a written comment, objection, request to be heard or attorney appearance. These purposes may be accomplished using the form provided with the notices or by other written submission. Any such letter or form must be received by the court or postmarked no later than February 27, 2012.

(7) Any responses to objections shall be filed by noon on March 2, 2012.

(8) Within fourteen days of entry of this order, Plaintiffs' counsel shall file a summary of the information contained on individual letters, including the individuals's name, calculations of

potential damages, and proposed payments. **This summary shall be filed as a restricted-access document.** *See supra* n.3.

(9) A Fairness Hearing on Plaintiffs' motion to approve settlement and allocation, and any motion by Plaintiffs' counsel for approval of attorney's fees, shall be held on Thursday, March 8, 2012 at 1:30 p.m., in Courtroom II of the Matthew J. Perry, Jr., Courthouse, 901 Richland Street, Columbia, South Carolina 29201.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
January 25, 2012