UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JESUS SILVA RODRIGUEZ and RIGOBERTO ZEPEDA LOA,

Plaintiffs,

v.

RCO REFORESTING, INC. and ROBERTO OCHOA,

Defendants.

CIV. NO. 2:16-2523 WBS CMK

MEMORANDUM AND ORDER RE: AMENDED MOTION FOR CONDITIONAL CERTIFICATION AND MOTION TO MODIFY THE PRETRIAL SCHEDULING ORDER

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Plaintiffs Jesus Rodriguez and Rigoberto Loa brought this action against defendants RCO Reforesting, Inc. ("RCO") and Roberto Ochoa, asserting various wage and hour and employment law claims under federal and California law. (First Am. Compl. ("FAC") (Docket No. 24).) Before the court is plaintiffs' amended Motion to conditionally certify this action as an FLSA collective action, issue notice to similarly situated individuals under 29 U.S.C. § 216(b), and modify the February 17, 2017, pretrial scheduling order. (Pls.' Mot. (Docket No. 33).)

Defendants employed plaintiffs as temporary forestry workers pursuant to the H-2B visa program. (Docket No. 35 ("Rodriguez Decl.") ¶ 2; Docket No. 33-4 ("Loa Decl.") ¶ 2.) Plaintiffs allege that defendants had a policy of not paying plaintiffs for overtime work and not reimbursing plaintiffs for their travel and visa costs, which reduced their first week pay to below minimum wage. (FAC ¶¶ 1, 23-26, 49-52.) These practices allegedly violate the FLSA. (See id. at 10-12.) The court denied plaintiffs' previous Motion to conditionally certify this as a collective action on June 16, 2017. (See June 16, 2017 Order (Docket No. 31).)

I. Conditional Certification

Employees may bring suits for FLSA violations on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). The FLSA does not define "similarly situated," and neither the Supreme Court nor the Ninth Circuit has offered clarification. Brown v. Citicorp Credit Servs., Civ. No. 1:12-62 BLW, 2013 WL 4648546, at *2 (D. Idaho Aug. 29, 2013). However, the Supreme Court has noted a collective action addresses "claims of multiple plaintiffs who share 'common issues of law and fact arising from the same alleged [prohibited] activity.'" Id. (quoting Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

Under the two-step process for FLSA actions, the court first determines whether to conditionally certify the proposed class and send notice of the action based on the pleadings and affidavits. Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 471 (E.D. Cal. 2010). "Determining whether a collective action is appropriate is within the discretion of the district court."

Leuthold v. Destination Am., 224 F.R.D. 462, 466 (N.D. Cal. 2004) (citation omitted). After discovery, the court engages in a more searching review of whether plaintiffs are similarly situated, often triggered by a motion to decertify by defendant. Id.

Courts apply a lenient standard to the first-step. Leuthold, 224 F.R.D. at 467. This step requires that "plaintiffs make substantial allegations that the putative class members were subject to a single illegal policy, plan or decision." Murillo, 266 F.R.D. at 471. However, a plaintiff must supply "some modest evidentiary showing," and the court need not rely on statements that indicate a lack of personal knowledge of alleged employer practices. Brown, 2013 WL 4648546, at *1-3. Plaintiffs bear the burden to show that they are similarly situated "to all potential class members, not merely some portion of them." Kesley v. Entm't U.S.A. Inc., 67 F. Supp. 3d 1061, 1066 (D. Ariz. 2014).

Here, plaintiffs seek to conditionally certify an FLSA class defined as:

> All non-exempt workers employed by Defendants at any time between May 5, 2014 through the present, as forestry workers either under the terms of an H-2B job order or who were engaged in corresponding employment, who incurred and were not reimbursed for their travel and visa costs during the first weeks of employment such that they made less than minimum wage and/or worked in excess of forty hours per week and were not compensated for those hours at the applicable overtime rate.

(Pls.' Proposed Order (Docket No. 33-6).) In support of their Motion, plaintiffs submit affidavits and copies of defendants' H-2B applications for 2013 through 2016.[1] (See Docket No. 33-2.)

[1] Defendants requested H-2B visas for 85 workers in 2013, 101 workers in 2014, 80 workers in 2015, and 67 workers in 2016.

Both plaintiffs attest that they, as H-2B workers, were "not paid overtime for the hours [they] worked more than eight hours a day" and were "not paid more than 40 hours per week regardless of how many hours [they] actually worked." (Rodriguez Decl. ¶ 15; see Loa Decl. ¶ 12.) They also allegedly were not reimbursed for their visa or travel costs from Mexico to the company office in Yreka, (Rodriguez Decl. ¶¶ 7-8; Loa Decl. ¶¶ 5-7), causing them to make below minimum wage their first week, (FAC ¶ 52). They were aware that other H-2B workers were subject to the same conditions because they witnessed such conduct and discussed these issues with other H-2B workers. (Id. ¶¶ 8, 15; Loa Decl. ¶¶ 5, 7, 12.)

Defendants argue the class is impermissibly vague and overbroad because it includes H-2B visa workers and workers "engaged in corresponding employment." The court may, in its discretion, narrow the scope of the proposed collective action. See, e.g., Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 483-84 (E.D. Cal. 2006) (Coyle, J.) (excluding certain types of drivers from conditional certification of an FLSA collective action because plaintiffs failed to show these drivers were similarly situated); see also Adams v. Inter-Con Sec. Sys., Inc., 242 F.R.D. 530, 539 (N.D. Cal. 2007) (narrowing the class of individuals who are entitled to receive notice of the action). The court agrees that the proposed class is overbroad.

First, including those engaged in corresponding employment introduces ambiguity in the class. See Romero, 235 F.R.D. at 484 (removing inclusion of individuals engaged in "equivalent delivery positions" from conditional certification

because it "introduces ambiguity in the class"). Corresponding employment is defined by 20 C.F.R. § 655.5 as someone engaged in "substantially the same work included in the job order or substantially the same work performed by the H-2B workers." However, it is unclear what constitutes "substantially the same work," and thus it is unclear to potential plaintiffs who falls within the scope of the class. Ambiguity also prevents the court from determining whether plaintiffs and all potential class members are similarly situated.

Second, and more importantly, plaintiffs' affidavits are devoid of any information or personal knowledge regarding workers in corresponding employment. There is no evidence or allegations that workers in corresponding employment were subject to the same alleged FLSA violations as the H-2B workers. See Adams, 242 F.R.D. at 536 (finding conditional certification proper where "the putative class members were subject to a single illegal policy, plan or decision"). Plaintiffs Loa's and Rodriguez's declarations discuss their knowledge of FLSA violations incurred by other H-2B visa workers, but make no mention of those in corresponding employment. (See, e.g., Rodriguez Decl. ¶ 15 ("I know other H-2B workers were not paid for all of the hours they worked because we would discuss our pay and compare our paychecks.") (emphasis added).) The First Amended Complaint also contains no allegations regarding workers in corresponding employment. Because plaintiffs fail to indicate that they have any personal knowledge regarding non-H-2B visa workers, plaintiffs fail to show that those in corresponding employment were subject to the same "single illegal policy, plan

or decision" as H-2B workers. See Murillo, 266 F.R.D. at 471.

Because including workers in corresponding employment introduces ambiguity and there is no evidence that workers in corresponding employment suffered FLSA violations, plaintiffs have not shown that they are similarly situated "to all potential class members." See Kesley, 67 F. Supp. 3d at 1066. The court will exercise its discretion to narrow the scope of the proposed collective action and exclude those in corresponding employment. The court will conditionally certify a class of:

> All non-exempt workers employed by Defendants at any time between May 5, 2014 through the present, as forestry workers under the terms of an H-2B job order who (1) incurred and were not reimbursed for their travel and visa costs during the first weeks of employment such that they made less than minimum wage and/or (2) worked in excess of forty hours per week and were not compensated for those hours at the applicable overtime rate.

II. Notice

Where "the court finds initial certification appropriate, it may order notice to be delivered to potential plaintiffs." Kress v. PricewaterhouseCoopers, LLP, 263 F.R.D. 623, 628 (E.D. Cal. 2009) (Karlton, J.) (citing Hoffmann-La Roche, 493 U.S. at 172). Having found that conditional certification is proper, the court finds that issuance of notice to the certified class is proper. The court will address plaintiffs' proposed notice plan and proposed notice.

Plaintiffs seek authorization of a notice plan whereby defendants provide plaintiffs with the contact information of all potential class members, plaintiffs send notice of this action to the potential members, defendants post a copy of the notice in

English and Spanish in their office and employer-provided housing, and defendants provide a copy of the notice with the paychecks of each H-2B worker for the entire opt-in period. Plaintiffs request a six-month opt-in period from the date defendants provide the information of potential plaintiffs. Defendants object to several aspects of this notice plan.

Defendants first object to the notice plan because plaintiffs' opt-in period begins after production of all potential plaintiffs' information, suggesting that failure by defendants to produce the name, phone number, and address of one potential member would delay commencement of the opt-in period indefinitely. The court shall remedy this objection by (1) requiring defendants to provide the information of all potential class members for which they have contact information and (2) commencing the opt-in period from the date this Order is signed.

Defendants next object to the requirement that defendants post notice of this action in all employer-provided housing and provide a copy of the notice with the paycheck of each H-2B worker for the six month opt-in period. The court agrees with both objections. Requiring defendants to provide notice of the action with each H-2B worker's paycheck for six months is overly burdensome. However, providing a copy of the notice with an H-2B worker's paycheck will help facilitate notice to the potential class members. Thus, defendants shall provide a copy of the notice in each H-2B worker's paycheck for the September 1, 2017, and October 1, 2017, pay periods.

Defense counsel argues that defendants do not own any of the employer-provided housing, and thus defendants would not

be permitted to post the notices in employer-provided housing. At oral argument, defense counsel confirmed that defendants own no employer-provided housing. The court will not compel non-parties to this case--the owners of the employer-provided housing--to permit defendants to place a copy of the notice of this action in their facilities. Thus, the court will not require defendants to post notice of this action in employer-provided housing.

As for the content of the notice, it must "provide potential class members 'accurate . . . notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.'" Romero, 235 F.R.D. at 492 (quoting Hoffmann-La Roche, 493 U.S. at 170)).

Defendants first object to the portion of the "Your Rights to Join This Lawsuit" section that states those who believe they "were not reimbursed for your transportation and other expenses during the first weeks of work" may seek to join this action. (See Proposed Notice at 3 (emphasis added).) Defendants argue that the reference to "other expenses" inaccurately suggests to potential plaintiffs that they may have broad entitlement for reimbursement of expenses beyond the requirements of the FLSA. Because the notice should provide potential class members with accurate information, Romero, 235 F.R.D. at 492, the court finds that the expenses in this section should reflect the expenses listed in the conditionally certified class. The court thus will require plaintiffs to substitute "transportation and other expenses" with "travel and visa costs." In light of the narrowed class, the court will also require

plaintiffs to clarify that only individuals employed under the terms of an H-2B job order may join this action.

Defendants also object to the portion of the "Your Legal Representation" section that states "However, CRLA and CDM will seek an award of costs and attorneys' fees from the Court pursuant to an agreement with the Defendants." (See Proposed Notice at 4.) Defendants argue this sentence is improper because it suggests the parties will reach an agreement regarding the attorneys' fees award. The court agrees and plaintiffs shall remove the phrase "pursuant to an agreement with the Defendants."

Defendants next object to the notice because it does not provide defense counsel's contact information and does not inform potential plaintiffs that they have a right to select their own counsel. Other courts in the Ninth Circuit have explicitly rejected these additions because they would "lead to confusion, inefficiency and cumbersome proceedings." See, e.g., Adams, 242 F.R.D. at 541. The court will overrule this objection.

In all other regards, the court will approve plaintiffs' notice plan and proposed notice.

III. Amend Pretrial Scheduling Order

Plaintiffs also move to modify the court's February 17, 2017, pretrial scheduling order (Docket No. 7) to extend discovery and other dates by six months in order to permit potential plaintiffs with time to opt-in. All discovery is set to close on August 31, 2017, and all motions must be filed by September 15, 2017, which will prevent potential plaintiffs from opting-in to this action and prevent the parties from

incorporating the opt-in plaintiffs into their dispositive motions. Plaintiffs did not delay in moving for this modification because they first moved to modify the Scheduling Order less than three months after the court issued its Scheduling Order. The court finds that there is good cause to modify the Scheduling Order, and the court will grant plaintiffs' Motion. See Fed. R. Civ. P. 16(b)(4); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607 (9th Cir. 1992).

IT IS THEREFORE ORDERED that plaintiffs' Motion for conditional certification of this action as an FLSA collective action and issuance of notice to class members (Docket No. 33) be, and the same hereby is, GRANTED:

(1) The court conditionally certifies a FLSA collective action for:

> All non-exempt workers employed by Defendants at any time between May 5, 2014 through the present, as forestry workers under the terms of an H-2B job order who (1) incurred and were not reimbursed for their travel and visa costs during the first weeks of employment such that they made less than minimum wage and/or (2) worked in excess of forty hours per week and were not compensated for those hours at the applicable overtime rate.

(2) The court directs defendants to produce to plaintiffs the names, addresses, and telephone numbers of all potential class members for which they currently possess information within fourteen days from the date this Order is signed.

(3) The court approves an opt-in period of six months, commencing from the date this Order is signed.

(4) The court approves the mailing of the Proposed

Notice (Docket No. 33-1), as amended below, for distribution to potential class members, which shall include notice of the opt-in period as established in this Order. Plaintiffs shall submit the amended notice to the court and defendants within seven days from the date this Order is signed and prior to distribution to any potential class members. Plaintiffs shall amend the Proposed Notice as follows:

(i) In the section of the Proposed Notice titled "Your Rights to Join This Lawsuit," plaintiffs shall substitute the clause "If you worked for Defendants at any time from May 5, 2014 through the present (and even if you are not currently employed by Defendants), and believe you were not reimbursed for your transportation and other expenses during the first weeks of work" for "If you worked for Defendants at any time from May 5, 2014 through the present (and even if you are not currently employed by Defendants) under the terms of an H-2B job order, and believe you were not reimbursed for your travel and visa costs during the first weeks of work."

(ii) In the section of the Proposed Notice titled "Your Legal Representation," plaintiffs shall delete the phrase "pursuant to an agreement with the Defendants."

(5) The court directs that, for the six month opt-in period, defendants shall post a copy of the notice, in Spanish and English, in defendants' offices.

(6) The court directs defendants to enclose a copy of the notice with the paycheck of each H-2B worker employed by defendants for the September 1, 2017, and October 1, 2017, pay periods.

IT IS FURTHER ORDERED that plaintiffs' Motion for to modify the court's February 17, 2017 Scheduling Order (Docket No. 33) be, and the same hereby is, GRANTED. The court's February 17, 2017 Scheduling Order is modified as follows:

(1) Expert Reports are due January 30, 2018;

(2) All discovery closes April 2, 2018;

(3) All motions shall be filed by April 16, 2018;

(4) The Final Pretrial Conference is set for July 16, 2018, at 1:30 p.m. in Courtroom No. 5;

(5) The jury trial is set for September 18, 2018, at 9:00 a.m.

Dated: August 8, 2017

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE