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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ANGELA HAMILTON and MATTHEW
7 HOGAN, individually and on behalf of all
8 others similarly situated,

9 Plaintiffs,

10 v.

11 NUWEST GROUP HOLDINGS, LLC,

12 Defendant.
13

Case No. C22-1117RSM

ORDER GRANTING IN PART MOTION
FOR CONDITIONAL COLLECTIVE
CERTIFICATION

14 This matter comes before the Court on Plaintiffs' Motion for Conditional Collective
15 Certification. Dkt. #42. Defendant NuWest Group Holdings, LLC ("NuWest") opposes. Dkt.
16 #43. Plaintiffs ask this Court to 1) conditionally certify this action as a representative collective
17 action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), (2) order NuWest to
18 produce a list of putative collective members and contact information; (3) direct that notice of
19 this action be issued to the collective in the form and manner requested; (4) establish a 90-day
20 period for opting in to the action; and (5) equitably toll the statute of limitations.
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22 The proposed collective is described as:

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24 All current and former hourly, non-exempt employees of NuWest
25 who (1) worked more than 40 hours in a workweek at any time
26 from three years prior to the filing of the initial Complaint to the
27 present and (2) who received a "Meals and Incidentals Stipend," or
"Housing Stipend" (or their equivalents by any other name) that
was not included in their regular rate of pay.

28 Dkt. #42 at 15.

ORDER GRANTING IN PART MOTION FOR CONDITIONAL COLLECTIVE
CERTIFICATION - 1

1 Plaintiffs seek to uphold the FLSA’s requirement that an employer compensate an
2 employee at a rate of “one and one-half times the regular rate” for hours worked in excess of 40
3 in a work week. 29 U.S.C. § 207(a)(1). The FLSA specifically authorizes employees to
4 enforce this right to overtime pay via a private right of action, and to do so collectively, on
5 behalf of themselves “and other employees similarly situated.” 29 U.S.C. § 216(b).
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7 Such collective actions are not subject to the numerosity, commonality, and typicality
8 rules of a class action suit under Rule 23 of the Federal Rules of Civil Procedure. Instead,
9 plaintiffs bringing a collective action must only show that they are “similarly situated” to the
10 other members of the proposed class, and those other members must “opt in” to the proposed
11 class. 29 U.S.C. § 216(b).
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13 Courts typically employ a two-step approach to the determination of whether a proposed
14 collective is “similarly situated.” *Randolph v. Centene Mgmt. Co.*, 2015 WL 2062609, *2
15 (W.D. Wash. May 4, 2015); *see also Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th
16 Cir. 2018) (recognizing that the two-step “certification” process is “the near-universal
17 practice”). At the first step, the “notice stage,” the court determines whether the class should be
18 conditionally certified and given notice of the pending action. *Randolph*, 2015 WL 2062609, at
19 *2. As this step generally takes place before discovery and with limited evidence, *Clarke v.*
20 *AMN Servs., LLC*, 2017 WL 6942755, at *5 (C.D. Cal. Oct. 12, 2017), the standard of proof is
21 “‘akin to a plausibility standard,’ so that the ‘court’s analysis is typically focused on a review of
22 the pleadings but may sometimes be supplemented by declarations or limited other evidence.’”
23 *Carlson v. United Nat. Foods, Inc.*, 2021 WL 3616786, at *2 (W.D. Wash. Aug. 14, 2021)
24 (quoting *Campbell*, 903 F.3d at 1109)). To meet this standard, all that is required is a “modest
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1 factual showing,” along with the allegations, that the plaintiff is “similarly situated” to the
2 potential collective. *Id.*

3 Under the FLSA, an action is time-barred when it is filed more than two years after the
4 cause of action accrued, although the limitations period may be extended by another year for
5 willful violations. 29 U.S.C. § 255(a). For a named plaintiff, an FLSA action is commenced
6 when they file a complaint or later file a consent to join the action. *Campbell*, 903 F.3d, at
7 1104, n.7 (citing 29 U.S.C. § 256). Opt-in plaintiffs’ claims are commenced when they file a
8 consent to join the action. 29 U.S.C. § 256(a). *Id.* at 1104. Consequently, the statute of
9 limitations continues running until a putative plaintiff joins the action.
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11 This case was filed on August 10, 2022. Dkt. #1. A Motion to Dismiss was granted in
12 part and denied in part. Dkt. #37. Defendants filed an Answer, Dkt. #38, and later an Amended
13 Answer, Dkt. #39. This instant Motion was filed on March 21, 2023. This case was reassigned
14 to the undersigned on May 8, 2023.
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16 NuWest is a “leading national staffing agency” that contracts with healthcare facilities
17 to staff open positions. *See* Plaintiffs’ First Amended Class and Collective Action Complaint
18 (“Compl.”), Dkt. #21, ¶¶ 14–16. NuWest signs up employees to fixed-term assignments at
19 healthcare facilities across the country. *Id.* at ¶ 16. Nurses and other healthcare workers who
20 accept these assignments often travel from their homes to work in other states. *Id.* at ¶¶ 18–20.
21 As part of these contracts, NuWest offers “stipends” nominally for “Housing” and “Meals and
22 Incidentals” that Plaintiffs allege are actually remuneration for their work and not expense
23 reimbursement. *Id.* at ¶¶ 44-47. Plaintiffs allege that when NuWest pays overtime wages these
24 stipends are excluded from the regular rate of pay resulting in underpayment. *Id.* at ¶¶ 47-54.
25 Plaintiffs argue this practice violates the FLSA’s requirement that “all remuneration for
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1 employment” be included in an employee’s regular rate of pay when calculating overtime
2 payments. *See* 29 U.S.C. 207(e).

3 Plaintiffs have come forward with substantial allegations supported by declaration
4 testimony, contracts, and paystubs tending to show the following: (1) that NuWest tied the
5 value of the per diem stipends to hours worked (as opposed to expenses incurred) and (2) that
6 NuWest excluded the value of these stipends from the “regular rate” when paying overtime.
7 *See* Dkt. #42-4 through #42-10. Plaintiffs cite favorably to *Clarke v. AMN Servs., LLC*, 987
8 F.3d 848, 857 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 710 (2021) as an analogous case.
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10 NuWest changed its contractual stipend language in 2022, possibly in response to
11 litigation in California. *See* Dkt. #42 at 11 (NuWest removed the language providing that
12 stipends would be “pro-rated” or not paid for “hours not worked” and added that “stipends will
13 not be paid for Requested Time Off during which the Contractor does not perform any work
14 during the work week or is no longer incurring duplicate living expenses.”). However,
15 Plaintiffs point to wrinkles in the revised contract language and the experience of employee
16 Terri Seastrom. NuWest changed her contract mid-assignment to remove the offending
17 language but added a provision allowing NuWest to “adjust rates downwards during your
18 assignment” because the “market for health care staffing services is dynamic;” NuWest then
19 reduced Ms. Seastrom’s housing stipend from \$672 to \$100. *See* Dkt. #42 at 11–12 and at n.6.
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22 NuWest is “willing to concede conditional certification (but not the merits), in part,
23 regarding Plaintiffs’ FLSA claims.” Dkt. #43 at 1. NuWest takes issue with any claims arising
24 after it made a change to its stipend policy in 2022 and claims from California where there has
25 already been a settlement. *Id.* at 2. NuWest opposes Plaintiffs’ proposed notice and related
26 process, as well as their suggested consent to join form, and requests that the parties meet and
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1 confer about various deficiencies following the Court’s Order. *Id.* NuWest argues against
2 equitable tolling on behalf of putative opt-in plaintiffs.

3 The California settlement was for healthcare workers assigned to work in any facility
4 inside California between March 25, 2017, and May 21, 2022. *See Knebel et al. v. NuWest*
5 *Group Holdings, LLC*, Case No. BCV-22-101158, Superior Court of California, County of
6 Kern. NuWest argues that, in response to *Knebel*, in March 2022 it altered its stipend policy to
7 “untether[] the weekly expense stipends paid to traveling nurses... from hours worked [and to]
8 calculate[] based on the stipend amount established by the U.S. General Services
9 Administration (GSA)—*i.e.*, the *per diem* reimbursement rate used to pay federal employees
10 for a given locale.” Dkt. #43 at 4 (emphasis in original). NuWest also maintains that “putative
11 plaintiffs who have already dismissed this claim [under *Knebel*] are not similarly situated with
12 Plaintiffs and should be excluded from any notice provided by this court with respect to time
13 spent working in California facilities from March 25, 2017 to May 21, 2022.” *Id.* at 7.

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16 The Court finds that Plaintiffs have adequately pled and offered evidence that NuWest’s
17 2022 change in the stipend policy did not result in a complete abandonment of stipends-as-
18 compensation. *See* Dkt. #45 at 7–8. Rather, it could plausibly be argued that NuWest’s actions
19 on the ground (rather than its policy) reflected that the stipends did not have an apparent nexus
20 to expenses incurred, instead reflected attempts to adjust pay due to changes in the market for
21 healthcare workers, and that NuWest’s stipend behavior was not so materially different than
22 before the policy change. This is sufficient for conditional collective certification.
23 Furthermore, Plaintiffs have adequately explained in their Reply brief how participants in the
24 *Knebel* case may still have claims against NuWest for work performed outside of California or
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1 for work performed after the settlement. *See* Dkt. #45 at 10–11. The Court declines to limit
2 conditional certification based on this issue.

3 As noted above, NuWest takes issue with Plaintiffs’ proposed notice plan and language.
4 Courts “must take care to avoid even the appearance of judicial endorsement of the merits of
5 the action” and notice must be neutral, accurate, and informative. *Hoffman-LaRoche, Inc. v.*
6 *Sperling*, 493 U.S. 165, 169, 174 (1989). The purpose of the notice is for putative plaintiffs to
7 “make informed decisions about whether to participate” in the lawsuit. *Id.*, at 170-172. The
8 utility of a collective FLSA action “depend[s] on employees receiving accurate and timely
9 notice concerning the pendency of the collective action.” *Id.*, at 170.
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11 The Court will attempt to address NuWest’s points as briefly as possible. The Court
12 agrees with NuWest that notice by text message would be incomplete, duplicative of notice by
13 email and mail, and an unnecessary invasion of privacy. *See Chetwood v. T-Mobile USA, Inc.*,
14 19-CV-458-RSL, 2020 WL 1689730, at *5 (W.D. Wash. Apr. 7, 2020). Plaintiffs are to revise
15 their notice plan to remove notice by text message. The Court finds that multiple reminder
16 notices and the 90-day opt-in period are necessary here given the traveling, on-the-road nature
17 of Plaintiffs. The notice should not be sent to traveling nurses who worked “from three years
18 prior to the filing of the initial Complaint to the present.” The Court agrees with NuWest that
19 the starting point should be calculated from the date of conditional certification. The Court also
20 agrees with NuWest that the notice should expressly provide that any putative plaintiff is free
21 to select his or her own counsel, or to proceed pro se. *See* Dkt. #43 at 18. This must be
22 changed before notice goes out. NuWest contends the notice should inform plaintiffs of
23 discovery obligations. *Id.* at 18–19 (citing cases). Plaintiffs reply by citing a case indicating
24 that such may have “a chilling effect” on participation. Dkt. #45 at 15 (citing *Randall v.*
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1 *Integrated Communication Service, Inc.*, 2021 WL 2328373, *4 (W.D.Wash. June 8, 2021)).
2 In *Randall*, the Court indeed questioned the need to inform putative class members of the
3 potential obligation to “provide documents, travel to the Western District of Washington to be
4 deposed or testify at trial, and pay attorneys’ fees and costs if they do not prevail.” However,
5 unlike in this case, the plaintiffs’ proposed notice in *Randall* had at least some “proposed
6 language regarding discovery obligations” deemed sufficient by the Court. Here, the notice
7 fails to mention discovery. The notice must be revised to indicate that by joining the lawsuit
8 plaintiffs may be “asked to give testimony and information about your work for defendant.”
9 The Court accepts Plaintiffs’ compromise solution to providing notice of tax consequences.
10 The Court agrees with Plaintiffs that the notice does not improperly encourage joinder or
11 suggest judicial endorsement. *See* Dkt. #45 at 15. NuWest’s concern that its position should
12 be more adequately represented is beyond the bounds of what is required for this type of notice,
13 and NuWest’s out-of-district citations fail to convince the Court otherwise.
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16 Turning to requested contact information, the Court agrees with NuWest that Plaintiffs
17 do not need phone numbers to send notice. Dates of employment seem relevant, and in any
18 event the Court will not hold up entry of this order based on a lack of protective order (now
19 entered) or a squabble over apparently relevant information obtainable in discovery.
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21 Finally, NuWest opposes Plaintiffs’ request to equitably toll the statute of limitations
22 from the noting date of the instant Motion until the day NuWest provides Plaintiffs’ counsel
23 with a list of putative collective members’ contact information. Dkt. #42 at 27–28 (citing
24 *Carlson*, 2021 WL 3616786 at *6). The Court in *Carlson* stated, “[e]quitable tolling is
25 appropriate to promote the interests of justice where the plaintiff is prevented from asserting a
26 claim due to a defendant’s wrongful conduct or when extraordinary circumstances beyond the
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1 plaintiff's control caused an innocent delay." 2021 WL 3616786 at *6 (citing *Stoll v. Runyon*,
2 165 F.3d 1238, 1242 (9th Cir.1999)). The Court finds that Plaintiffs have failed to demonstrate
3 wrongful conduct or extraordinary circumstances such as to justify this requested relief.

4 The Court finds that Plaintiffs have adequately pled that they are similarly situated to
5 the potential collective under the above law. Given all of the above, and after reviewing the
6 briefing and the remainder of the record, the Court ORDERS:
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- 8 1) Plaintiffs' Motion for Conditional Collective Certification, Dkt. #42, is GRANTED
9 IN PART as stated above.
- 10 2) The FLSA collective defined above is conditionally certified.
- 11 3) NuWest is to produce to Plaintiffs' counsel the following information within 14
12 days of this Order: An Excel document containing the name, employee
13 identification number, the date(s) and location(s) of employment, email address, and
14 last known mailing address for each putative member of the collective.
- 15 4) Plaintiffs' proposed Notice, Consent to Join, and notice plan are approved with the
16 above revisions. Plaintiffs are to make the above changes and send a revised notice
17 and plan to Defendant as soon as possible. Defendant is to make every effort to
18 resolve any remaining issues without Court involvement. Putative collective
19 members shall have 90 days from the mailing of the Notice to return their executed
20 Consent to Join.
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23 DATED this 22nd day of May, 2023.
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26 RICARDO S. MARTINEZ
27 UNITED STATES DISTRICT JUDGE
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