THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

LAURA BYRNE, on behalf of herself, individually, and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**Case No. 17-cv-18**
v.	)	**Honorable Young B. Kim**
CENTEGRA HEALTH SYSTEM,	)	
Defendant.	)	

PLAINTIFF'S MOTION AND MEMORANDUM IN SUPPORT OF CONDITIONAL CERTIFICATION AS COLLECTIVE ACTION AND ISSUANCE OF NOTICE UNDER 29 U.S.C. § 216(b)

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INTRODUCTION

Named Plaintiff Laura Byrne, along with Opt-in Plaintiffs Cheryl Stoneburner, Mary Neubauer, and Natalie Guilbeau (collectively, "Plaintiffs") are home health care clinicians whom Defendant Centegra Health System ("Defendant" or "Centegra") classified as exempt from overtime pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and who were not compensated at a rate of time and one-half for time worked in excess of 40 hours per workweek. An employer may classify an employee as exempt from overtime under the FLSA only if the employer affirmatively establishes both that the employee performs duties that fall within one of the exempt duty categories and that the employee was compensated on either a salary or fee basis. *See Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 990 F.2d 279, 283 (7th Cir. 1993); 29 C.F.R. §§ 541.200, 541.300, 541.605(a).

Plaintiffs allege that because they were not paid on a valid salary or fee basis, they and other similarly situated employees were misclassified by Defendant as exempt and denied proper overtime pay in violation of the FLSA.[1] Instead, Centegra paid Plaintiffs on a combined hourly basis for some work and "per visit" basis for other work. Accordingly, Plaintiffs' pay was based, in part, on the number of hours worked rather than the accomplishment of a given single task as required by the FLSA's fee basis regulation. 29 C.F.R. § 541.605; *see also, e.g.*, *Elwell v. Univ. Hospitals Home Care Servs.*, 276 F.3d 832, 839 (6th Cir. 2002) (holding a "hybrid" compensation plan that pays on a fee basis for most required job duties and an hourly basis for other duties does not qualify as a valid fee basis arrangement). Plaintiffs' claims here are very similar to those made by a class of home health care clinicians against a different employer in which this Court granted both final FLSA collective certification and Rule 23 class certification

[1] Plaintiffs further allege that they and a class of others similarly situated were misclassified and denied proper overtime payments in violation of the Illinois Minimum Wage Law ("IMWL"), 820 ILCS § 105/1, *et seq.* Plaintiffs' state law claims are not at issue in this Motion.

on their IMWL claims. *Lukas v. Advocate Health Care Network and Subsidiaries*, No. 1:14-CV-2740, 2015 WL 5006019 (N.D. Ill. Aug. 19, 2015) ("*Lukas*"). They are also similar to *Hauser v. Alexian Brothers Medical Center, et al.*, Case No. 15 Civ. 6462 (N.D. Ill.), where the Court granted plaintiffs' motion for conditional certification under indistinguishable facts Ex. A, Minute Order and Court Tr. (Jan. 6, 2016).

Pursuant to 29 U.S.C. § 216(b), Plaintiffs move this Court to conditionally certify a collective action and to issue notice to all similarly situated employees of the pending FLSA claims so that those affected current and former employees will have the opportunity to join the collective action and exercise their rights under the FLSA.[2]

Conditional certification and court-facilitated notice are warranted because Plaintiffs and other home health workers employed by Defendant as registered nurses, physical therapists, occupational therapists, and speech therapists (hereinafter "Clinicians") are "similarly situated" with respect to their misclassification claim and meet the lenient standard applied at this stage of the litigation. The core issue in this collective action is whether Defendant's compensation practice of paying Clinicians based on a combination "per visit" and hourly basis is consistent with treating them as exempt from the FLSA's requirement to pay hours worked over 40 in a week at a rate of time and one half. *See Lukas*, 2015 WL 5006019 at *4-6. Because the Plaintiffs and proposed class members are compensated pursuant to the same challenged compensation practice, they are similarly situated with respect to Plaintiffs' overtime claim and conditional certification should be granted. Further, expeditious court-facilitated notice is critical because the

[2] As Plaintiffs have also filed this lawsuit as a class action under Rule 23 of the Federal Rules of Civil Procedure with respect to their IMWL claims, Plaintiffs will bring a motion for Rule 23 class certification at a later time. It is well established in the Seventh Circuit that courts will certify combined actions, such as this one, that include both an opt-in FLSA collective claim and an opt-out state wage law Rule 23 class action. *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 974 (7th Cir. 2011) (finding "there is no insurmountable tension between the FLSA and Rule 23(b)(3)"); *see also Lukas*, 2015 WL 5006019 at *8.

claims of potential opt-in plaintiffs who are not yet aware of their opportunity to participate in this case are diminished with every passing day because of the running of the statute of limitations.

I. FACTS

Defendant Centegra Health System ("Centegra"), provides home health care services to patients in McHenry County and operates out of an office located at 385 Millennium Drive, Crystal Lake, Illinois. Ex. B, Home Health Care Services for McHenry County, *available at https://centegra.org/service/other-services/home-health/* (last accessed Apr. 11, 2017); Ex. C, Declaration of Laura Byrne ("Byrne Decl.") ¶ 3. Defendant is an "employer" as defined by 29 U.S.C. § 203(d). *See* ECF No. 1 ("Compl.") ¶¶ 16-17; ECF No. 25 ("Ans.") ¶¶ 16-17.

Plaintiffs, and others similarly situated, are or were employed by Defendant as registered nurses, physical therapists, occupational therapists, and speech therapists. Named Plaintiff Laura Byrne ("Laura") is a Registered Professional Nurses ("RN") who was employed by Centegra as a home health RN since approximately April 2014. Byrne Decl. ¶ 2; *see also* Ex. D, Declaration of Cheryl Stoneburner ("Stoneburner Decl.") at ¶ 2 (opt-in Plaintiff employed by Centegra as a home health RN since July 1994); Ex. E, Declaration of Mary Neubauer ("Neubauer" Decl.) ¶ 2 (opt-in Plaintiff employed by Centegra as a home health RN since January 2004); Ex. F, Declaration of Natalie Guilbeau ("Guilbeau Decl.") ¶ 2 (opt-in Plaintiff employed by Centegra as a home health RN since December 2001). The primary duties of Clinicians include providing care to patients in their homes; traveling from one patient's home to the next; documenting and charting observations of patients' health, treatment, medication, education, and status; communicating with patients, physicians and other medical care providers regarding scheduling, physician orders, and patient care; and attending regular meetings and training. *See* Compl. ¶ 18;

Ans. ¶ 18; Byrne Decl. ¶¶ 4, 6-7; Stoneburner Decl. ¶¶ 4, 6-7; Neubauer Decl. ¶¶ 4, 6-7; Guilbeau Decl. ¶¶ 4, 6-7.

Centegra does not pay Clinicians an overtime rate for hours worked in excess of 40 in any given workweek. *See* Compl. ¶¶ 9, 21; Byrne Decl. ¶ 5; Stoneburner Decl. ¶ 5; Neubauer Decl. ¶ 5; Guilbeau Decl. ¶ 5. But Centegra's pay scheme does not comport with either the salary basis or fee basis requirements under the FLSA to properly exempt them from overtime. *See* 29 C.F.R. §§ 541.300, 541.605; *also Lukas*, 2015 WL 5006019 at *4-6. Rather than paying Clinicians a salary or on a "fee basis," as defined in 29 C.F.R. § 541.605, Centegra's uniform compensation policy was to pay Clinicians based on a combined hourly basis for some work and "per visit" basis for other work, reflecting rates that correspond with the estimated amount of time home visits were expected to take. *See* Compl. ¶¶ 3-6, 18-20; Byrne Decl. ¶¶ 9-11; Stoneburner Decl. ¶¶ 9-11; Neubauer Decl. ¶¶ 9-11; Guilbeau Decl. ¶¶ 9-11. At any given time, Centegra employed at least 30 Clinicians that it compensated under the pay per visit method. *See* Byrne Decl. ¶ 12; Stoneburner Decl. ¶ 12; Neubauer Decl. ¶ 12; Guilbeau Decl. ¶ 12.

The pay per visit compensation method operated as follows: Centegra paid Clinicians on a "per visit" basis for time spent visiting patients whereby each Clinician was paid a predetermined visit rate for each visit completed of a certain type. Compl. ¶¶ 3-4; Ans. ¶ 3; Byrne Decl. ¶ 9; Stoneburner Decl. ¶ 9; Neubauer Decl. ¶ 9; Guilbeau Decl. ¶ 9. For instance, all of a Clinician's routine and discharge visits were paid at the routine rate, all start of care visits were paid at the start of care rate, and so on. *Id.* These visit rates correlated to the average time duration for each visit type, and Plaintiffs assert that the "per visit" rates were set based on time estimates for each visit type. *Id.*

In addition to the visit rates, Centegra paid Clinicians a separate hourly rate for certain work, including time spent attending regular staff meetings, case conferences, continuing education training, in-services, and occasional work in the office. *See* Compl. ¶¶ 5, 19; Byrne Decl. ¶ 10; Stoneburner Decl. ¶ 10; Neubauer Decl. ¶ 10; Guilbeau Decl. ¶ 10.

Centegra, moreover, did not accurately count all of the time Clinicians spent on visit-related activities, and there were many activities related to patient care for which Centegra did not provide compensation beyond the visit rates. Centegra failed to provide additional compensation for time spent completing patient documentation ("charting"), preparation time for visits, travel time between patients' homes, time spent coordinating care with the scheduler, managers, patients, physicians, pharmacists and other medical care providers by email, fax, phone, voicemail, and text messaging, time spent completing required reports, and, for registered nurses, time spent dropping off lab specimens and following up on lab work. *See* Compl. ¶¶ 6, 20; Byrne Decl. ¶ 11; Stoneburner Decl. ¶ 11; Neubauer Decl. ¶ 11; Guilbeau Decl. ¶ 11. Centegra failed in its exclusive duty to make or maintain accurate records of all the time worked by Clinicians. *See* Compl. ¶ 25; Ans. ¶ 25; Byrne Decl. ¶ 13; Stoneburner Decl. ¶ 13; Neubauer Decl. ¶ 13; Guilbeau Decl. ¶ 13; *see also* 29 U.S.C. § 211(c); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (employer has statutory duty to keep proper records), *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

Centegra misclassified Clinicians as exempt from overtime under the FLSA and failed to pay them for any of their overtime hours worked at a rate of time and one half for time worked over 40 hours per week. *See* Compl. ¶¶ 7-9, 21-24; Ans. ¶¶ 21, 22, 24; Byrne Decl. ¶ 5; Stoneburner Decl. ¶ 5; Neubauer Decl. ¶ 5; Guilbeau Decl. ¶ 5. Plaintiffs and other Clinicians are similarly situated in that they had the same job requirements and pay provisions and were subject

to Centegra's common practice of failing to pay time and one half for hours worked in excess of 40 hours per week in violation of the FLSA. *See* Compl. ¶¶ 3-9, 18-26; Byrne Decl. ¶¶ 6-12; Stoneburner Decl. ¶¶ 6-12; Neubauer Decl. ¶¶ 6-12; Guilbeau Decl. ¶¶ 6-12.

II. ARGUMENT

This Court should direct that notice be sent to all persons who have been employed by Defendant as Clinicians within the past three years who have not yet joined this action.[3] All such persons are similarly situated with respect to the FLSA claims in this action because they were subjected to a common policy to deprive them of overtime pay when they worked more than 40 hours per week. Indeed, this Court – in a similar overtime class action filed on behalf of a similar class of clinicians – granted conditional FLSA certification, Rule 23 class certification, and final FLSA certification. *See Lukas v. Advocate Health Care Network and Subsidiaries*, No. 14 cv 2740 (RAG), 2014 WL 4783028, at *3 (N.D. Ill. Sept. 24, 2014) (granting conditional FLSA certification); *Lukas*, 2015 WL 5006019 at *1 (granting Rule 23 class certification and final FLSA certification). Specifically here, as in *Lukas*, all Clinicians were classified as exempt but compensated pursuant to a pay practice that did not comport with either the salary basis or fee basis requirements for exemption from overtime. *Lukas*, 2015 WL 5006019 at *4 ("The practice or course of conduct Plaintiffs complain of is Advocate's policy of classifying Clinicians as exempt yet paying them with a combination of fee-based and hourly rates. ... [T]his pay scheme applies to all Clinicians."); *see also* Ex. A, *Hauser* Minute Order and Court Tr. (Jan. 6, 2016).

[3] The statute of limitations under the FLSA is three years where, as here, Plaintiffs allege a willful violation. 29 U.S.C. § 255(a); *see, e.g., Nehmelman v. Penn Nat. Gaming, Inc.*, 822 F. Supp. 2d 745, 764 (N.D. Ill. 2011) (authorizing notice to a conditional FLSA class of employees who worked within three years prior to the date of class notice).

A. Allowing Plaintiffs to Pursue Their Claims Collectively by Facilitating Notice to Potential Class Members Furthers the Remedial Purpose of the FLSA

Under the FLSA, an employee may pursue a collective action on behalf of herself and "other employees similarly situated." 29 U.S.C. § 216(b); *e.g.*, *Girolamo v. Cmty. Physical Therapy & Assocs.*, No. 15 C 2361, 2016 WL 3693426, at *2 (N.D. Ill. July 12, 2016); *Terry v. TMX Furniture*, No. 13 C 6156, 2014 WL 2066713, at *2 (N.D. Ill. May 19, 2014). To pursue claims as part of a collective action, employees must give consent to join the action filed on their behalf. 29 U.S.C. § 216(b); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 441 (N.D. Ill. 1982). Therefore, "[a] collective action under § 216(b) differs from a class action under Federal Rule of Civil Procedure 23 in that Rule 23 binds class members unless they opt out, whereas collective action members are bound under § 216(b) only if they opt in to the action by providing their written consent." *Girolamo*, 2016 WL 3693426 at *2 (citing *Ervin*, 632 F.3d at 976). Until an employee opts-in, the statute of limitations on their claims continues to run. *See Harkins v. Riverboat Services, Inc.*, No. 99 C 123, 2002 WL 32406581, at *2 (N.D. Ill. May 17, 2002). Additionally, as discussed in detail below in Part C, courts apply a "less stringent" standard for conditional certification pursuant to 29 U.S.C. § 216(b) than the much higher threshold plaintiffs are held to in demonstrating commonality and predominance in certification of a class action under Rule 23. *E.g.*, *Vaughan v. Mortgage Source*, No. CV 08-4737(LDW)(AKT), 2010 WL 1528521, at *4 (E.D.N.Y. Apr. 14, 2010) (citation omitted); *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008).

The collective action mechanism furthers the remedial purposes of the FLSA and supports judicial economy. The Supreme Court has emphasized that by "expressly authoriz[ing] employees to bring collective ... actions ... Congress has stated its policy that [Section 216(b)] plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche Inc. v.*

Sperling, 493 U.S. 165, 170 (1989).[4] Collective actions further the remedial purpose of the FLSA by allowing individual employees to pool their resources to enforce their rights. *Id.* At the same time, collective actions serve the interest of the courts and of all parties by providing an efficient means to resolve all common issues resulting from an unlawful policy or practice in a single proceeding. *Id.*

However, these benefits cannot be realized if the employees who suffered from the unlawful activity do not receive timely notice of the collective action and of their opportunity to opt-in. *Id.* Accordingly, courts have the power to facilitate the issuance of notice of an action to potential class members. *Id.* at 170-71; *Woods v. New York Life Ins. Corp.*, 686 F.2d 578, 580 (7th Cir. 1982) (district courts have the power to authorize notice of the action to similarly situated employees); *also Girolamo*, 2016 WL 3693426 at *2 (district courts have discretion in managing collective actions because the FLSA does not detail specific procedures for certifying a conditional class or authorizing collective action notices). The statute of limitations for an FLSA claim is two years after the cause of action has accrued, unless a willful violation is alleged, in which case the plaintiff has three years to bring a lawsuit. 29 U.S.C. § 255(a). Thus, speed is of the essence in issuing notice because the statute of limitations continues to run under the FLSA until aggrieved employees affirmatively opt-in to the action. *See* 29 U.S.C. § 216(b); *Harkins*, 2002 WL 32406581 at *2; *Larsen v. Clearchoice Mobility*, No. 11 C 1701, 2011 WL 3047484, at *2 (N.D. Ill. July 25, 2011). In the absence of timely notice, aggrieved employees could be deprived of the opportunity to participate until after their claims are diminished or extinguished by the passage of time. Because "delaying the notification procedure ... could have the undesirable effect of preventing potential opt-in plaintiffs from presenting their FLSA

[4] The plaintiff in *Hoffman-La Roche* brought an age discrimination case under the Age Discrimination in Employment Act that incorporates the enforcement and certification provisions of the FLSA. *Hoffman-La Roche*, 493 U.S. at 167.

claims" *Larsen*, 2011 WL 3047484 at *2, the FLSA's broad remedial intent favors early notice to potential plaintiffs.

In this case, Plaintiffs allege that until changing its pay plan in October 2016, Centegra willfully engaged in a practice of misclassifying Clinicians as exempt from the FLSA's overtime requirements and failing to pay them at a rate of time and one half for all hours worked over 40 in any given workweek. If the Clinicians are able to prove these allegations, the FLSA allows them to recover back wages. However, the statute of limitations is running on the claims of absent members of the collective action. Therefore, the timing of the notice given to putative class members is of great significance.

B. The First Step in Conditional Certification Requires Only a Showing that Potential Opt-in Plaintiffs May Be "Similarly Situated"

In certifying collective actions, "the majority of courts—including this Court—have adopted a two-step process for determining whether an FLSA lawsuit should proceed as a collective action." *Girolamo*, 2016 WL 3693426 at *2 (internal quotation omitted); *see also Terry*, 2014 WL 2066713 at *2; *Byrne v. Club Assist Road Service U.S., Inc.*, No. 12 CV 5710, 2013 WL 5304100, at *12 (N.D. Ill. Sept. 19, 2013). During the first stage (the notice stage), the court determines whether the allegations are sufficient for the court to find that the representative plaintiff and putative class members are "similarly situated." *Girolamo*, 2016 WL 3693526 at *2. At this initial stage of the litigation, Plaintiffs need only make "a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1045 (N.D. Ill. 2003) (citation omitted). "Courts interpret the 'similarly situated' requirement 'leniently.'" *Sylvester v. Wintrust Financial Corp.*, No. 12 C 01899, 2013 WL 5433593, at *3 (N.D. Ill. Sept. 30, 2013) (citations omitted); *Howard v. Securitas Sec. Servs. USA, Inc.*, No. 08

C 2746, 2009 WL 140126, at *5 (N.D. Ill. Jan. 20, 2009) ("[T]he court looks for no more than a 'minimal showing' of similarity.").

In an FLSA misclassification case, plaintiffs meet their low burden of proof by making some showing that there are other employees who are similarly situated with respect to their job requirements and with regard to their pay provisions, on which the criteria for many FLSA exemptions are based, who are classified as exempt pursuant to a common policy or scheme. *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). During the first stage certification analysis, "[t]he Court's determination as to whether a collective action may be appropriate ... does not involve adjudication of the merits of the claims." *Girolamo*, 2016 WL 3693426 at *2. At the second stage, later in the litigation and on a fuller record, the employer can move to decertify the class and the court will determine whether the collective action may go forward by determining whether the plaintiffs who have opted in are in fact sufficiently "similarly situated" to the named plaintiff. *Id*.

C. The Evidentiary Burden for Conditional Certification and Notice Is Modest

The "modest factual showing" required for conditional certification "is not a stringent standard; a plaintiff need only demonstrate a factual nexus that binds potential members of a collective action together." *Girolamo*, 2016 WL 3693426 at *3 (internal quotation omitted). At this initial stage, the court does not decide substantive issues or require conclusive support of plaintiffs' claims. *Molina v. First Line Solutions LLC*, 566 F. Supp. 2d 770, 786 (N.D. Ill. 2007). Plaintiffs can meet this burden by providing "some evidence in the form of affidavits, declarations, deposition testimony, or other documents of a common policy to which they and other similarly situated employees were subjected." *Boltinghouse v. Abbott Labs., Inc.*, No. 15 CV 6223, 2016 WL 3940096, at *2 (N.D. Ill. July 20, 2016) (internal quotation omitted).

In meeting this modest burden, discovery is therefore not required. In fact, courts have explicitly rejected arguments that discovery should take place before the issuance of notice because the broad remedial purpose of the FLSA is best served by issuing notice before discovery. *Larsen*, 2011 WL 3047484 at *2.

Courts in this Circuit need only reach the question of whether opt-in plaintiffs in a conditionally certified class are actually similarly situated at the second stage of the two-step inquiry, which occurs after discovery is complete. *Cf. Strait v. Belcan Eng'g Grp., Inc.*, 911 F. Supp. 2d 709, 718 (N.D. Ill. 2012) (applying the stricter "second stage standards" when the parties had completed fact discovery on the issues relevant to class certification). After discovery, a court may again consider the similarly situated requirement and make a factual determination as to whether plaintiffs have satisfied it, based upon information gained in discovery and knowledge of the exact makeup of the class. *See Cramer v. Bank of America, N.A*, No. 12 C 8681, 2013 WL 6507866, at *2 (N.D. Ill. Dec. 12, 2013). Further, "it is well settled that the existence of certain individual claims or defenses does not preclude the conditional certification." *Sexton v. Franklin First Fin., Ltd.*, No. 08-CV-04950(JFB)(ARL), 2009 WL 1706535, at *8 (E.D.N.Y. June 16, 2009).

As explained above, early notice furthers the broad remedial goals of the FLSA because the statute of limitations is running. If a more substantial evidentiary showing were required, discovery would have to be completed before notice could be issued, and the substantial delay would cause class member claims to become untimely. *See Larsen*, 2011 WL 3047484 at *2. A stricter standard would also be an unnecessary hindrance at this stage because the determination that plaintiffs are similarly situated is preliminary, not final. *Jirak*, 566 F. Supp. 2d at 848.

Therefore, Defendant is in no way prejudiced by the initial determination because Defendant can ask the court to reevaluate certification after the completion of discovery. *Id.* at 847.

D. Plaintiffs Have Easily Satisfied Their Burden to Support Notice to the Class

In determining whether Plaintiffs have made a sufficient showing that they are similarly situated to warrant issuance of notice, the relevant issue is not whether Plaintiffs and potential opt-in plaintiffs are identical in all respects, but rather whether they were subjected to a common policy to deprive them of overtime pay when they worked more than 40 hours per week. *Molina*, 566 F. Supp. 2d at 786. Here, the record demonstrates that Plaintiffs were the victims of a common compensation policy that they allege violates the FLSA. At any given time, at least 30 Clinicians employed by Centegra are classified as exempt and predominantly compensated pursuant to the pay per visit method. *See* Byrne Decl. ¶¶ 9, 12; Stoneburner Decl. ¶¶ 9, 12; Neubauer Decl. ¶¶ 9, 12; Guilbeau Decl. ¶¶ 9, 12. In addition, the Named Plaintiff and three additional Opt-in Plaintiff Declarants ("Declarants") submit declarations in which they attest to receiving compensation according to the company compensation policy described in Plaintiff's Complaint, whereby Clinicians are compensated for patient visits by "per visit" payments and for other work by the hour. Compl. ¶¶ 3-6, 18-19; Byrne Decl. ¶¶ 8-10; Stoneburner Decl. ¶¶ 8-10; Neubauer Decl. ¶¶ 8-10; Guilbeau Decl. ¶¶ 8-10. They also attest to not receiving pay for hours worked over 40 per week at a rate of time and one half, as required under the FLSA. *See* Compl. ¶¶ 8, 21-26; Byrne Decl. ¶ 5; Stoneburner Decl. ¶ 5; Neubauer Decl. ¶ 5; Guilbeau Decl. ¶ 5. Plaintiffs are thus similarly situated in that they all were misclassified as exempt and deprived of the overtime compensation to which they were entitled under the FLSA because they were not properly paid on a salary or fee basis, but instead based on a combined hourly basis for some work and "per visit" basis for other work.

While the merits are not yet at issue, the Sixth Circuit held that a nearly identical clinician pay policy was incompatible with the claimed exemption from overtime. *Elwell*, 276 F.3d at 838-39. In that case, the court found that the practice of paying nurses on a combined per visit and hourly basis does not meet the regulatory definition of a "fee basis" if "it contains any component that ties compensation to the number of hours worked." *Id.* at 838 (concluding that defendant's "compensation plan, which combines fee payments and hourly compensation, does not qualify as a fee basis because it ties compensation, at least in part, to the number of hours or days worked and not on the accomplishment of a given single task") (internal quotation omitted). The compensation practice challenged here thus violates the FLSA, and Plaintiffs are similarly situated with respect to their claim that they were unlawfully denied overtime for that reason. The evidence also demonstrates that the Plaintiffs performed similar job duties. Compl. ¶¶ 1-6, 18-19; Byrne Decl. ¶¶ 2-7; Stoneburner Decl. ¶¶ 2-7; Neubauer Decl. ¶¶ 2-7; Guilbeau Decl. ¶¶ 2-7. They are thus similarly situated with respect to the challenged compensation practice here.

These circumstances were not experienced by the Named Plaintiff and Declarants alone. Numerous other Centegra Clinicians were subject to the same company compensation practices and thus are similarly situated to the Named Plaintiff. *See* Compl. ¶¶ 1-6, 18-19; Byrne Decl. ¶¶ 9-11; Stoneburner Decl. ¶¶ 9-11; Neubauer Decl. ¶¶ 9-11; Guilbeau Decl. ¶¶ 9-11. Similar to the Named Plaintiff and Declarants, these Clinicians were paid on an hourly basis for some work and paid visit fees based on time estimates for other work. *See* Byrne Decl. ¶¶ 8-9; Stoneburner Decl. ¶¶ 8-9; Neubauer Decl. ¶¶ 8-9; Guilbeau Decl. ¶¶ 8-9.

Courts have repeatedly issued FLSA notice in cases where employees seeking compensation for unpaid wages have presented evidence similar to that submitted in this case. *See*, *e.g.*, *Lukas*, 2014 WL 4783028 at *3 (holding that FLSA notice to 234 home health care

clinicians was proper based on the declarations of three employees); *also Boltinghouse*, 2016 WL 3940096 at *2 (holding that similarly formatted declaration statements that offer specific facts of each plaintiff, such as dates of employment, job titles, average number of overtime hours without compensation are sufficient as evidence to support a motion for conditional class certification); *Molina*, 566 F. Supp. 2d at 786 ("Plaintiffs need not provide conclusive support, but they must provide an affidavit, declaration, or other support beyond allegations in order to make a minimal showing of other similarly situated employees subjected to a common policy."). It is enough for plaintiffs to allege in pleadings and declarations that they experienced similar pay policies as members of the potential collective action, even if plaintiffs' jobs differ from those of other employees. *See, e.g.*, *Molina*, 566 F. Supp. 2d at 786.

Here, Plaintiffs have easily satisfied their burden. Plaintiff's Complaint sets forth detailed allegations that she and similarly situated employees, three of whom have already joined, were subject to common compensation practices and were the victims of a common scheme perpetuated by Centegra to classify Clinicians as exempt employees. As the declarations and other evidence reveals, all Clinicians performed the similar job duties; were compensated according to the same combination of visit fees and hourly payments; and were unlawfully classified as exempt from the overtime requirements of the FLSA. In light of the allegations in the Complaint, supported by the declarations of the Named Plaintiff and other similarly situated home health Clinicians, Plaintiffs have presented a clear record that these home health care providers are subject to the same policy of being classified as exempt from the overtime requirements and are therefore being denied compensation for work performed in excess of 40 hours a week. As a result, Plaintiffs have readily satisfied their lenient burden to warrant issuing notice to the Class.

E. This Court Should Direct Centegra to Produce a List of Potential Class Members to Facilitate Notice

As discussed above, all persons employed as Clinicians by Centegra within the three-year limitations period are "similarly situated" employees for purposes of the FLSA. Thus, the identification of all putative collective class members is necessary in order to provide them with adequate notice of this action, as contemplated by law. Accordingly, Plaintiffs request that the Court, in addition to entering an order granting conditional certification and approving the proposed Notice, attached hereto as Exhibit G, order Centegra to produce to Plaintiffs the following within ten days of the Court's Order:

> A list, in electronic and importable format, of all persons who worked as home health Clinicians for Defendant at any time since three (3) years prior to the date of the Court's Order, and who were classified as exempt, were paid on a hybrid "per visit" and hourly basis, and were not paid overtime compensation for time worked in excess of forty (40) hours in given workweeks, including their first and last names, last-known addresses, email addresses, telephone numbers, dates of employment, social security numbers, and dates of birth.

F. Plaintiffs' Proposed Notice Is Fair, Adequate and Consistent With Court-Approved Notices in Other Similar Actions

Collective "opt-in" actions depend on "employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffman-LaRoche*, 493 U.S. at 170. Supervised notice also prevents "misleading communication." *Id.* at 172.

Plaintiffs' proposal for notice to potential opt-in Plaintiffs meets the requirements of "timeliness, accuracy and information." *Id*. The proposed notice informs similarly situated Clinicians of this action and gives them the opportunity to join. It also accurately describes Plaintiffs' legal claims, their rights, and their options. Finally, the notice provides clear instructions

on how to "opt-in" to the lawsuit and sets forth the prohibition against discrimination or retaliation for participation in this FLSA action. *See* Ex. G.

Plaintiffs propose that the Proposed Notice and Opt-in Consent Form be sent via first class U.S. mail and email to all current and former Clinicians employed by Defendant within the past three (3) years. *Cf.*, *Girolamo*, 2016 WL 3693426 at *6 (ordering the production of class member names, mailing addresses, telephone numbers and email addresses). In addition, in order to best facilitate dissemination of the notice of pendency to Defendant's employees, Plaintiffs request an order requiring Defendant to post a copy of the proposed notice at a location in its office where potential opt-in Plaintiffs are likely to see it and learn about their rights related to this lawsuit. *See* Ex. G; *see also* Ex. A, *Hauser* Minute Order and Court Tr. (Jan. 6, 2016) (ordering a copy of notice to be posted at a location in defendants' office where it was likely to be seen by potential opt-in plaintiffs); *Harhash v. Infinity West Shoes, Inc.*, No. 10 Civ. 8285(DAB), 2011 WL 4001072, at *5 (S.D.N.Y. Aug. 25, 2011) (holding that Courts routinely order that Notice be posted in common areas or employee bulletin board, even when notice is also provided via first-class mail).

Plaintiffs request that potential opt-in Plaintiffs interested in participating in this lawsuit be provided with sixty (60) days from the date of mailing to "opt-in" to this case. Plaintiffs' request is consistent with established FLSA practice in this judicial district. *See, e.g.*, *Anyere v. Wells Fargo*, No. 09 C 2769, 2010 WL 1542180, at *4 (N.D. Ill. Apr. 12, 2010) (ordering a 120 day opt-in period). Furthermore, Plaintiffs request approval for the option to send a reminder notice 15 days before the end of the opt-in period to any and all potential opt-in plaintiffs who have not yet replied. *See, e.g.*, *Boltinghouse*, 2016 WL 3940096 at *5 (authorizing use of a

reminder notice). Plaintiffs' proposed notice is fair and accurate and should be approved for immediate distribution.

CONCLUSION

Conditional certification and court-approved notice is routinely granted in cases like this, where individuals allege similar treatment and experiences in their employment. Plaintiffs have shown they are "similarly situated" and notice to the putative class is warranted here. Plaintiffs, therefore, respectfully request that the Court grant this Motion as follows:

(1) Order conditional certification of this action as a representative collective action pursuant to the FLSA, 29 U.S.C. § 216(b), on behalf of all Clinicians who were classified as exempt, were paid on a hybrid "per visit" and hourly basis, were not paid overtime compensation for time worked in excess of forty (40) hours in given workweeks, and who worked for Defendant dating back three (3) years from the date of notice until the present (the "FLSA Class");

(2) Order court-facilitated notice of this collective action to the FLSA Class in the form of Exhibit G;

(3) Order Defendant to produce a computer-readable data file containing the names, addresses, email addresses, telephone numbers, dates of employment, social security numbers, and dates of birth of the FLSA Class;

(4) Order the posting of the Notice at a location in Defendant's office where members of the FLSA Class are likely to view it; and

(5) Authorize Plaintiffs to send a notice, at their expense, by U.S. First Class mail and email to all members of the FLSA Class to inform them of their right to opt-in to this lawsuit and a reminder notice 15 days before the end of the opt-in period.

DATED: April 17, 2017

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, the attorney, hereby certify that on April 17, 2017, I electronically filed the attached with the Clerk of the Court using the ECF system which will send such filing to all attorneys of record.

/s/ James B. Zouras