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How To Ensure Employees Receive Class Action Notices

By **Christine Webber and Brian Corman** (February 4, 2021, 2:08 PM EST)

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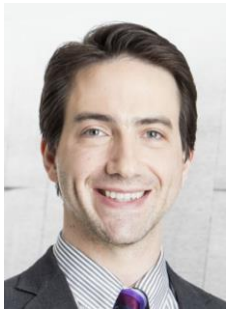

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Whether a Section 216(b) collective action under the Fair Labor Standards Act, or a Rule 23 class action under state wage and hour law, notice to the potential class members will be required at some point for any class case.

This may arise with the initial notice of the opportunity to opt in to an FLSA action or a notice of proposed settlement at the conclusion of a Rule 23 case.

However, class members are not always reliably found by first-class mail, for a number of reasons, and there are numerous alternatives to consider in appropriate circumstances.

For Rule 23(b)(3) classes seeking damages, Rule 23(c)(2)(B) requires:

> The best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

The language of the rule points specifically to the circumstances of the case, indicating that the best notice practicable will be different depending on the facts of the case and the makeup of the parties.

And while compliance with the rule may seem like a procedural formality, it is in fact a critical part of a class action, as judgments and settlements bind the entire class, and therefore class members' constitutional rights can be violated if class notice is ineffective or inappropriate under the circumstances.[1]

Rule 23(c)(2)(B) was amended in 2018 to include notice via electronic means, or other appropriate means, cementing the flexibility already afforded by the courts to authorize notice other than first-class mail under the appropriate circumstances.

As the 2018 advisory committee note points out:

> [W]hen selecting a method or methods of giving notice ... [the court should] ... consider the capacity and limits of current technology, including class members' likely access to such technology.

When attempting to disseminate notice to class members who are difficult to find, such as transient or seasonal employees, notice by electronic means such as text, social media and digital advertising may be

effective, in particular when used alongside regular mail notice.

Reasons for Alternative Notice

There are several common scenarios where mailed notice will not reach a large percentage of the class:

- When there is substantial turnover among employees, so that most class members are former employees, who may not be at the same address as when they worked for the employer. This is particularly common with lower-wage workers who rent rather than own a home.

- When the workforce is inherently transient, such as migrant farmworkers, or where the workers spend months living and working away from the home address where they get mail (such as workers on oil rigs in the Gulf, or working on fracking and living in temporary housing).

- When the employer has not kept records of its employees' addresses — or in some cases, names.

Types of Alternative Notice

Email and Text Notice

If the employer has cellphone numbers or email addresses for employees, those numbers are more likely to be stable, when physical addresses are not.

For example, if class members are likely to be off in the oil fields, they may not get mail forwarded from home very often, but they'll have their cellphones with them.

And even some employers who don't do much to record employee addresses may still record cellphone numbers, because they are useful to the employer.

Thus, when the class is characterized as having a high turnover rate or frequent changes in location, email or text notice may be highly effective.[2]

In addition, notice by email is comparatively cost-efficient, as email is generally free, and most claims administrators and firms have systems in place to send mass emails.

These savings may prove important in class actions involving low monetary payouts, given that expensive notice programs may diminish the available recovery for class members.

However, as the 2018 advisory committee note points out, email notice would not be appropriate if class members don't have access to modern technologies or an understanding to navigate notice sent through email, such as a class of older workers or migrant farmworkers.

Texting is also cost-effective and used by a wider range of individuals than email.

Email as the sole means of notice should be used with caution.

Emails can be blocked by the recipient as spam or returned as undeliverable, or bounced back, for various reasons.

Because of this, it is important to use and monitor read receipts, which send a response message to the sender when an email is opened.

A more appropriate method of disseminating notice than email alone may be to supplement with email when direct mail is returned as undeliverable, or by supplementing with regular mail if an email is bounced back or has no read receipt.[3]

In addition, class counsel should make sure to fashion the subject line of the email so that it stands the best chance of being read and not discarded as potential spam, such as including the name of the employer or type of work involved in the settlement.

Both email and text messages are electronic means of communication under Rule 23(c)(2)(B), but there are important differences with respect to their appropriateness for disseminating class notice.

While both email and cellphone numbers are relatively stable and don't frequently change over time, allow for bounce back messages if they are undeliverable, and are extremely cost-efficient, "many Americans use text messages as their primary contact and access text messages much more than they would email."[4]

In addition, people typically have only one cellphone to receive texts, while they may have multiple email accounts, some of which are provided as a junk accounts to receive unimportant emails.[5]

Indeed, one court addressing a request to send notice to potential class members by text message in addition to email and mail observed that:

> Providing notice via text message in addition to other traditional notice methods will almost always be more appropriate in modern society.[6]

And many workers who come to America for temporary work not only use cellphones but use them as a primary means of communication with their U.S.-based employers.

Text messages, however, will not allow the sender to send all the information that might need to be communicated about the case, settlement and claims process.

It therefore would be useful to include in a text notice plan a dedicated website for the case.

The site would be designed to relay the extensive information about the case or settlement to class members and to answer frequently asked questions class members may have.

This can provide the additional information that a text cannot, and the text can provide a link to the website.[7]

Finally, providing a telephone number for potential class members to ask questions and get assistance submitting a claim form is beneficial.

If such a hotline is made available, text notice should include this number, in particular when class members may have limited access to or familiarity with electronic means of communication.

It is also worth noting that courts have held that sending mass text messages does not violate the Telephone Consumer Protection Act or any Federal Communications Commission regulations if part of a court-approved notice plan, as the court is fulfilling its duty of ensuring class members are provided their due process rights in the most effective manner possible.[8]

Telephone Notice

Telephone numbers, whether cellphone or landline, can be used to provide notice by voice message

instead of, or in addition to, texting.

However, notice by telephone call is less favored.

Courts are most likely to direct production of telephone numbers for the limited purpose of facilitating tracing potential class members whose mailing is returned undeliverable.[9]

Telephone notice has been permitted when no email address is available, or when email and regular mail addresses have proven to be incorrect, provided an approved script is used.[10]

Publication Notice

If the employer did not keep records of employees' addresses and neither plaintiffs nor defendants have the ability to identify individual members of the class through other means, notice through publication may be the only way to let them know about a potential case.[11]

Publication may take various forms, such as print, internet banner or pop-up advertisements, social media, or radio. This is most feasible if the former employees are all in a relatively narrow geographic area, or are likely to read a particular publication or participate in a website that serves a particular industry.

As their names suggest, banner advertisements display notice in a banner at the top of a webpage, while pop-up advertisements appear dynamically on the webpage. Most courts permit these advertisements to be posted on the defendant's own website, which may be useful if current or former employees frequent that website.[12]

Social media platforms offer robust targeting mechanisms allowing plaintiffs to narrowly tailor the reach of class notice. For example, on Facebook, class members can be targeted by age, gender, education, job title, location, or people who have visited a particular website or downloaded a corporate defendant's mobile app.[13]

Courts have also approved parties' use of keyword search results to place advertisements containing notice for anyone who has searched a term or phrase related to the class.[14]

With this type of notice, a search engine like Google will display the advertisement when a person searches for certain keywords or phrases connected to the class, such as the name of a defendant employer or the job or industry involved in the case.

This could prove more effective than trying to determine which newspapers and websites class members may frequent.

Posting in the Workplace

Courts have often approved notice plans that include requiring the employer to post a notice at the worksite, often where employees would clock in.[15]

Workplace posting can be particularly helpful when many class members are current employees, but they are working someplace other than their permanent address that is on file with the employer.

Some courts permit posting of notice in the workplace only after other forms of notice prove inadequate or if the defendant employer does not provide individual contact information for the class member employees.[16] However, many courts permit such posting as a matter of course.[17]

In-Person Delivery

While uncommon, and rarely addressed, courts have permitted notice to be delivered in person.[18] This may be the most effective form of notice for employees like migrant laborers who do not have consistent physical addresses, do not use permanent cellphones, and move around the country to various farms or other temporary workplaces.

For example, a class of farmworkers known to have worked for a specific farm labor contractor may work for that same farm labor contractor at other locations in the United States where they can be found at specific times of year during a growing or harvesting season.

This type of notice, while sometimes appropriate, should be approached with caution, as employers may attempt to obstruct these in-person visits, especially if the labor contractor is a defendant in the case.

Thus, third-party claims administrators or class counsel should be present — along with interpreters, if needed — and the laws against retaliation should be clearly explained.

Conclusion

Courts expect the parties to fashion notice plans that will effectively reach the class, and are tailored to the particular circumstances of each case.

And while using just one form of notice may be sufficient, it is more likely that class members will be found by using various forms of notice that complement each other.

This is particularly true with hard-to-find class members, and attorneys in such cases should become knowledgeable about their class and the methods by which the class members most often communicate.

This information may come from various sources, including class representatives, experts or reviews of relevant case authority regarding a particular industry.

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[1] See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

[2] See, e.g., Landry v. Swire Oilfield Servs., No. 16-621, 2017 WL 1709695, at *39-40 (D.N.M. May 2, 2017) ("[C]ommunication via email and text message will "increase the chance of the class members receiving and reading the notice," especially because class members likely are "dispersed to various wellsites around the country and may be away from their homes and addresses of record for weeks or months at a time."); Bhumithanarn v. 22 Noodle Mkt. Corp., No. 14-cv-2625, 2015 WL 4240985, at *5 (S.D.N.Y. July 13, 2015) ("[G]iven the high turnover characteristic of the restaurant industry, the Court finds that notice via text message is likely to be a viable and efficient means of communicating with many prospective members of this collective action.).

[3] See, e.g., Lynch v. Dining Concept Group, LLC, Inc., No. 2:15-cv-580, 2015 WL 5916212 (D.S.C Oct. 18, 2015) (granting text message notice where mail and email returned undeliverable."); O'Connor v. Uber

Techs., 2019 WL 1437101, *12 (N.D. Cal. 2019) (permitting email notice in the first instance and use of follow-up emails and follow-up notice by regular mail to any class member who did not submit a claim in response to email notice).

[4] Yates v. Checkers Drive-In Restaurants, Inc., No. 17 C 9219, 2020 WL 6447196, at *3 (N.D. Ill. Nov. 3, 2020). See also Lawrence v. A-1 Cleaning & Septic System Sys., LLC, 2020 WL 2042323, at *5 (S.D. Tex. Apr. 28, 2020) ("The reality of modern-day life is that some people never open their first-class mail and others routinely ignore their emails. Most folks, however, check their text messages regularly (or constantly).").

[5] See Thrower v. Universal Pegasus, Int'l Inc., No. 3:19-CV-00068, 2020 WL 5258521, at *12 (S.D. Tex. Sept. 3, 2020) ("[E]mails have the infelicitous tendency of slipping through the cracks, especially when folks have multiple e-mail accounts (e.g., work, personal, school) with which they must stay current.... The same cannot be said about text message; people keep up with them.").

[6] Dickensheets v. Arc Marine, LLC, 440 F.Supp.3d 670, 672 (S.D. Tex. Feb. 19, 2020). See also Irvine v. Destination Wild Dunes Mgmt., Inc., 132 F.Supp.3d 707, 711 (D.S.C. 2015) ("The request that notice be distributed via direct mail, email and text messaging appears eminently reasonable to the Court. This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication. Political candidates now routinely seek out their supporters' cell phone numbers and email addresses because traditional methods of communication via regular mail and land line telephone numbers quickly become obsolete."); Eley v. Stadium Grp., LLC, Civil Action No. 14–cv–1594 (KBJ), 2015 WL 5611331, at *4 (D.D.C. Sept. 22, 2015) (granting request for text message notice because the request was "in line with what has been approved in other FLSA collective actions"); Martin v. Sprint/united Mgmt. Co., No. 15–CV–5237, 2016 WL 30334, at *19 (S.D.N.Y. Jan. 4, 2016) (granting text message notice due to high turnover rate among employees); Regan v. City of Hanahan, 2017 WL 1386334, 2:16-cv-1077, at *3 (D.S.C. Apr. 17, 2017) ("Mail, email and text message notice is reasonable because, in today's mobile society, individuals are likely to retain their mobile numbers and email addresses even when they move."); Lopez v. Paralia Corp., No. 16-CV-6973 (SLT)(PK), 2018 WL 582466, at *3 (E.D.N.Y. Jan. 26, 2018) (finding that "cellphones are often the most consistent way to reach individuals who may have changed jobs or residences" and directing their production to facilitate notice).

[7] See Wallace v. Powell, 301 F.R.D. 144, 159 (M.D. Pa. 2014) (approving notice plan that included the use of "a detailed website" providing information on the class action).

[8] See, e.g., Yates v. Checkers Drive-In Restaurants, Inc., No. 17 C 9219, 2020 WL 6447196, at *5 (N.D. Ill. Nov. 3, 2020).

[9] Deatrick v. Securitas Sec. Servs. USA, Inc., No. 13-CV-05016-JST, 2014 WL 5358723, at *5 (N.D. Cal. Oct. 20, 2014); Clark v. Williamson, No. 1:16CV1413, 2018 WL 1626305, at *6 (M.D.N.C. Mar. 30, 2018).

[10] Ferguson v. Texas Farm Bureau Bus. Corp., No. 6:17-CV-111-RP, 2018 WL 1392704, at *4 (W.D. Tex. Mar. 20, 2018); Parrish v. Premier Directional Drilling, L.P., No. SA-16-CA-00417-DAE, 2016 WL 8673862, at *5 (W.D. Tex. Oct. 14, 2016), report and recommendation adopted, No. 5:16-CV-417-DAE, 2016 WL 8673863 (W.D. Tex. Nov. 7, 2016).

[11] See Brown v. 22nd Dist. Agricultural Ass'n, 2017 WL 2172239, *4 (S.D. Cal. 2017) ("Notice by publication is used when the identity and location of class members cannot be determined through reasonable efforts."). See also Lima v. International Catastrophe Solutions, Inc.,493 F. Supp.2d 793, 800-01(E.D. La. 2007) (approving use of radio announcements, newspaper advertisements, and internet postings to provide notice, in addition to first-class mail).

[12] See Stuart v. State Farm Fire & Cas. Co., 332 F.R.D. 293, 298 (W.D. Ark. 2019) (permitting banner ads on defendant's website).

[13] See,e.g. Find Your Audience, Facebook for Business, https://www.facebook.com/business/ads/ad-targeting.

[14] See, e.g.,In re Philips/Magnavox Television Litig., No. 09-3072, 2012 WL 1677244, at *14 (D.N.J. May 14, 2012) (notice disseminated, in part, through a "search engine marketing campaign that directed potential Class Members to the Settlement Web site").

[15] See, e.g., Irvine v. Destination Wild Dunes Management, Inc., 132 F. Supp. 3d 707 (D.S.C. 2015) (postingatworkplace of right to opt-in as members ofclassin prominent place in immediate vicinity of each work location where putativeclassmembers clock or sign in to work during noticeperiod was reasonable and effective method of FLSA notice); Rivenbark v. JPMorgan Chase & Co., 340 F. Supp. 3d 619 (S.D. Tex. 2018) (notice would be posted at job sites of putative class members since posting notice would not be unduly burdensome for employer and there was no danger of reputational harm or other adverse impact on employer's business, as call centers were not open to the public);Adams v. Inter-Con Sec. Systems, Inc., 242 F.R.D. 530, 541 (N.D. Cal. 2007) (requiring employer to post notices at its many facilities).

[16] See Hu v. Windhaven Ins. Co., No. 8:15-CV-0277-MSS-TGW, 2016 WL 7177618, at *4 (M.D. Fla. Feb. 16, 2016) (summarizing case law).

[17] See Perrin v. Papa John's Int'l, Inc., No. 4:09CV01335 AGF, 2011 WL 4815246, at *1 (E.D. Mo. Oct. 11, 2011) (summarizing case law where posting at workplace permitted without needing to show other forms of notice insufficient or employer provided inadequate contact information).

[18] See Lopez, et al. v. Ham Farms, LLC, et al., 17-CV-00329-D, Doc. No. 122-10 (approved notice includes "in-person outreach" at North Carolina farm labor camps).
