UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 16-4132 DSF (KSx)	Date	10/12/17
Title	Verna Maxwell Clarke, et al. v. AMN Services, LLC		

DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff	Attorneys Present for Defendants
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Plaintiffs' Motion for Class Certification (Dkt. 36)

I. BACKGROUND

Plaintiffs Verna Clarke and Laura Wittmann were employed as non-exempt hourly employees of Defendant AMN Services, LLC (AMN) in California from January to April 2016 and December 2014 to March 2015, respectively. Third Am. Compl. (TAC) ¶¶ 6-7 (Dkt. 34). AMN is a staffing company that employs health care professionals who work on short-term travel assignments, typically lasting four to eight weeks, at various healthcare providers in the United States. Id. ¶ 12. The terms of employment are governed by a Professional Services Agreement (PSA), which provides for per diem payments for meals, incidentals, and lodging. Id. ¶¶ 13-14. The PSA allows for adjustments to per diem amounts. Id. ¶ 15. During the relevant time period, AMN had two adjustment policies: the Missed Shift Adjustment policy (MSA), which was in effect until 2014, and the Per Diem Adjustment policy (PDA), which replaced the MSA. Opp., Larson Decl. ¶ 5.

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Under the MSA, per diems would be reduced by $18.00 per hour if an employee failed to work the minimum required hours for the week. Opp. at 5. Under the PDA, per diem adjustments are proportionate to the number of weekly shifts missed. Id. at 5-6. Wittman worked subject to the MSA, and Clarke worked subject to the PDA. Id. For employees who traveled for work, AMN had a policy of excluding per diem reimbursements from their regular rate for calculating overtime.[1] Mot. at 1. Plaintiffs contend these amounts should have been included because they are adjusted based on hours worked. Id. at 2. Plaintiffs also argue their wage statements were inaccurate because they (1) included overtime hours as regular hours and (2) listed the overtime rate as half the regular rate and the double time rate as the regular rate. Id.

Plaintiffs seek Rule 23 class certification for two classes and conditional certification for a Fair Labor Standards Act (FLSA) collective action. The first proposed Rule 23 class (Overtime Class) includes: "All non-exempt hourly employees employed by AMN in California from September 11, 2013 through the date of class certification who worked pursuant to a Professional Services Agreement that provided for per diem adjustments based on the number of hours and/or shifts missed and had the value of per diem benefits excluded from their regular rate for purposes of calculating overtime." Id. at 9. The second proposed Rule 23 class (Wage Statement Class) includes: "All non-exempt hourly employees employed by AMN in California who worked pursuant to a Professional Services Agreement and worked overtime during one or more pay periods from May 7, 2015 through the date of class certification." Id. at 9-10.

The proposed FLSA collective action includes: "All non-exempt hourly employees employed by AMN in California at any time since September 13, 2013 or outside California at any time since December 15, 2013 whose employment was governed by a Professional Services Agreement that provided for per diem adjustments based on the number of hours and/or shifts missed and had the value of per diem benefits excluded from their regular rate for purposes of calculating overtime." Id. On behalf of the Overtime Class, Plaintiffs bring claims for unpaid overtime under California Labor Code sections 510 and 1194 (Overtime Claim), unlawful business practices under California Business and Professional Code section 17200, and waiting time penalties under California Labor Code section 203 (Waiting Time Claim). Id. at 9. On behalf of the Wage Statement Class, Plaintiffs bring a claim for failure to provide accurate wage

[1] AMN's Rule 30(b)(6) witness testified per diem compensation is included in the regular rate for employees who do not travel for work. Mot., Ex.4 (Larson Dep.) at 7:3-6.

statements under California Labor Code section 226 (Wage Statement Claim). Id. at 9-10.

II. DISCUSSION

A. RULE 23 CLASS CERTIFICATION

A party seeking class certification must satisfy Rule 23(a)'s four requirements: numerosity, commonality, typicality, and adequacy of representation. See Wang v. Chinese Daily News, Inc., 737 F.3d 538, 542 (9th Cir. 2013). "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." Wang, 737 F.3d at 542-43. This analysis may "overlap with the merits of the plaintiff's underlying claim." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011). But the merits can be considered only to the extent they are "relevant to determining whether the Rule 23 prerequisites to class certification are satisfied." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013).

Even if Rule 23(a) is satisfied, certification is not appropriate unless the plaintiff can establish that the proposed class falls within one of Rule 23(b)'s provisions. Plaintiffs argue that the proposed classes fall within Rule 23(b)(3). Under Rule 23(b)(3), class certification is appropriate where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Defendant argues that Plaintiffs have not established adequacy of representation under Rule 23(a)(4), and that Rule 23(b)(3)'s predominance requirement is not met. Therefore, the Court addresses only those issues.

1. Adequacy of Representation

"The named Plaintiffs must fairly and adequately protect the interests of the class." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir. 2011); F.R.Civ.P. 23(g)(4). To determine whether this requirement has been met, "courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Id. Plaintiffs' counsel has submitted evidence of his qualifications to represent both classes. Mot., Ex. 1 (Hayes Decl.) ¶¶17-20. AMN does not dispute these qualifications. Instead, AMN contends that (1) Wittman is not an adequate representative because she suffered no injury and (2) named Plaintiffs and

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Plaintiffs' counsel are not adequate representatives because they have conflicts of interest with other class members. Opp. at 1-2.

AMN points out that Wittman was never subject to an adjustment under the MSA because she never missed a shift. Id. at 11-12. But even if Wittman's per diems were never actually adjusted, the entirety of the amounts should have been included in the regular rate under Plaintiffs' theory. AMN does not dispute that Wittman worked overtime and thus received less pay than under Plaintiffs' theory. Nor does it dispute that Wittman was subject to the same uniform per diem policies as other Class members.

As to the conflict of interest with counsel, AMN asserts that only Plaintiffs' counsel will benefit financially from this litigation. Id. at 11. If the suit succeeds, AMN argues that the tax treatment of per diem compensation would change. Id. at 7-8. As a result, the vast majority of class members, including named Plaintiffs, would lose money. Id. at 7. AMN contends that under the existing policy, per diems are not subject to taxation because they are part of an "accountable plan." Id. at 7-8. "A plan is 'accountable' when (1) it covers only expenses with a business connection; (2) all expenses are substantiated to the employer; and (3) the employee is required to return to the employer any amount paid in excess of substantiated expenses." Trucks, Inc. v. U.S., 234 F.3d 1340, 1342-43 (11th Cir. 2000) (citations and internal citations omitted). Without citing any legal authority, AMN initially argued that if per diem expenses were considered compensation for hours worked as Plaintiffs allege, then those payments would be treated as paid under a nonaccountable plan and would be taxable. Opp. at 8. But - as Plaintiffs indicate - courts have recognized the tests for whether per diems should be included in an employee's regular rate under FLSA and whether per diems should be taxable are not coextensive. See, e.g., Baouch v. Werner Enters., 2017 U.S. Dist. LEXIS 42321, at *51 (D. Neb. 2017); Houston Police Officers' Union v. City of Houston Police Dep't, 2001 U.S. Dist. LEXIS 26260, at *17 (S.D. Tex. 2001), affirmed, 330 F.3d 298 (5th Cir. 2003); Madison v Resources for Human Dev., Inc., 39 F. Supp. 2d 542, 551 (E.D. Pa. 1999), vacated and remanded on other grounds, 233 F.3d 175 (3rd Cir. 2000).

The Court requested supplemental briefing on this issue because of the uncertain tax implications. Based on this additional evidence and argument, the Court is not convinced that any conflict exists.

Plaintiffs' expert opines that regardless of any determination made under the FLSA, Plaintiffs and the class are already at risk of owing taxes because the business connection requirement is not satisfied. See Brager Decl., ¶¶ 21-24. AMN's expert

offered no apparent response; instead, AMN encourages the Court to ignore this argument as irrelevant. See AMN Supp. at 7 n.3. AMN's position makes it relevant. AMN argued certification must be denied because a favorable ruling for Plaintiffs would be the but-for cause of class members incurring tax liabilities greater than any overtime recovered. Plaintiffs responded with an expert opinion indicating the class may owe taxes regardless of the outcome of this case. AMN's failure to respond, in turn, is telling.[2]

Plaintiffs' expert also contends the outcome of this lawsuit will not dictate the tax treatment of per diems; instead, the IRS looks to separate rules and criteria to make such determinations. See Brager Decl., ¶¶ 11-14. The deposition testimony of AMN's expert is in accord. See Supp. Hayes Decl., Ex. 14 (Shimkus Depo. at 13:16-14:17, 27:23-28:16, 29:2-19); see also AMN Supp. at 5 ("AMN agrees that one finding does not technically determine the other."). The Court is not inclined to give much - if any - consideration to AMN's expert's supplemental declaration, which appears to contradict his deposition testimony.[3] But even if this evidence is considered, the result is the same. At most, AMN's expert posits that the outcome here may encourage the IRS to take a certain position. See Supp. Shimkus Decl. at ¶ 19 ("Ultimately, it is the IRS that

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[2] At his deposition, AMN's expert agreed that at least one ruling found that per diems were paid outside an accountable plan when provided whether the employee was traveling or not, and treated as wages if working a local assignment, but as nontaxable reimbursement if working a traveling assignment. See Supp. Hayes Decl., Ex. 14 (Shimkus Depo. at 24:6-24); see also Opp. at 5 n.4 ("Per diem amounts are taxed as wages and included in the regular rate for overtime purposes for clinicians working within 50 miles of their tax homes.").

[3] AMN's expert provided a supplemental declaration stating it was "highly likely" that Plaintiffs' success under the FLSA would lead the IRS to "take the position" that the per diems are subject to withholding and taxes. Supp. Shimkus Decl. at ¶ 19. He went on to state that "[t]his opinion is based on the numerous tax audits I have defended, as well as matters I have reviewed in due diligence of transactions, where the IRS has used court rulings rendered under the FLSA, as well as Department of Labor decisions, and other competent authority to bolster their position that retroactive taxes are owed." Id. This contradicts his deposition testimony. See, e.g., Supp. Hayes Decl., Ex. 14 (Shimkus Depo. at 29:11-19) ("I'm not aware of a direct connection in tax law between the tax law and the FLSA, so I'm not aware of any rulings that would cite the FLSA rules as they are applied to tax law"; also stating he was not aware of any indirect connection between the FLSA and tax laws); see also id. (Shimkus Depo. at 27:23-28:16) (confirming not familiar with any tax statute, regulation, revenue ruling, revenue procedure, tax court holding, or any other tax authority that adopts the FLSA's test for the regular rate for determining whether payment satisfies accountable plan rules).

determines whether a per diem allowance arrangement meets accountable plan rules."). Whether that position is upheld is then another, separate consideration. See Worldwide Labor Support of Mississippi, Inc. v. United States, 312 F.3d 712, 715-16 (5th Cir. 2002) (vacating summary judgment; business connection test depends on reasonableness of employer's expectations, which goes to state of mind and is within purview of jury). For example, Plaintiffs' expert discusses an exception that may impede the IRS from treating the per diems as taxable (and permit Plaintiffs, the class, and AMN to argue that, even if included in the regular rate for purposes of FLSA, the per diems nonetheless satisfy the accountable plan requirements). See Brager Decl., ¶¶ 15-18. At his deposition, AMN's expert conceded he had not taken this exception into consideration and his supplemental declaration does not appear to address this issue. See Supp. Hayes Decl., Ex. 14 (Shimkus Depo. at 37:7-38:10). That AMN has "never taken advantage" of this grandfather provision seems immaterial – as does AMN's representation that it no longer maintains documents from the relevant time period. See Supp. Larson Decl. at ¶ 6; see also 26 C.F.R. § 1.62-2(d)(3)(ii) (indicating exception may apply if computing per diem based on number of hours worked was commonly used in the industry during relevant time); cf. Worldwide Labor Support, 312 F.3d at 716 ("there is no dispute in this case that it was the custom in [the employer's] industry - the skilled temporary labor industry - on December 12, 1989 to use hourly per diem travel reimbursement arrangements"). As the record stands now, there is no evidence whether this exception could apply to AMN's per diems.

To the degree that the concern is that Plaintiffs' suit will awaken the IRS's interest in whether AMN maintains an accountable plan, the Court notes that it is *AMN* that has brought this issue to the forefront, not Plaintiffs. If the problem is that the IRS was ignorant of possible problems with the AMN plan and a prosecution of the case would alert it, the Court fails to understand why this very discussion of the accountable plan problem is not sufficient to do just that. In short, the issue is out there for the IRS to see; whether it takes action would not appear to depend on anything the parties or this Court will do going forward because nothing in this case will change the underlying substance of AMN's per diem payment structure. The way the per diem payments are structured either does or does not meet the business connection requirement. That the same underlying facts may lead to a certain conclusion about overtime treatment does not mean that arguments in favor of that overtime treatment *cause* tax consequences in any meaningful way.

AMN is, at best, left with a general argument that counsel should not make an argument in one situation for the benefit of a client that would possibly imply negative

effects in another context where the net of the two results would be negative for the client. This is theoretically true, as far as it goes, but there must be some judgment exercised regarding how likely the various outcomes are and how closely connected they are in any specific case. If a lawyer is fairly certain that she can obtain a positive result for a client, but there is a small attenuated chance that a similar argument could lead to a larger, bad result for the client in a different area, it is difficult to say in the abstract that the lawyer should not take the former position. Ultimately, it comes down to counsel's professional judgment regarding what is best for the client after considering the likely magnitude of the positives and negatives, the likelihood of each occurring, and the strength of the connection between the two results. The Court sees no reason to believe that proposed class counsel has not considered the matter and believes that the claims in this case have little to no bearing on the tax treatment of the per diems. As discussed above, this is certainly a defensible position and probably the correct one. Therefore, there is no true conflict between counsel and the class – just a difference in opinion between class counsel and AMN regarding the strategic choices being made.[4] The Ninth Circuit "does not favor denial of class certification on the basis of speculative conflicts," Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003), which is, at most, what is present here.

For the reasons above, the Court finds Plaintiffs are adequate representatives and class counsel is adequate.

2. **Predominance**

"The Rule 23(b)(3) predominance inquiry tests whether classes are sufficiently cohesive to warrant adjudication by representation." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998). "This analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3). When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Id.

[4] And, obviously, AMN is not unbiased in its view of the proper course of action here because it benefits from the class claims not being pursued whatever the interests of the potential class members.

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AMN argues that individualized inquiries will be needed because the Court will need to determine whether the per diem amounts reasonably approximate actual expenses. Opp. at 13-17. But Plaintiffs do not question whether the per diems are reasonable estimates of appropriate expenses incurred while traveling; they contend the per diems should be considered compensation for work because they are tied to hours worked. Reply at 7-8. In the former scenario, the amount in excess of a reasonable approximation must be included in the regular rate, see 29 C.F.R. § 778.217(c); in the latter scenario, the entire amounts must be included, see Gagnon v. United Technisource, Inc., 607 F.3d 1036, 1041-42 (5th Cir. 2010). Therefore, these individualized issues raised by AMN are irrelevant under Plaintiffs' theory of liability.

AMN also contends that damages are not amenable to class treatment. Opp. at 17-19. But even if this were true, it would not, by itself, defeat class certification. Leyva v. Medline Industries Inc., 716 F.3d 510, 513 (9th Cir. 2013).

AMN also attacks the Overtime Class as overbroad. Opp. at 19. The Ninth Circuit has addressed the issue of whether a class is overbroad as part of the Rule 23(b)(3) predominance analysis. See Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136-39 (9th Cir. 2016). AMN contends the class fails to distinguish between members subject to the MSA versus the PDA. Opp. at 19. Further, AMN argues the class impermissibly includes individuals: 1) subject to the PDA who have missed entire shifts, 2) subject to the MSA because Wittmann - who is the named Plaintiff for this policy - lacks standing, and 3) who have not worked overtime. Id. at 19-20. The first argument fails because under Plaintiffs' theory both the MSA and PDA unlawfully tie per diems to hours worked. AMN argues those who missed entire shifts under the PDA should be excluded because the DOL allows an employer to pay adjusted per diems that are not subject to the regular rate. Id. But this is a merits argument that is not appropriate at the certification stage. The next argument fails because - as previously indicated - Wittman has standing, as she was subjected to the allegedly illegitimate overtime policy.

AMN's remaining argument also fails because the class is defined as "All non-exempt hourly employees employed by AMN in California from September 11, 2013 through the date of class certification who worked overtime during one or more pay periods from September 11, 2013 through the date of class certification pursuant to a Professional Services Agreement that provided for per diem adjustments based on the number of hours and/or shifts missed and had the value of per diem benefits excluded

from their regular rate for purposes of calculating overtime." Not. at 1.[5] Because the Court can determine AMN's liability by reviewing its uniform per diem policies, the predominance requirement is met.

AMN also argues Plaintiffs fail to show predominance for the Waiting Time claim. Opp. at 21. AMN contends that because it is a temporary services employer, waiting time penalties are not due when an employee completes an individual assignment - as Plaintiffs contend - but rather on her termination or resignation. Opp. at 21. The Court would therefore need to conduct individualized inquires as to which employees are eligible for penalties. Id. Plaintiffs argue AMN is not a temporary services employer as defined in California Labor Code section 201.3(a)(1). Reply at 10. This threshold question can be decided on a class basis and, depending on its adjudication, individualized issues may become moot. The Court finds the predominance requirement is met.

As common issues will predominate, Plaintiffs have satisfied their burden under Rule 23(b)(3).[6]

B. CONDITIONAL CERTIFICATION UNDER FLSA

The FLSA provides a right of action by an employee against his employer when the employer fails to pay overtime wages. See 29 U.S.C. §§ 203, 207. Such an employee may also bring a collective action on behalf of similarly situated employees. Id. at § 216(b). The plaintiff bears the burden of showing that the putative collective action members are "similarly situated." O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 584 (6th Cir. 2009), abrogated on other grounds by Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016); Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1995). Although the FLSA does not define "similarly situated," courts have recognized that this standard is less stringent than the "common questions predominate" standard under Federal Rule of Civil Procedure 23(b)(3)." O'Brien, 575 F.3d at 584-85; Grayson, 79 F.3d 1086, 1096 (11th Cir. 1995) (citation omitted). The majority of courts have generally adopted a two-step approach to determine whether to permit a collective action to proceed. Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (citations omitted). The Court agrees with this approach. The first step is the "notice stage," at which time the

[5] To the extent AMN contends this is not Plaintiffs' definition, the Court now redefines it.
[6] AMN does not dispute that common issues predominate as to Plaintiffs' Wage Statement Class.

court assesses whether potential class members should be notified of the opportunity to opt in to the action. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995), overruled on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Given the first step is generally assessed before the close of discovery and with limited evidence, courts apply a "fairly lenient standard" that "typically results in conditional class certification." Leuthold v. Destination America, Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004)(collecting cases).[7]

For the same reasons discussed above with regard to Rule 23 class certification, the Court finds that Plaintiffs have sufficiently shown that potential collective action members are "similarly situated" within the meaning of the FLSA and thus have satisfied the lenient standard for conditional certification.

III. CONCLUSION

Plaintiffs' motion for class certification is GRANTED.

IT IS SO ORDERED.

[7] At the second step - typically initiated by a motion to decertify after discovery is complete - the court can engage in a more searching inquiry. See Mooney, 54 F.3d at 1214.