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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

13 RICHARD T. NEWTON; FRANK M.)
14 MCNEAL; and SEAN A. BEATON,)

15 Plaintiffs/Petitioners,)

16 v.)

17 ARNOLD SCHWARZENEGGER, in his)
18 official capacity as Governor of the State)
19 of California; DEBBIE ENDSLEY, in her)
20 official capacity as the Director of the)
21 California Department of Personnel)
22 Administration; JOHN CHIANG, in his)
23 official capacity as the Controller of the)
24 State of California; MATTHEW CATE,)
25 in his capacity as the Secretary of the)
26 California Department of Corrections and)
27 Rehabilitation; BERNARD WARNER, in)
28 his official capacity as the Chief Deputy)
Secretary of the California Division of)
Juvenile Justice; STEPHEN MAYBERG,)
in his official capacity as the Director of)
the California Department of Mental)
Health, and DOES 1 THROUGH 10,)
INCLUSIVE,)

Defendants/Respondents)

CASE NO. CV 09 5887 VRW

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR CONDITIONAL
CERTIFICATION OF COLLECTIVE
ACTION UNDER 29 U.S.C. §216(b)

DATE: June 3, 2010
TIME: 2:00 p.m.
CTRM: 6 (Hon. V. R. Walker)
TRIAL: none

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1 **I. INTRODUCTION / SUMMARY OF ARGUMENT**

2 Plaintiffs seek the conditional certification by the court of their collective action thereby
3 permitting them to provide notice, and the opportunity to join the action, to those similarly situated.
4 This case arises from the furloughing, by Governor ARNOLD SCHWARZENEGGER, of state workers
5 employed in the California correctional institutions operated by the CALIFORNIA DEPARTMENT
6 OF CORRECTIONS AND REHABILITATION (hereinafter "CDCR")¹ and the DEPARTMENT OF
7 MENTAL HEALTH (hereinafter "DMH"). By this motion, RICHARD T. NEWTON; FRANK M.
8 MCNEAL; and SEAN A. BEATON (collectively "Plaintiffs") move for an Order providing for the
9 conditional certification of a Fair Labor Standards Act ("FLSA") Collective Action Under 29 U.S.C.
10 §216(b).

11 Plaintiffs bring this action as a collective action claiming the manner in which Defendants
12 implement furloughs violates the FLSA. Plaintiffs are the proposed Collective Action Representatives.
13 They, like all other similarly situated employees working for CDCR and DMH in California's
14 correctional institutions which operate on a 24/7/365 basis, are: 1) forced to work their furlough days
15 without pay; 2) not being paid for their furlough days worked in a timely manner; 3) not having the
16 furlough hours they work counted towards overtime worked; and 4) not having records properly
17 maintained for the work they performed or for payments made to them.²

18 The scope of the class of potential consenters to whom Plaintiffs propose to provide notice of
19 this collective action consists of the public employees identified as Bargaining Unit 6. All of the
20 approximately 30,000 public employees in Bargaining Unit 6 are similarly situated to Plaintiffs in the
21 way in which they are affected by Defendants' furlough program. As these putative class members are
22 all subject to a single illegal policy, plan or decision, that being the manner the furloughs are being
23 implemented in violation of the FLSA, the action should be conditionally certified and notice circulated.
24 The proposed notice to the putative class members is included as Exhibit "A" to Plaintiffs' Exhibits.

25
26 ¹ Also named as a Defendant to this action is the Director of the Division of Juvenile Justice ("DJJ"), which is under the
27 direction and control of CDCR. The employers CDCR, DJJ, and DMH are, for the purpose of this motion herein, collectively
28 referred to as the "Defendants".

² California's State Controller, JOHN CHAING, was additionally named as a separate Defendant to this action. Plaintiffs do
not claim herein that any employees of California's State Controller's office need receive notice of this action in order to
become Consenters to it.

1 **II. STATEMENT OF FACTS / PROCEDURAL BACKGROUND**

2 In response to the weak performance of the California economy and the projected budget
3 shortfall, Governor ARNOLD SCHWARZENEGGER issued a Fiscal Emergency Proclamation
4 (included as Exhibit "B" to Plaintiffs' Exhibits) and Executive Order S-16-08 (included as Exhibit "C"
5 to Plaintiffs' Exhibits) on December 19, 2008. The Order adopted a plan to implement a two day per
6 month furlough, effective February 1, 2009 through June 30, 2010, for almost all of the workers
7 employed by the State of California. The plan provided for most state workers to be given two days off
8 work each month, colloquially referred to as "Furlough Fridays." California's State prisons are 24-hour-
9 per-day, 7-days-per-week facilities and cannot close, unlike, for example, the Department of Motor
10 Vehicles, thereby causing Correctional Peace Officers ("CPOs") to work their two furlough days and
11 accrue the two furlough days per month to be taken at a later time, when feasible.

12 On February 3, 2009, Defendant Department of Personnel Administration issued a Memorandum
13 To: Personnel Management Liaisons (PML) entitled: "Furlough Program." This memorandum
14 (included as Exhibit "D" to Plaintiffs' Exhibits) outlined the extent of the furlough program. On March
15 10, 2009 Defendant Department of Personnel Administration issued a Memorandum To: Personnel
16 Management Liaisons (PML) entitled: "Updates to the Furlough Program." This memorandum
17 (included as Exhibit "E" to Plaintiffs' Exhibits) addressed self directed furloughs.

18 On July 1, 2009 Governor ARNOLD SCHWARZENEGGER issued another Fiscal Emergency
19 Proclamation (included as Exhibit "F" to Plaintiffs' Exhibits) and Executive Order S-13-09 (included as
20 Exhibit "G" to Plaintiffs' Exhibits). Executive Order S-13-09 increased the number of furlough days per
21 pay period to three. On July 2, 2009, Defendants Department of Personnel Administration issued a
22 Memorandum To: Personnel Management Liaisons (PML) entitled: "Furlough Program." This
23 memorandum (included as Exhibit "H" to Plaintiffs' Exhibits) addressed this change.

24 On October 14, 2009, the California Senate Office of Oversight and Outcomes Report to the
25 Senate Rules Committee entitled: "Furloughs in Round-the-Clock Operations: Savings are Illusory."
26 This report (included as Exhibit "M" to Plaintiffs' Exhibits) provides a concise summary of the
27 furloughing of state workers employed in California's correctional facilities.

28 ///

1 On December 16, 2009, Plaintiffs filed this action seeking solely prospective, declaratory relief
2 indicating that the manner in which Defendants implement furlough days violates the FLSA. Plaintiffs
3 brought this action on behalf of themselves individually as employees, and other similarly situated CPO
4 employees (herein "Consenters") of Defendants. Each Plaintiff also filed a consent form with this Court
5 to become a "Consenter" to this action. Four additional state employees also filed consent forms with
6 this Court to become Consenters to this action. All of these employee Plaintiffs/Consenter are members
7 of, and are represented by, the California Correctional Peace Officers' Association ("CCPOA") Legal
8 Department.³ In addition to declaratory relief, Plaintiffs and Consenters (hereinafter collectively called
9 "Plaintiffs") seek attorneys' fees and costs. Defendants are sued in their official capacity by means of
10 the Ex Parte Young exception to the state's sovereign immunity protections.⁴

11 Defendant, Controller JOHN CHIANG, (hereinafter "CONTROLLER Defendant"), answering
12 Plaintiffs' complaint on January 19, 2010, in his official capacity as the Controller of the State of
13 California, and represented by the Attorney General, admits that Plaintiffs are not being paid for all of
14 the hours they worked at the conclusion of the pay period in which they worked them. (CONTROLLER
15 Defendant's Answer, p.3, ¶13) The Controller further admits that accrued furlough hours are not
16 included in overtime calculations. (CONTROLLER Defendant's Answer, p.3, ¶16) The Controller,
17 however, denies generally violating FLSA rules and regulations.

18 Defendants, Governor ARNOLD SCHWARZENEGGER, Director DEBBIE ENDSLEY,
19 Secretary MATTHEW CATE, Chief Deputy BERNARD WARNER, and Director STEPHEN
20 MAYBERG, (hereinafter "ADMINISTRATION Defendants"), answering Plaintiffs' complaint on
21 January 6, 2010, in their official capacities, and represented by the law firm of Kronick, Moskovitz,

22 ³ CCPOA is a non-profit, mutual benefit corporation and the exclusive collective bargaining representative for approximately
23 30,000 rank-and-file, non-exempt employees in California State Bargaining Unit 6 ("Unit 6"). CCPOA also represents
24 approximately 2,500 correctional sergeants and lieutenants, most of whom are non-exempt, who supervise the rank-and-file
25 members. Unit 6 employees are employed by the State of California, in a variety of correctional peace officer classifications,
26 and work at the various institutions and offices, run by the responsibilities include feeding inmates, escort duties within the
27 institutions, supervising inmates 24-hours-per-day, parole agent services, correctional firefighting, and inmate medical and
28 counseling services. Unit 6 employees also schedule and transport inmates for scheduled and emergency medical treatment,
transport inmates throughout the state between institutions, respond to emergencies such as riots, and are entrusted to protect
public safety by maintaining the overall security at all of California's prisons. (see CCPOA v State of California (2006), 142
Cal. App 198, and Baird v. Kessler (2001) 172 F.Supp.2d 1305, 1308.

⁴ Under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), there is a long and well-recognized exception to the doctrine of
sovereign immunity for suits against state officers seeking prospective, equitable relief to end ongoing and continuous
violations of federal law.

1 Tiedemann & Girard, also admit that accrued furlough hours are not included in overtime calculations.
2 (ADMINISTRATION Defendants' Answer, p.5, ¶16). However, they deny that Plaintiffs are not being
3 paid for all of the hours they worked at the conclusion of the pay period in which they worked them, or
4 generally violating FLSA rules and regulations.

5 **III. LEGAL ARGUMENT WHY MOTION SHOULD BE GRANTED**

6 **A. Legal Standard for Conditionally Certifying Collective Actions**

7 The FLSA provides an employee a right of action against his employer when the employer fails
8 to properly pay overtime wages. See 29 USC §§ 203, 207, and 216(b). Such an employee may also
9 bring a collective action on behalf of similarly situated employees. *Id.* at § 216(b); see also Does v.
10 Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000); Leuthold v. Destination Am., Inc., 224
11 F.R.D. 462, 466 (N.D.Cal. 2004); Pfohl v. Farmers Ins. Group, No. 03-3080, 2004 WL 554834 at *2
12 (C.D. Cal. June 2, 2005). The district court may authorize the named FLSA plaintiffs to notice all
13 potential plaintiffs and may set a deadline for those potential plaintiffs to join the suit. [Pfohl at *2,
14 (citing Advanced Textile Corp., 214 F.3d at 1064).] To join a FLSA “collective action” as a consentor,
15 an employee must affirmatively opt-in by filing a written “consent to join” in the court where the action
16 is pending. 29 U.S.C. § 216(b). Should an employee not file such written consent, then he is not bound
17 by the outcome of the collective action and may bring a subsequent private action. [Pfohl at *2, (citing
18 EEOC v. Pan Am. World Airways, Inc., 897 F.2d 1499, 1508 n. 11 (9th Cir.1990)]. To certify a FLSA
19 collective action, the court must evaluate whether the proposed lead plaintiffs and the proposed
20 collective action group, called consentors, are “similarly situated” for purposes of § 216(b). Plaintiffs
21 herein meet the burden of showing they are similarly situated with those to whom they propose to
22 provide notice of this action.

23 A majority of courts, including district courts in the Ninth Circuit, have adopted a two-stage
24 certification procedure for collective actions brought under the FLSA. See, e.g., Thiessen v. Gen. Elec.
25 Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d
26 1208, 1219 (11th Cir. 2001); Gilbert v. Citigroup, No. 08-0385 2009 WL 424320 at *1 (N.D. Cal. Feb.
27 18, 2009); Escobar v. Whiteside Construction Corp., No. 08-1120, 2008 WL 3915715, at *3 (N.D.Cal.
28 Aug.21, 2008); Beauperthuy v. 24 Hour Fitness USA, Inc., No. 06-0715, 2007 WL 707475, at *5

1 (N.D.Cal. Mar.6, 2007); Gerlach v. Wells Fargo & Co., No. 05-0585, 2006 WL 824652, at *2 (N.D.Cal.
2 Mar.28, 2006); Leuthold, 224 F.R.D. 462, 466. “At the first stage, the district court approves
3 conditional certification upon a minimal showing that the members of the proposed class are ‘similarly
4 situated’; at the second stage, usually initiated by a motion to decertify, the court engages in a more
5 searching review.” Beauperthuy, 2007 WL 707475 at *5 (citing Leuthold, 224 F.R.D. at 467.)

6 “Determining whether a collective action is appropriate is within the discretion of the district
7 court.” Leuthold, 224 F.R.D. 462, 466. To certify a FLSA collective action, the court must evaluate
8 whether the proposed lead plaintiffs and the proposed collective action group are “similarly situated” for
9 purposes of § 216(b). Plaintiffs bear the burden of making this showing. Pfohl, 2004 WL 554834 at *2.
10 Given that a motion for conditional certification usually comes before much, if any, discovery, and is
11 made in anticipation of a later more searching review, a movant bears a very light burden in
12 substantiating its allegations at this stage. See, e.g., Aguayo v. Oldenkamp Trucking, No. 04-6279, 2005
13 WL 2436477 (E.D.Cal. Oct. 3, 2005) (disregarding hearsay and foundational challenges to declarations
14 submitted in support of motion for conditional certification); Ballaris v. Wacker Silttronic Corp., No. 00-
15 1627, 2001 WL 1335809 (D.Or. Aug. 24, 2001) (granting motion for conditional certification on basis
16 of two affidavits).

17 The FLSA does not define “similarly situated,” and the Ninth Circuit has not addressed the issue.
18 The Supreme Court, in Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170, 110, S.Ct. 482, 107
19 L.Ed.2d 480 (1989), left the term undefined.⁵ However, the Supreme Court in Hoffmann-La Roche
20 indicated that a proper collective action encourages judicial efficiency by addressing in a single
21 proceeding, claims of multiple plaintiffs who share “common issues of law and fact arising from the
22 same alleged [prohibited] activity.” *Id.* Courts have distilled this into the requirement that a proponent
23 for conditional certification present the court with “nothing more than substantial allegations that
24 putative class members were together the victims of a single decision, policy, or plan.” Thiessen, 267
25 F.3d at 1102 (internal quotations omitted); see also, e.g., Gerlach, 2006 WL 824652, at *2.

26 In pertinent part, 29 U.S.C. §216(b) describes the substantive standard as follows:

27
28 ⁵ Hoffmann-La Roche addressed a collective action brought under the Age Discrimination in Employment Act, which, the Court recognized, incorporates § 16(b) of the FLSA. 493 U.S. at 170.

1 ... [a]n action to recover the liability prescribed in the preceding sentences may be maintained
2 against any employer ... in a Federal ... court ... by any one or more employees for and on
3 behalf of himself or themselves and other employees similarly situated. No employee shall be a
4 party plaintiff to any such action unless he gives his consent in writing to become such a party
5 and such consent is filed in the court in which such action is brought...

6 Crain v. Helmerich and Payne Int. Drilling Co., No. 92-0043 1992 WL 91946, at * 2-3 (E.D. LA
7 1992) describes the showing a plaintiff must make for notice stage/conditional certification under
8 §216(b):

9 It is well settled that whether a court should certify an FLSA class (that is, determine that the
10 case can proceed as a collective action), depends upon whether the named plaintiffs and the
11 members of the FLSA class the plaintiffs seek to represent are similarly situated. [multiple cites]
12 The procedural prerequisites for Rule 23 certification are simply inapplicable in the FLSA
13 setting. [cites;] ¶ Similarly situated does not mean identically situated. [cites] Rather, an FLSA
14 class determination is appropriate when there is ‘a demonstrated similarity about the individual
15 situations ... some factual nexus which binds the named plaintiffs and the potential class
16 members together as victims of a particular alleged (policy or practice).’ [cites] Thus, a court
17 can foreclose a plaintiff’s right to proceed collectively only if ‘the action relates to a specific
18 circumstances personal to the plaintiff rather than any generally applicable policy or practice.’
19 [cite]” “Actions of this nature, which are commonly termed ‘representative suits,’ should be
20 liberally administered since it may be that other persons interested in the same common
21 questions of law or facts might desire to join as party plaintiffs and by the binder being permitted
22 a multiplicity of suits would be avoided and a litigious situation would be corrected at one time.
23 Barrett v. National Malleable & Steel Casting Co., 68 F.Supp.410, 416 (W.D. PA 1946).

24 Consistent with this policy of liberal administration, courts are loath to deny the right to proceed
25 on a FLSA overtime/minimum wage claim for lack of similarity between the named plaintiff and other
26 employees. In Crain, supra, the court found adequate similarity among oil rig employees working on
27 different rigs, under different circumstances and for different lengths of time:

28 The Court holds that the plaintiffs have adequately demonstrated that they are similarly situated
to the potential plaintiffs they seek to represent. All the named plaintiffs and putative class
members are current and former non-exempt H & P employees. ... Further, plaintiffs do not
allege isolated personal incidents of failures to pay, but rather contend that they and the potential
class members were victims of a company-wide policy that employees would not be paid for this
time. [¶] ... That the plaintiffs and the potential claimants may have worked in different areas
of the country, on different types of rigs, and performed different jobs is not dispositive. [cites]
The Court accepts defendants’ contention that the number of meetings or training sessions
attended or the actual amount of time spent engaged in these activities may have varied from
place to place, rig to rig, or hitch to hitch. But what matters is that the fundamental allegations-
that according to company policy the time spent in job related meetings and training was

1 uncompensated-is 'common to all (FLSA) plaintiffs and dominates each of their claims. [cite]
2 (pp. *5-*7).

3 Distelhorst v. Day & Zimmerman, Inc., 58 F.Supp.334, 335 (S.D. IO 1944) ("In interpreting,
4 therefore, the meaning of the words 'similarly situated' the courts should not be governed by how much
5 or what degree of similarity there may or may not be, but permit such a procedure [under §216(b)] if
6 there is any similarity."); Leyva v. Buley, 125 F.R.D. 512, (E.D. WA 1989), ("Plaintiffs' complaint and
7 memoranda support a finding that the individual plaintiffs were similarly situated, albeit there appear to
8 have been some differences in the length of employment with defendant, whether they had second jobs,
9 and whether they lived in defendants' housing."). In Avitia v. The Metropolitan Club of Chicago, Inc.,
10 1989 WL 105283 (N.D. IL 1989), the Court, in holding that plaintiffs suing for overtime were
11 sufficiently similarly situated to those also claiming unlawful retaliation to permit all claimants to
12 proceed as a group under §216(b), reasoned:

13 Under 29 U.S.C. §216(b), plaintiffs must be similarly situated in order to be included in a
14 representative action. They need not be identically situated, however, to be potential class
15 members. [cite] Thus, the plaintiffs need not have similar positions of employment, in terms of
16 responsibility, location, or dates of discrimination. [cite] The key concern in determining
17 whether plaintiffs have alleged that defendant engaged in a course of conduct designed to
18 discriminate against a certain class of employees. [cite; ¶] In this case, all plaintiffs' claims
19 relate to the issue of back overtime pay. Some plaintiffs claim overtime pay is still due them;
20 some claim that they have been harassed or discharged in retaliation for their pursuit of claims
21 for overtime pay. The difference in the consequences that allegedly befell each plaintiff are
22 relevant only in calculating damages. [cites] The plaintiffs in this case are all similarly situated
23 for the purposes of 29 U.S.C. §216(b). (p.*2).

24 The Age Discrimination in Employment Act ("ADEA") incorporates 29 U.S.C. §216(b)'s
25 procedure, with ADEA cases reflecting similar liberality in defining whether plaintiffs are similarly
26 situated to other employees. In Burt v. Manvill Sales Corp., 116 F.R.D. 276, 277 (D CO 1987), the
27 court thus held:

28 [d]efendant argues no persons similarly situated to plaintiffs exist, as plaintiffs held different job
assignments, worked in different departments, and had different supervisors. We find the issues
in this action should not be so narrowly confined. Potential plaintiffs need only show their
positions are similar, not identical, to the named plaintiffs. [cite] The focus of this case is on
allegations that Manville engaged in activities which adversely affected older management
employees during a particular reduction in force."

///

1 Behr v. Drake Hotel, 586 F.Supp. 427, 430-31 (N.D. IL 1984). In Allen v. Marshall Field & Co.,
2 93 F.R.D. 438, 442-43 (N.D. IL 1982), the court rejected a defendant's argument that current and
3 former employees were not similarly situated for purposes of 29 U.S.C. §216(b) in an ADEA action,
4 further noting that:

5 [d]ifferences in the particular adverse consequences (of this campaign) that different individuals
6 allege – whether discharge, forced early retirement, demotion, or transfer to a dead-end job – will
7 be relevant primarily to the computation of damages. Any conflicts of interest within the
8 plaintiff class that result from the decisions of particular claimants to opt-in to this action are
9 unlikely to be insurmountable.

10 In Heagney v. European American Bank, 122 F.R.D. 125, 127-128 (E.D. NY 1988), the court
11 rejected defendants' effort to thwart notice of the right to opt into an ADEA action to employees who
12 did not accept early retirement, but had left the allegedly discriminating employer for other reasons.

13 Rejecting defendants' argument on the issue of similarly situated, the court also notes:

14 [c]lass treatment under the ADEA is not defeated simply because, as here, the plaintiffs
15 performed a variety of jobs in a number of departments at different locations. [cite] Although
16 each retiree may have faced a unique package of incentives, as well as a unique set of alleged
17 coercions, the fundamental allegation – that the supposedly voluntary ERIP was in reality a
18 smokescreen for a deliberate campaign of discrimination – is common to all the ERIP plaintiffs
19 and dominates each of their claims. The ERIP retirees are thus 'similarly situated' as required by
20 the Fair Labor Standards Act.

21 In a footnote, the Heagney court further noted, "[o]f course, the 'similarly situated' requirement of
22 29 U.S.C. §216(b) is considerably less stringent than the requirement of Fed.R.Civ.P. 23(b)(3) that
23 common questions 'predominate.'" See also, Hargrove v. Sykes Enterprises, Inc., 1999 U.S. Dist.
24 LEXIS 20141, p. *9 (D OR 1999) ("many of Rule 23's requirements for certification – such as
25 numerosity, typicality, commonality, and adequate representation of the class – do not apply in this
26 instance.")

27 Given that a motion for conditional certification usually comes before much discovery, and is
28 made in anticipation of a later more searching review, a movant bears a very light burden in
29 substantiating its allegations at this stage. See, e.g., Beauperthuy, 2007 WL 707475 at *5. This
30 preliminary pronouncement is 'usually based only on the pleadings and any affidavits that have been
31 submitted during the initial stages of the litigation. [cite] Because the court has minimal evidence at the
32 'notice stage,' this determination 'is made using a fairly lenient standard and typically results in

1 'conditional certification' of a representative class." Reeves v. Alliant Techsystems, Inc., 77 F.Supp.2nd
2 242, 246. (D RI 1999); Kane v. Gage Merchandising Services, Inc., 138 F.Supp.2d 212, 214 (D MA
3 2001). See Pfohl, 2004 WL 554834 at *8.

4
5 **B. Plaintiffs' are Similarly Situated to Other Correctional Peace Officers Employed by**
6 **Defendants**

7 The main issue, therefore, is whether plaintiffs' allegations and evidence are sufficient to satisfy
8 the "fairly lenient standard" required to send a conditional class notice under the FLSA. "Courts have
9 held that conditional certification requires only that 'plaintiffs make substantial allegations that the
10 putative class members were subject to a single illegal policy, plan or decision.' Under this lenient
11 standard, 'the plaintiffs must show that there is some factual basis beyond the mere averments in their
12 complaint for the class allegations.' " Escobar, 2008 WL 3915715, at *4, citing Adams v. Inter-Con Sec.
13 Systems, Inc., 242 F.R.D. 530, 536 (N.D. Cal. 2007). Plaintiffs here provide a factual basis showing
14 that the putative class members are subject to a single illegal policy, plan or decision. They do so by
15 means of the documents included with their complaint, the answers Defendants made to the complaint,
16 the documents Defendants provided in initial disclosures, and by means of declarations by the Plaintiffs
17 themselves.

18 Plaintiffs' include as exhibits several California State Government issued documents declaring a
19 fiscal crisis and implementing State employee furlough programs. (See Exhibits B, C, D, E, F, G, and
20 H). These documents generally show that the putative class members and Plaintiffs (collectively
21 referred to as Correctional Peace Officers or "CPOs") are subject to a single policy, plan or decision to
22 furlough them without pay while requiring them to report to work. Defendants, in their answers, admit
23 many of Plaintiffs' factual allegations. Further, declarations of Plaintiffs, Consenters, and the Chief of
24 Labor for BU6, Steve Weiss, support the existence of a putative class subject to a single policy, plan or
25 decision which Plaintiffs contend violates the FLSA.

26 ///

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28 ///

1 **1. The Scope of the Class**

2 The scope of the class of potential consenters, Plaintiffs propose to provide notice of this
3 collective action to, consists of the public employees identified as BU6.⁶ Plaintiffs are represented by
4 the CCPOA's Legal Department ("CCPOA"). CCPOA is organized as a California nonprofit mutual-
5 benefit corporation. CCPOA represents approximately 31,000 rank-and-file correctional employees of
6 Defendants CDCR, DJJ, and DMH. CCPOA functions as the exclusive bargaining representative for
7 Bargaining BU6, which consists primarily of Correctional Officers, but also includes Board
8 Coordinating Parole Agents, Casework Specialists, Community Services Consultants, Correctional
9 Counselors Classes I and II, Firefighters, Fire Services Training Specialists, Correctional Fire Captains,
10 Medical Technical Assistants, Parole Agents Classes I and II, Youth Correctional Counselors and Youth
11 Correctional Officers. (See Declaration of Steve Weiss paragraph 3).

12 Employment relations, including all contract bargaining, between CCPOA (on behalf of BU6)
13 and the State of California, are governed by the Ralph C. Dills Act, Government Code section 3512 *et*
14 *seq.* ("the Dills Act"). Defendant DPA is the agency of the State of California designated as the
15 Defendant Governor's bargaining representative under the Dills Act. The DPA represents the Governor
16 as the employer in all matters pertaining to California state personnel employer-employee relations, and
17 it is responsible for administering salaries and benefits, job classifications, and training. (Gov. Code §
18 19815 *et seq.*) Thus, although BU6 members work within CDCR, DJJ, and DMH, it is the DPA that
19 functions as the State employer. On September 18, 2007, the State unilaterally imposed its purported
20 "Last Best and Final Offer" ("LBFO") on BU6 and terminated the existing Memorandum of
21 Understanding ("MOU") between the parties, and instead replaced the MOU with Implemented Terms.

22 The current Implemented Terms sections identify the classifications of BU6 employees and are
23 helpful in defining the scope of the proposed noticed class. Section 11.11 of the Implemented Terms
24 (included as Exhibit I to Plaintiffs' Exhibits) identifies the classifications of BU6 employees that the
25 state has declared subject to a specific exemption to overtime requirements of Section 207k of the FLSA.
26 Section 11.11 also defines work periods. Section 15.01 of the Implemented Terms (included as Exhibit
27 J to Plaintiffs' Exhibits) defines and identifies the classifications and salary ranges of BU6 employees.

28 ⁶ BU6 includes rank and file employees ("RO6"); supervisory employees, ("S06"); and managerial employees, ("MO6").

1 Section 15.19 of the Implemented Terms (included as Exhibit K to Plaintiffs' Exhibits) further defines
2 and identifies the classifications and salary ranges of BU6 employees. Section 11.08 of the
3 Implemented Terms (included as Exhibit L to Plaintiffs' Exhibits) addresses when overtime is paid to
4 BU6 employees.

5 Plaintiffs identify the proposed class requiring notice of this action, and the opportunity to join as
6 consenters to this action, as all California Correctional Officers, Board Coordinating Parole Agents,
7 Casework Specialists, Community Services Consultants, Correctional Counselors Classes I and II,
8 Firefighters, Fire Services Training Specialists, Correctional Fire Captains, Medical Technical
9 Assistants, Parole Agents Classes I and II, Youth Correctional Counselors and Youth Correctional
10 Officers (Collectively referred to as Correctional Peace Officers or "CPOs").⁷

11 **2. All CPOs are similarly forced to work their furlough days and bank days off in the**
12 **future**

13 The proposed putative class, to which Plaintiffs are similarly situated, is comprised of CPOs
14 forced to work on their furlough days and bank days off in the future. The Declarations of Plaintiffs
15 RICHARD T. NEWTON, FRANK M. MCNEAL, and SEAN A. BEATON support the contention that
16 they are each similarly situated to all other CPOs in that they are all forced to work on their furlough
17 days and bank these "furlough" days for future use, often in a different pay period. Plaintiffs'
18 declarations demonstrate their personal knowledge of this fact. (See Newton Dec. p.3:¶¶ 9, 10,12,
19 13,15,16, 21,and 22; McNeal Dec. p.2:¶¶ 6, 7, and 9, p. 3:¶¶ 12 and14; Beaton Dec. p.2:¶¶ 6, p.3:¶¶ 9,
20 11, 13, 15, 17, 21, 22, 23 and 24.) The declarations of Consenters BRENDA GIBBONS and TROY
21 TESTO support Plaintiffs' contention that they are each similarly situated to all other CPOs in that they
22 are all forced to on work their furlough days and bank these "furlough" days for future use, often in a
23 different pay period. (See Gibbons Dec p.3:¶¶ 10, 13, 15, 16, and 18. Testo Dec. p.3:¶¶ 7, 9, 10, 11,
24 13 and 14.)

25 The Fiscal Emergency Proclamations, Executive Orders, and PMLs memorandum issued by
26 Defendants, and the October 14, 2009, California Senate Office of Oversight and Outcomes Report to
27 the Senate Rules Committee entitled: "Furloughs in Round-the-Clock Operations: Savings are Illusory,"

28 ⁷ Parole Service Associates are part of BU6 and may have a claim under this action as well.

1 evidence the fact that all CPOs are similarly situated in that they are forced to work on their furlough
2 days and bank them as days off in the future. (See Exhibit B through Exhibit H and Exhibit M of
3 Plaintiffs' Exhibits).

4 As California's Senate Office of Oversight and Outcomes Report states: "In round-the-clock
5 institutions, employees in positions that must be filled day and night are generally not taking off three
6 days per month. Instead, while absorbing a 14% reduction in income, they are working furlough days
7 and banking time to be taken off in the future." Exhibit M at p. 2.

8 **3. All CPOs are similarly not promptly paid for the work they perform**

9 The proposed putative class, to which Plaintiffs are similarly situated, is comprised of CPOs
10 forced to accrue furlough time off by working on their furlough days without being promptly paid for
11 their work within the pay period in which they performed the work. The Declarations of Plaintiffs
12 RICHARD T. NEWTON, FRANK M. MCNEAL, and SEAN A. BEATON support the contention that
13 they are each similarly situated to all other CPOs in that they are all forced to work on their furlough
14 days without being promptly paid for their work within the pay period in which they performed the
15 work. Plaintiffs' declarations demonstrate their personal knowledge of this fact. (See Newton Dec p.
16 3:¶¶ 15, 16, 18, 20, 21 and 22. McNeal Dec. p. 3:¶¶ 11 and 14. Beaton Dec. p. 3:¶¶ 11, 13, 21, 22, 23
17 and 24.) The Declarations of Consenters BRENDA GIBBONS and TROY TESTO support Plaintiffs'
18 contention that they are each similarly situated to all other CPOs in that they are all forced to work their
19 on furlough days without being promptly paid for their work within the pay period in which they
20 performed the work. (See Gibbons Dec p.3:¶¶ 11, 13, and 18. Testo Dec. p.3:¶¶ 8, 9, 10, 13 and 14)

21 The Fiscal Emergency Proclamations, Executive Orders, and management PML memorandums
22 issued by Defendants, and the October 14, 2009, California Senate Office of Oversight and Outcomes
23 Report to the Senate Rules Committee entitled: "Furloughs in Round-the-Clock Operations: Savings are
24 Illusory" evidences the fact that all CPOs are similarly situated in that they are forced to work their
25 furlough days without being promptly paid for their work within the pay period in which they perform
26 the work. (See Exhibit B through Exhibit H and Exhibit M of Plaintiffs' Exhibits).

27 CONTROLLER Defendant, answering Plaintiffs' complaint on January 19, 2010, in his official
28 capacity as the Controller of the State of California, and represented by the Attorney General, admits

1 that Plaintiffs are not being paid for all of the hours they worked at the conclusion of the pay period in
2 which they worked them. (CONTROLLER Defendant's Answer, p. 3, ¶13)

3 As California's Senate Office of Oversight and Outcomes Report states: "Remarkably,
4 correctional workers banked 1.5 million furlough hours between February and August 2009. Most are
5 correctional officers. At a pay rate of \$34.91 an hour, those hours create a future liability of at least \$52
6 million." Exhibit M at p. 2.

7 **4. All CPOs are similarly not properly paid for the work they perform**

8 The proposed putative class, to which Plaintiffs are similarly situated, is comprised of CPOs
9 forced to accrue furlough time off by working on their furlough days without being properly paid as the
10 furlough hours worked are not being counted as total time worked for the purposes of overtime
11 calculation.

12 The Declarations of Plaintiffs RICHARD T. NEWTON, FRANK M. MCNEAL, and SEAN A.
13 BEATON support the contention that they are each similarly situated with all other CPOs in that they
14 are all forced to accrue furlough time off by working on their furlough days without being properly paid
15 as the furlough hours worked are not being counted toward total time worked for the purposes of
16 overtime calculations. (See Newton Dec p. 3:¶¶ 8, 11, 14, 18,21, and 22. McNeal Dec. p. 2:¶ 8, 3:¶¶
17 10, 13, and 14. Beaton Dec. p.2:¶ 6, p.3 ¶¶ 10,12, 14,18, 21, 22, 23, and 24.) The Declarations of
18 Consenters BRENDA GIBBONS and TROY TESTO support Plaintiffs' contention that they are each
19 similarly situated to all other CPOs in that they are all forced to accrue furlough time off by working on
20 their furlough days without being properly paid as the furlough hours worked are not being counted
21 toward total time worked for the purposes of overtime calculations. (See Gibbons Dec. p. 3:¶¶ 9, 11,14,
22 17, and 18. Testo Dec. p. 2:¶ 6, p. 3:¶¶ 13 and 14.

23 CONTROLLER Defendant, answering Plaintiffs' complaint, admits that Plaintiffs' accrued
24 furlough hours are not included in overtime calculations. (CONTROLLER Defendant's Answer, p.3,
25 ¶16) ADMINISTRATION Defendants, answering Plaintiffs' complaint on January 6, 2010, also admit
26 that Plaintiffs' accrued furlough hours are not included in overtime calculations. (ADMINISTRATION
27 Defendants' Answer, p.5, ¶16).

28 ///

1 **5. All CPOs are similarly not having adequate payroll records maintained**

2 Defendants fail to maintain records indicating which days constitute furlough days worked or
3 which furlough hours worked should be compensated at the overtime rate. The proposed putative class,
4 to which Plaintiffs are similarly situated, is comprised of CPOs whose employer is not maintaining these
5 payroll records.

6 The Declarations of Plaintiffs RICHARD T. NEWTON, FRANK M. MCNEAL, and SEAN A.
7 BEATON support their contention that they are each similarly situated to all other CPOs whose
8 employer is not maintaining adequate payroll records. (See Newton Dec. p. 3:¶¶ 9, 12, 19, 21, and 22.
9 McNeal Dec. p. 2:¶ 6, p.3:¶¶ 12 and 14. Beaton Dec. p. 3:¶¶ 11, 13, 16, 21, 22, 23 and 24. The
10 Declarations of Consenters BRENDA GIBBONS and TROY TESTO support Plaintiffs' contention that
11 they are each similarly situated to all other CPOs whose employer is not maintaining adequate payroll
12 records. (See Gibbons Dec. p. 3:¶¶ 10 and 18. Testo Dec. p. 3:¶¶ 7 and 14

13 **Plaintiffs' Proposed Notice of Collective Action is Appropriate**

14 Plaintiffs also request that, following conditional certification, Plaintiffs should be allowed to
15 send out a court-approved form of notice to class members. Attached is a proposed form of notice that
16 explains (i) the purpose of the notice, (ii) the nature of the litigation and counsel, (iii) how to participate
17 in the lawsuit and the consequences thereof, (iv) what happens if recipients do not respond to the notice,
18 and (v) how to obtain additional information.

19 The Supreme Court has held that district courts have the discretion, in appropriate cases, to
20 implement 29 U.S.C. 216(b) "by facilitating notice to potential plaintiffs." Hoffmann-La Roche Inc.,
21 493 U.S. at 169. Plaintiffs requests publication of notice through posted mailing, website posting, or
22 CCPOA bi-monthly membership publication entitled "Peacekeeper".

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1 **IV. CONCLUSION**

2 Plaintiffs request that this Court certify the collective action under 29 U.S.C. § 216(b), and that
3 this Court approve notice in the form Plaintiffs have proposed.

4 Dated: April 29, 2010

**CALIFORNIA CORRECTIONAL
PEACE OFFICERS ASSOCIATION
LEGAL DEPARTMENT**

5
6
7 By: 

8 JAMES P. HARRISON (SBN 194979)
9 Attorneys for Plaintiffs and Consenters
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