IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION AND SEND NOTICE TO THE CLASS

Plaintiff David Driscoll, through the undersigned counsel, hereby moves the Court to conditionally certify a Fair Labor Standards Act collective action and order notice sent to members of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment. Pursuant to LCvR 7(m), Plaintiff's counsel conferred with Defendant's counsel regarding this motion on August 7, 2012. Defendant opposes the motion.

As explained in the accompanying memorandum of points and authorities, this case meets the standard for conditional certification as Driscoll has shown that the proposed class members are similarly situated pursuant to 29 U.S.C. § 216(b). Additionally the Court should authorize notice to the class, as court authorization of notice to the class in a FLSA collective

action serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action. A proposed order is submitted herewith.

Dated: August 8, 2012

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION AND SEND NOTICE TO THE CLASS

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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I. INTRODUCTION

Plaintiff David Driscoll filed this action on behalf of himself and other similarly situated current and former employees pursuant to 29 U.S.C. § 216(b). He alleges that The George Washington University ("GWU" or "the University") failed to pay him and a class of similarly situated employees overtime wages for years, claiming that they were exempt employees. Finally in 2011, GWU acknowledged that Driscoll and the class were misclassified and reclassified their positions so that they would receive overtime wages going forward. As part of the reclassification, GWU paid the reclassified employees back overtime wages for overtime worked in the two years prior to the reclassification. Rather than pay the full overtime wages owed, however, GWU calculated the back wages under a "half-time" method that resulted in class members receiving only one-third or less of the full wages owed. The University also unilaterally limited its back overtime liability to two years, even though the law imposes back wage liability going back three years. To further limit its liability, GWU used an unrealistically low estimate of hours that ignored evidence of the actual hours that class members worked. Finally, GWU's payments did not include any interest or liquidated damages for its failure to pay the overtime wages when they were due.

Driscoll now moves the Court to conditionally certify a Fair Labor Standards Act ("FLSA") collective action and order notice sent to members of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment.[1]

[1] Plaintiff's Cross Motion to Amend the Class Action Complaint (Doc. 12) is currently pending before the Court. Among other things, the motion seeks to amend the complaint to plead a Rule 23 class for claims brought under the D.C. Minimum Wage Act. Should the Court find that this

II. STATEMENT OF THE CASE

The George Washington University has a centralized Human Resources department ("HR") that serves the entire University. See Ex. A to the Declaration of Michael J.D. Sweeney in Support of Plaintiff's Motion for Conditional Certification and Notice ("*Sweeney Decl.*"). Part of HR's function is to develop job classifications for application to jobs throughout the university. See Ex. B to *Sweeney Decl.* (*"Position Management Web Page").* The classifications share a job title, FLSA classification, and salary grade and apply to groups of positions with similar duties and the same level of responsibility. *Id*.; *see also* Ex. C to *Sweeney Declaration* ("*Salary Grade Ranges Web Page*").

GWU employs people as Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates throughout the University to perform clerical work (the "Clerical Jobs"). Declaration of David Driscoll in Support of Plaintiff's Motion for Conditional Certification and Notice ("*Driscoll Decl.*"), at ¶ 6; Declaration of Jamie Lewis in Support of Plaintiff's Motion for Conditional Certification and Notice ("*Lewis Decl.*"), at ¶ 6. Although the clerical work varies from department to department, the nature of the work does not—all the Clerical Jobs perform clerical work as their primary job duty. *Driscoll Decl.* at ¶ 7; *Lewis Decl.* at ¶ 7. The Clerical Jobs are HR classifications. Ex C to *Driscoll Decl*., Dec. 7, 2011 e-mail from Merica Dito, HR Client Partner in GWU's Human Resources Department, to David Driscoll ("*Dito 12/7/11 e-mail*") ("This was a University-wide

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claim is not classable under Rule 23, the Court should construe this motion as a motion to also conditionally certify a collective action under the D.C. Minimum Wage Act, as the analysis made in conditionally certifying a collective action under the D.C. Minimum Wage Act is the same as it is under the Fair Labor Standards Act. *See Dinkel v. MedStar Health, Inc.*, --- F.Supp.2d ----, 11–00998 (CKK), 2012 WL 3062461, *2 fn 3 (D.D.C. July 29, 2012); *Castillo v. P & R Enterprises, Inc.*, 517 F.Supp.2d 440, 445 fn 3 (D.D.C. 2007).

examination across all classifications. All employees within certain classifications, including Executive Coordinators, are eligible for overtime going forward.") Within each classification employees carry the same pay grade and FLSA classification. *Driscoll Decl*. at ¶ 6; *Lewis Decl*. at ¶ 6.

For FLSA exemption purposes, GWU treated the primary work duties of everyone with the same Clerical Job as the same. Prior to 2011, GWU classified employees holding Clerical Jobs as exempt from the FLSA's overtime provisions and did not pay them overtime wages. *Driscoll Decl*. at ¶ 7; *Lewis Decl*. at ¶ 7, Ex C to *Driscoll Decl*., *Dito 12/7/11 e-mail.*

In 2011, as part of a University–wide project, GWU reassessed its exempt classification for certain classifications and as a result reclassified all the employees within certain titles from exempt to non-exempt from overtime requirements. *Driscoll Decl*. at ¶ 10; *Lewis Decl*. at ¶ 12; *Dito 12/7/11 e-mail* ("This was a University-wide examination across all classifications."); Ex B to *Lewis Decl*., Dec. 9, 2011 e-mail from Reem Zaghal to Lewis ("*Zaghal 12/9/11 e-mail*") ("What was the reason for the university to review the misclassification of my position? It was a University wide project."); *Dito 12/7/11 e-mail*. The Clerical Jobs were among those reclassified. *Driscoll Decl*. at ¶ 10; *Lewis Decl*. at ¶ 12; *Dito 12/7/11 e-mail* ("All employees within certain classifications, including Executive Coordinators, are eligible for overtime going forward.")

GWU sent a form letter to reclassified employees. Ex. B to *Driscoll Decl. and Ex. A* to *Lewis Decl*. ("*Reclassification Letter*"). The letter explained that GWU was reclassifying the positions to acknowledge that the employees were eligible for overtime pay and would be paid overtime going forward. *Reclassification Letter* ("we have determined that you are eligible to receive overtime pay"). The letter further explained that "Your eligibility for overtime pay does

not change in any way the nature or level of your work. … Your employment status does not change. In other words, if your current status is full-time regular, you will remain full-time regular." *Id.* The reclassification did not entail a change in employees' "base pay, pay grade, or pay structure." *Id*. Employee Frequently Asked Questions attachment ("FAQ").

As part of the reclassification, GWU made a back overtime payment to reclassified employees. *Reclassification Letter*. The back overtime payment was calculated using a "half-time" payment method. *Lewis Decl*. at ¶ 20; Ex. B to *Lewis Decl.*; *Driscoll Decl*. at ¶19; Ex. C to *Driscoll Decl*., ("*Dito 12/7/11 e-mail*") ("We are using a method that is sanctioned by the Department of Labor, which is the 'half-time' calculation rate. This method uses the rate based on the total hours worked per week, with the salary covering the straight-time portion, with the half-time amount being paid as retroactive payment."); Ex. H to *Driscoll Decl*, U.S. Department of Labor Opinion Letter Jan. 14, 2009 ("*DOL Opinion Letter*"); Ex. H to *Driscoll Decl*, FLSA: Overtime backpay alternatives ("*GWU Backpay Calc.*").

The "half-time" method GWU used, known as the fluctuating workweek ("FWW"), results in overtime wages of only one-third or less of those required under the FLSA's default method of calculation. Because of its drastic effect on overtime wages, the FWW has strict prerequisites to its use, one of which is that the employer and employee have "a 'clear mutual understanding of the parties that the fixed salary' is 'compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week.'" *DOL Opinion Letter*. GWU's agreement with class members, however, was that their salaries were intended to cover a specific amount of hours. For example, Driscoll was hired as a full-time Executive Coordinator which GWU defined as a 40-hour work week with a schedule from 8:00 a.m. to 5:00 p.m. *Driscoll Decl*. at ¶ 8; Ex. A to *Driscoll Decl*., Job Description ("*Driscoll*

Job Descrip."). Lewis was also hired for a 40-hour workweek. *Lewis Decl*. at ¶ 8. GWU confirmed the agreement that the employees' salaries were intended to cover a set number of hours in the *Reclassification Letter*, explaining that the reclassification did not change the agreement with respect to the number of hours GWU intended employees' pay to cover. *Reclassification Letter* ("Your employment status does not change. In other words, if your current status is full-time regular, you will remain full-time regular.") The letter explained that the base pay employees received pre-reclassification is the same that they receive post-reclassification and that any hours beyond 40 are considered overtime hours. *Reclassification Letter FAQ*. The University also paid prospective overtime pay at time-and-one-half the hourly rate, not calculated under a "half-time" method. Ex. B to Lewis Decl., Dito 12/5/11 e-mail to Lewis ("After 12/11 hours beyond 40 in a week are compensated at time-and-a-half"); *Reclassification Letter*, FAQ. Because GWU and class members had a written agreement as to the number of hours the salaries were intended to compensate, GWU's use of the "half-time" method resulted in its paying class members one-third or less of the back wages due.

GWU also unilaterally limited its liability to two years of back overtime pay, even though the law requires three years of back wages. The University paid class members back overtime wages for a period two years prior to the reclassification. Ex. B to *Lewis Decl*., 12/5/11 e-mail from Merica Dito to Lewis ("*Dito 12/5/11 e-mail*") ("The University is providing compensation to employees who have been mis-classified and whose supervisors have indicated that they have worked over forty hours in a week over the past two years."); *Reclassification Letter* (back overtime pay for overtime hours in the past two years.) The limitation on liability ignores the three-year statute of limitation provided by the FLSA where an employer acts willfully. 29 U.S.C. § 255. Driscoll alleges that GWU acted willfully. First Amended Complaint, Doc. No. 8,

at ¶¶ 50, 51. Accordingly, GWU did not pay class members all the back overtime wages they were due.

In calculating the back overtime wages due to reclassified employees, GWU did not make a good faith attempt to determine the actual hours the employees worked. Instead, it relied on supervisors' estimates of overtime hours. *Reclassification Letter* ("Human Resources worked with your manager to estimate your hours worked"). It did not require supervisors to provide specific information, only the supervisors' estimates. Ex. F to *Driscoll Decl.*, 1/17/12 e-mail from Merica Dito to Driscoll ("*Dito 1/17/12 e-mail*") ("The supervisors were asked to provide HR the estimated number of hours, but not the dates and number of hours per date."); *Driscoll Decl*. at ¶ 18; *Lewis Decl*. at ¶ 20

GWU had access to objective sources of overtime hours but chose to ignore them. For example, GWU had records of overtime hours employees worked. Before GWU informed Driscoll and other employees of the reclassification project, GWU had required them to submit their work hours for a two-week period. . *Driscoll Decl*. at ¶ 16. During that period, Driscoll recorded more than 50 hours of overtime in just two weeks. *Driscoll Decl*. at ¶ 16. Nevertheless, GWU paid him for only 24 overtime hours in twenty months. *Reclassification Letter (Driscoll)*. That is, the University estimated that he worked fewer overtime hours over a 20-month period than records show he had worked in a two-week period. Additionally, GWU required Driscoll to work on at least six (6) Saturdays for at least eight (8) hours each, *Driscoll Decl*. at ¶ 15, which alone equals 48 hours of overtime, again more than the 24 hours GWU estimated for the 20-month period. Like any other employer, GWU also had access to time information from electronic footprints on time stamped information such as e-mails and activity in information systems and from scheduled overtime work on weekends. *Driscoll Decl*. at ¶ 15;

Lewis Decl. at 21. GWU also could have asked the employees themselves for estimates, but did not. *Driscoll Decl*. at ¶ 17; *Lewis Decl*. at ¶ 23. Of course, the underestimation of hours resulted in GWU paying less in back overtime wages than it owed.

III. A FLSA COLLECTIVE ACTION SHOULD BE CONDITIONALLY CERTIFIED AND NOTICE SENT TO THE CLASS

A. Legal Standards Governing FLSA Representative Actions

The purpose of the FLSA is to provide "specific minimum protections to *individual* workers and to ensure that each employee covered by the Act ... receive[s] '[a] fair day's pay for a fair day's work' and [is] protected from 'the evil of "overwork" as well as "underpay."'" *Barrentine v. Arkansas-Best Freight Sys. Inc.,* 450 U.S. 728, 739 (1981). In passing the FLSA, Congress intended to address long working hours that "are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine,* 450 U.S. at 739. Congress also recognized that allowing individual employees subject to the same illegal practices to bring claims collectively was both fair and efficient. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The FLSA provides for one or more employees to pursue an action in a representative capacity for "other employees similarly situated." *Id*., 29 U.S.C. § 216(b).

A FLSA "collective action" differs from a Rule 23 representative action in that an employee must affirmatively opt-in to a FLSA collective action by filing a written consent with the court. Thus, there are only two requirements to proceed as a representative action under 216(b): (1) all plaintiffs must be "similarly situated," and (2) a plaintiff must consent in writing to take part in the suit. This latter requirement means that a representative action follows an

"opt-in" rather than an "opt-out" procedure. *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 6 (D.D.C. 2010) *citing Hunter v. Sprint Corp.*, 346 F. Supp. 2d 113, 117 (D.D.C. 2004).

There is only a threshold issue of whether the group is "similarly situated." *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997). While the FLSA does not define "similarly situated," courts understand it to require a showing that the plaintiffs "and potential plaintiffs together were victims of a common policy or plan that violated the law." *Encinas*, 265 F.R.D. at 6, *citing Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440, 445 (D.D.C. 2007). In determining if a group is similarly situated, courts in this District consider "(1) whether [putative class members] all worked in the same corporate department, division and location; (2) whether they all advanced similar claims; and (3) whether they sought substantially the same form of relief." *Encinas*, 265 F.R.D. at 6, *quoting Hunter*, 346 F. Supp. 2d at 119. While courts consider these three factors, class members need not have identical job titles or duties or have worked in the same department or location to be similarly situated. It is enough that they share substantively similar job responsibilities and suffer from a uniform pay policy. *Encinas*, 265 F.R.D. at 6 -7, *citing Castillo*, 517 F. Supp. 2d at 446-48. Reclassification of a group of employees from exempt to non-exempt can demonstrate that the employees are similarly situated even when they have different job titles or work in different locations. *Hunter*, 346 F. Supp. 2d at 119.

When employees are shown to be similarly situated, the district court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient way and has the discretion to facilitate notice to potential plaintiffs of their right to opt-into the action. *See Hoffmann-La Roche*, 493 U.S. at 166, 170, 172; *Hunter*, 346 F. Supp. 2d at 117. Such notice should be "timely, accurate, and informative." *See Hoffmann-La Roche*, 493

U.S. at 172. Notice should issue early in the litigation to give class members the opportunity to join the action. *See, e.g., Encinas,* 265 F.R.D. at 6; *McKinney v. United Stor-All Centers, Inc.*, 585 F. Supp. 2d 6, 8 (D.D.C. 2008); *Castillo*, 517 F. Supp. 2d at 444 -445; *Cryer v. Intersolutions, Inc.*, Civ. A. No. 06–2032, 2007 WL 1053214 at *2 (D.D.C. Apr. 7, 2007); *see also, Sbarro,* 982 F. Supp. at 262 (J Sotomayor) ("courts have endorsed the sending of notice early in the proceeding, as a means of facilitating the FLSA's broad remedial purpose and promoting efficient case management.").

Courts utilize a two-step process when analyzing motions to certify a collective action under the FLSA. *Encinas*, 265 F.R.D. at 6; *McKinney*, 585 F. Supp. 2d at 8. First, the court determines whether the proposed class members are "similarly situated." *Encinas*, 265 F.R.D. at 6; *Castillo,* 517 F. Supp. 2d at 445. This first step is conducted early in the litigation before discovery is conducted and when the court has limited evidence regarding the "similarly situated" issue. At this initial stage,

> [t]he court employs a lenient standard ... requiring only that the plaintiff make "a modest factual showing" that potential class members are "similarly situated." This showing may be made through pleadings and affidavits that demonstrate that "the putative class members were together the victims of a single decision, policy or plan" that violated the law.

McKinney, 585 F. Supp. 2d at 8 (citations omitted); *see also, Encinas*, 265 F.R.D. at 6 (The modest factual showing "is ordinarily based mostly on the parties' pleadings and affidavits."); *Cryer*, 2007 WL 1053214 at *2 (Plaintiffs have an initial burden of a "modest factual showing" demonstrating that the named plaintiffs and potential as yet unnamed class members "were victims of a common policy or plan that violated the law."), *citing Hunter,* 346 F. Supp. 2d at 117. *See also, Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2007 WL 2994278, at *2 (E.D.N.Y. Oct. 11, 2007). "[I]t would be inappropriate . . . to require plaintiff to meet a more

stringent standard than that typically applied at the early stages of litigation" before discovery is complete); *Sbarro*, 982 F. Supp. at 262 (J Sotomayor) (courts endorse early notice to facilitate "FLSA's broad remedial purpose and promot[e] efficient case management.")

The second stage is typically precipitated by a motion for "decertification" filed by defendant after discovery is largely complete. *Encinas*, 265 F.R.D. at 6, *citing Castillo*, 517 F. Supp. 2d at 445. If the additional claimants are similarly situated, the district court allows the representative action to proceed. If the claimants are not similarly situated, the district court decertifies the class and opt-in plaintiffs are dismissed without prejudice. *Castillo*, 517 F. Supp. 2d at 445, *citing Hunter*, 346 F. Supp. 2d at 117.

The reason for this two-step process with its relatively liberal first-stage standard for assessing the question of whether class members are "similarly situated" arises because, unlike a Rule 23 class action, limitations are not tolled for putative members of a FLSA class until they affirmatively opt into the action. Thus, it is critical that notice of the right to opt-in is issued promptly after the filing of the case if there is a colorable basis for believing the class members may be similarly situated. *Castillo*, 517 F. Supp. 2d at 444 -445, *citing Hoffmann–LaRoche*, 493 U.S. at 170; *Cryer*, 2007 WL 1053214 at *2. *See also*, *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 831 (E.D. Va. 2008) ("Because the statute of limitations continues to run on unnamed class members' claims until they opt into the collective action, *see* 29 U.S.C. § 256(b), courts have concluded that the objectives to be served through a collective action justify the conditional certification of a class of putative plaintiffs early in a proceeding, typically before any significant discovery, upon an initial showing that the members of the class are similarly situated.")

The second-stage of the proceeding, which occurs after an opportunity for discovery, allows the court to revisit the "similarly situated" question on a full factual record and to

decertify the class if the facts demonstrate that the initial "conditional ruling" was erroneous. *Castillo*, 517 F. Supp. 2d at 445. Thus, the two-stage procedure protects the interests of workers in ensuring they receive prompt and timely notice of their right to vindicate their FLSA rights while simultaneously ensuring that only claims on behalf of genuinely similarly situated workers go to trial.

Courts regularly exercise their discretion to order notice be sent to a class of similarly situated employees early in a litigation. *See, e.g.*, *Encinas*, 265 F.R.D. 3; *McKinney*, 585 F. Supp. 2d 6; *Castillo*, 517 F. Supp. 2d at 445; *Cryer*, 2007 WL 1053214; *Hunter*, 346 F. Supp. 2d at 117. Delay for discovery is neither necessary nor appropriate given the running of the statute of limitations. *Sbarro*, 982 F. Supp. at 262.

B. This Case Meets the Standard for Conditional Certification

Driscoll has met his first-stage burden to show that the class of people employed in the Clerical Jobs is similarly situated. The burden at this stage is lenient and the declarations, admissions, and other documentation that Driscoll offers are sufficient to meet it. He alleges that GWU did not pay all the back overtime wages due to people working in the Clerical Jobs when it reclassified those positions. In support of the allegations, Driscoll offers his own testimony and that of another class member alleging that the reclassification affected people GWU employed to perform clerical work at the University and that GWU used the same method in paying back overtime wages to reclassified employees. He also offers statements from GWU confirming that the reclassification was university-wide, that it applied to everyone in certain clerical job classifications, and that GWU employed the same method for paying back overtime wages for all the reclassified employees. Moreover, he offers GWU's explanation of the calculation and how the inputs to the calculation were determined. These allegations along with the supporting

evidence are sufficient to show that all the people working in the Clerical Jobs were subject to a common illegal pay policy—GWU did not pay them all the back overtime wages they were due when their jobs were reclassified. Accordingly, the putative class is similarly situated and should be conditionally certified for purposes of notifying putative class members of the opportunity to join the action. *Encinas*, 265 F.R.D. at 3; *McKinney*, 585 F. Supp. 2d at 6; *Castillo*, 517 F. Supp. 2d at 445; *Cryer*, 2007 WL 1053214; *Hunter*, 346 F. Supp. 2d at 117.

C. Defendants Should Provide Information Necessary to Effectuate Notice

Court authorization of notice to the class in a FLSA collective action "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche*, 493 U.S. at 172.[2] In *Hoffmann-La Roche*, the Supreme Court recognized that courts have the authority to require employers to provide the names and addresses of putative class members, and courts regularly require such production to facilitate notice. *See, e.g.*, *Encinas*, 265 F.R.D. at 7; *Cryer*, 2007 WL 1053214; *Hunter*, 346 F. Supp. 2d at 121.

Driscoll asks the Court to order GWU to provide his counsel with the last known addresses of the class members in order to assist with the issuance of the notice and to provide his counsel with the dates of birth and partial social security numbers for any class members whose mailed notice is returned by the post office. The dates of birth and partial Social Security numbers can assist with locating the correct address for those workers so that they receive notice.

[2] *Hoffmann-La Roche* involved a collective action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, which incorporates the FLSA's collective action provision in 29 U.S.C. § 626(b). Courts have looked to *Hoffmann-La Roche* for guidance on interpretation of the FLSA, particularly since the Court's opinion contains an extended discussion of the FLSA collective action provision.

Davis v. Abercrombie & Fitch Co., 08 Civ. 1859(PKC), 2008 WL 4702840, *12 (S.D.N.Y. Oct. 23, 2008); *Lynch v. United Services Auto. Ass'n*, 491 F. Supp. 2d 357, 371-72 (S.D.N.Y. 2007).

Driscoll further requests that the Court allow his counsel to send a follow-up postcard to any class members who have not responded thirty days after the mailing of the initial notice. Such follow up mailing contributes to dissemination among similarly situated employees and serves what the Supreme Court in *Hoffman-La Roche v. Sperling* recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." 493 U.S. at 172. Accordingly, courts have approved the sending of a follow-up postcard to class members who have not responded after the mailing of the initial notice. *See, e.g., Helton v. Factor 5, Inc.*, C 10–04927 SBA, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012); *Graham v. Overland Solutions, Inc.*, 10–CV–672 BEN (BLM), 2011 WL 1769737, *4 (S.D. Cal. May 9, 2011).

Driscoll also requests that the Court order GWU to post the notice at all of GWU's worksites in the same areas in which it is required to post FLSA notices. See 29 C.F.R. 516.4 (requiring posting of FLSA requirements "in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy"). Posting of notice also contributes to dissemination among similarly situated employees and serves what the Supreme Court in *Hoffman-La Roche v. Sperling* recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." 493 U.S. at 172. District Courts around the country have recognized posting as an efficient, non-burdensome method of notice that courts regularly employ. *See, Castillo*, 517 F. Supp. 2d at 449 (ordering notice posted in "(1) Defendant's offices, or (2) office spaces designated for Defendant's use in third-party buildings"); *Sherrill v. Sutherland Global Servs.*

Inc., 487 F. Supp. 2d 344, 351 (W.D.N.Y. 2007) (allowing notice to be posted at defendant's places of business for 90 days and mailed to all class members); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492-93 (E.D. Cal. 2006) (finding that posting of notice in workplace and mailing is appropriate and not punitive); *Veliz v. Cintas Corp.*, 03 Civ. 1180, 2004 WL 2623909, at * 2 (N.D. Cal. Nov. 12, 2004) (citing Court order to post notice in all workplaces where similarly situated persons are employed); *Garza v. Chicago Transit Authority*, 00 Civ. 0438, 2001 WL 503036, at *4 (N.D. Ill. May 8, 2001) (ordering defendant to post notice in all its terminals); *Johnson v. American Airlines, Inc.*, 531 F. Supp. 957, 961 (D.C. Tex. 1982) (finding that sending notice by mail, "posting on company bulletin boards at flight bases and publishing the notice without comment in American's The Flight Deck, are both reasonable and in accordance with prior authority"); *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, 679 (S.D.N.Y. 1981) (requiring defendant to "permit the posting of copies of public bulletin boards at FP offices"); *Soler v. G & U, Inc.*, 86 F.R.D. 524, 531-32 (S.D.N.Y. 1980) (authorizing plaintiffs to "post and mail the proposed Notice of Pendency of Action and Consent to Sue forms").

D. Plaintiff's Proposed Notice Should Be Approved

A copy of the notice Driscoll proposes to post and send to class members is attached to the motion as Exhibit 1.[3] This notice informs class members in neutral language of the nature of the action, of their right to participate in it by filing a consent to sue form with the Court, and the

[3] Plaintiff's Cross Motion to Amend the Class Action Complaint (Doc. 12) is currently pending before the Court. Among other things, the motion seeks to amend the complaint to plead a Rule 23 class for claims brought under the D.C. Minimum Wage Act. Should the Court find that this claim is not classable under Rule 23, the Court should approve the proposed noticed attached to this motion as Exhibit 2. This proposed notice includes references to the D.C. Minimum Wage Act.

consequences of their joining or not joining the action. It is consistent with forms of notice that have been approved in this District. See, e.g., *Sweeney Decl.* at ¶¶ 6 & 7, Ex. D & E to *Sweeney Decl.*

IV. CONCLUSION

For all of the foregoing reasons, this Court should conditionally certify this action as a FLSA representative action on behalf of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment, authorize Plaintiffs' counsel to issue the notice that is attached to this motion and to send a follow-up postcard to any class members who have not responded thirty days after the mailing of the initial notice, and require GWU to post the attached notice of this lawsuit and consents to sue in a conspicuous location in the workplace. The Court should also order GWU to provide Plaintiffs' counsel with the last known addresses of all putative class members and the telephone number, date of birth, and last four digits of the social security number of any potential class members whose notice is returned by the post office, so that Plaintiffs' counsel may provide effective notice to the class.

Dated: August 8, 2012

Respectfully Submitted,

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phone: (845) 255-9370
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Attorneys for Plaintiffs

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

NOTICE OF OPPORTUNITY TO JOIN A LAWSUIT

TO RECOVER BACK OVERTIME WAGES

To: All current and former Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants and Executive Associates employed by The George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment.

Re: Collective action lawsuit against The George Washington University under the federal Fair Labor Standards Act.

The purpose of this Notice is to inform you of the existence of a collective action lawsuit in which you may be "similarly situated" to the named Plaintiff, David Driscoll ("Driscoll"), to advise you of how your rights may be affected by this lawsuit, and to instruct you on the procedure for participating in this lawsuit.

1. WHAT THE LAWSUIT IS ABOUT:

Driscoll filed this lawsuit against The George Washington University ("GWU") on April 27, 2009. Driscoll is a former Executive Coordinator employed by GWU and not paid overtime wages until the position was reclassified in 2011. Driscoll filed the lawsuit individually and on behalf of all other similarly situated persons. He claims that GWU violated his rights under the Federal Fair Labor Standards Act ("FLSA"), as well as the rights of other administrative support staff who

worked for GWU. Driscoll claims that prior to 2011, GWU did not pay Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants and Executive Associates overtime wages even though they worked overtime hours; that in 2011, GWU reclassified these positions and began paying overtime wages to people working in them; that GWU made back overtime wage payments as part of the reclassification; that GWU improperly calculated the back overtime wages due; and that as a result of the improper calculation, GWU paid employees substantially less in back overtime wages than they were due. The lawsuit seeks back overtime pay plus liquidated damages equal to the amount of the back pay owed. The lawsuit also asks that GWU be required to pay Plaintiffs' costs and attorney's fees. GWU deny Driscoll's allegations, and deny that they are liable for any back pay or liquidated damages.

2. WHO CAN PARTICIPATE IN THE LAWSUIT

You can join the case if you worked for GWU in the past three (3) years as an Executive Aide, Executive Assistant, Executive Coordinator, Executive Support Assistant or Executive Associate and worked overtime but were not paid for it. You can join the case even if GWU reclassified your position and began paying you overtime or made a back wage payment to you upon reclassification. You can join the case if you are still employed by GWU.

3. HOW TO PARTICIPATE IN THIS LAWSUIT

If you wish to join this case, you may do so by completing the attached "Consent to Become Party Plaintiff" form and mailing it in the enclosed pre-paid envelope or sending it to the Plaintiffs' counsel by fax to 845-255-8649 or by e-mail to ltse@getmansweeney.com. The form must be sent to the Plaintiffs' counsel by **[date 60 days from mailing].** You must return the Consent to Become Party Plaintiff by that date to participate in this lawsuit. It is entirely your own decision whether or not to join this lawsuit. This notice does not mean that you have a valid claim or that you are entitled to any monetary recovery. Any such determination must still be made by the Court.

4. EFFECT OF JOINING THIS CASE

If you choose to join in this case you will become a plaintiff class member and you will be bound by any judgment, whether it is favorable or unfavorable.

If you sign and return the Consent to Become a Party Plaintiff form attached to this Notice and are joined in the case, you are agreeing to designate Plaintiffs as your agents to make decisions on your behalf concerning the litigation, the method and manner of conducting this litigation, the entering of an agreement with Plaintiffs' attorneys concerning attorney's fees and costs, and all other matters pertaining to this lawsuit. These decisions made and entered into by the representative Plaintiffs will be binding on you if you join this lawsuit.

The attorneys for the plaintiffs are being paid on a contingency fee basis as set forth in the "Consent to Become Party Plaintiff" form which is attached. Under the terms of the contingency agreement, you are not responsible for paying attorneys' fees or costs unless Plaintiffs recover on their claims. If you sign and return the Consent to Become Party Plaintiff form, you are entering into an agreement with Plaintiffs' counsel concerning attorney's fees and costs, and all other matters pertaining to this lawsuit. However, the Court retains jurisdiction to determine the reasonableness of any contingency agreement entered into by Plaintiffs with their attorneys, and to determine the adequacy of Plaintiffs' counsel.

You also have the right to join this lawsuit and be represented by counsel of your own choosing who will represent only you and will be compensated on the terms as agreed between you and your attorney. You may also proceed *pro se*, that is on your own and without an attorney. If you choose to do either, you or your attorney must file an "opt-in" consent form by **[date 60 days from mailing]**.

5. TO STAY OUT OF THE LAWSUIT

If you do not wish to be part of the lawsuit, you do not need to do anything. If you do not

join the lawsuit, you will not be part of the case in any way and you will not be bound by or affected by the result (whether favorable or unfavorable). Your decision not to join this case will not affect your right to bring a similar case on your own at a future time. If you intend to bring your own action, you should be aware that the statute of limitations is running on your claims, which means you may be losing claims each week that you wait to bring them.

6. NO RETALIATION PERMITTED

Federal law prohibits GWU or anyone from discharging or in any other manner discriminating against you because you "opt-in" to this case, or have in any other way exercised your rights under the FLSA.

7. YOUR LEGAL REPRESENTATION IF YOU JOIN

If you choose to join this lawsuit and agree to be represented through Plaintiffs' attorney, your counsel in this action will be:

Getman & Sweeney PLLC
9 Paradies Lane
New Paltz, NY 12561
845-255-9370
845-255-8649 (FAX)
ltse@getmansweeney.com
http://www.getmansweeney.com

8. FURTHER INFORMATION

The Complaint and GWU's Answer filed in this lawsuit are available for inspection at the office of the Clerk of the Court. In addition, you may obtain a copy by contacting either Plaintiffs' counsel who will forward a copy to you. Documents concerning the case are also available at www.getmansweeney.com.

Further information about this Notice, the deadline for filing a Consent to Become Party Plaintiff, or answers to questions concerning this lawsuit may be obtained by writing, telephoning, or e-mailing the Plaintiffs' counsel at the telephone number and addresses stated above.

Dated: August XX, 2012

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THIS NOTICE AND ITS CONTENTS HAVE BEEN AUTHORIZED BY THE FEDERAL DISTRICT COURT, HONORABLE ELLEN S. HUVELLE, UNITED STATES DISTRICT JUDGE OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. THE COURT HAS TAKEN NO POSITION IN THIS CASE REGARDING THE MERITS OF PLAINTIFFS' CLAIMS OR OF THE GWU'S DEFENSES. PLEASE DO NOT CONTACT THE COURT, THE COURT'S CLERK, OR THE JUDGE. THEY ARE NOT PERMITTED TO ADDRESS YOUR INQUIRIES OR QUESTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	Case 1:12-cv-00690 **CONSENT TO SUE**

CONSENT TO SUE UNDER THE FLSA

I hereby consent to be a plaintiff in an action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., to secure unpaid overtime pay, liquidated damages, attorneys' fees, costs and other relief arising out of my employment with the George Washington University and any other associated parties.

I authorize Getman & Sweeney, PLLC, and any associated attorneys as well as any successors or assigns, to represent me with my claims by joining my claims to an existing lawsuit against Defendants and any other associated parties in which they represent plaintiffs. By signing and returning this consent to sue, I understand that, if accepted for representation, I will be represented by the above attorneys without prepayment of costs or attorneys' fees. I understand that if Plaintiffs are successful, costs expended by attorneys on my behalf will be deducted from my settlement or judgment amount on a pro rata basis with all other plaintiffs. I understand that the attorneys may petition the court for an award of fees and costs to be paid by defendants on my behalf. I understand that the fees retained by the attorneys will be either the amount received from the defendant or 1/3 of my gross settlement or judgment amount, whichever is greater.

Dated: _____ Email: _____

Signature:_____ Address:_____

Name: _____ Phone:_____

To be considered for representation send the completed form to Getman & Sweeney, PLLC, 9 Paradies Lane, New Paltz, NY 12561, or send it by fax to (845) 255-8649, or e-mail it to ltse@getmansweeney.com. This Consent to Sue is not valid and effective until you have received a receipt from Plaintiffs' Counsel indicating that it has been filed. If you have not received a receipt within 3 weeks from your transmission of the form to us, you must contact us by phone at (845) 255-9370.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

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TO RECOVER BACK OVERTIME WAGES

To: All current and former Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants and Executive Associates employed by The George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment.

Re: Collective action lawsuit against The George Washington University under the federal Fair Labor Standards Act and the District of Columbia Minimum Wage Act.

The purpose of this Notice is to inform you of the existence of a collective action lawsuit in which you may be "similarly situated" to the named Plaintiff, David Driscoll ("Driscoll"), to advise you of how your rights may be affected by this lawsuit, and to instruct you on the procedure for participating in this lawsuit.

1. WHAT THE LAWSUIT IS ABOUT:

Driscoll filed this lawsuit against The George Washington University ("GWU") on April 27, 2009. Driscoll is a former Executive Coordinator employed by GWU and not paid overtime wages until the position was reclassified in 2011. Driscoll filed the lawsuit individually and on behalf of all other similarly situated persons. He claims that GWU violated his rights under the Federal Fair

Labor Standards Act ("FLSA") and the District of Columbia Minimum Wage Act ("DCMWA"), as well as the rights of other administrative support staff who worked for GWU. Driscoll claims that prior to 2011, GWU did not pay Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants and Executive Associates overtime wages even though they worked overtime hours; that in 2011, GWU reclassified these positions and began paying overtime wages to people working in them; that GWU made back overtime wage payments as part of the reclassification; that GWU improperly calculated the back overtime wages due; and that as a result of the improper calculation, GWU paid employees substantially less in back overtime wages than they were due. The lawsuit seeks back overtime pay plus liquidated damages equal to the amount of the back pay owed. The lawsuit also asks that GWU be required to pay Plaintiffs' costs and attorney's fees. GWU deny Driscoll's allegations, and deny that they are liable for any back pay or liquidated damages.

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not to join this lawsuit. This notice does not mean that you have a valid claim or that you are entitled to any monetary recovery. Any such determination must still be made by the Court.

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If you choose to join in this case you will become a plaintiff class member and you will be bound by any judgment, whether it is favorable or unfavorable.

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You also have the right to join this lawsuit and be represented by counsel of your own choosing who will represent only you and will be compensated on the terms as agreed between you and your attorney. You may also proceed *pro se*, that is on your own and without an attorney. If you choose to do either, you or your attorney must file an "opt-in" consent form by **[date 60 days from mailing]**.

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If you do not wish to be part of the lawsuit, you do not need to do anything. If you do not join the lawsuit, you will not be part of the case in any way and you will not be bound by or affected by the result (whether favorable or unfavorable). Your decision not to join this case will not affect your right to bring a similar case on your own at a future time. If you intend to bring your own action, you should be aware that the statute of limitations is running on your claims, which means you may be losing claims each week that you wait to bring them.

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7. YOUR LEGAL REPRESENTATION IF YOU JOIN

If you choose to join this lawsuit and agree to be represented through Plaintiffs' attorney, your counsel in this action will be:

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Dated: August XX, 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	Case 1:12-cv-00690 **CONSENT TO SUE**

CONSENT TO SUE UNDER THE FLSA AND DCMWA

I hereby consent to be a plaintiff in an action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the District of Columbia Code, § 32-1001, *et seq*,. to secure unpaid overtime pay, liquidated damages, attorneys' fees, costs and other relief arising out of my employment with the George Washington University and any other associated parties.

I authorize Getman & Sweeney, PLLC, and any associated attorneys as well as any successors or assigns, to represent me with my claims by joining my claims to an existing lawsuit against Defendants and any other associated parties in which they represent plaintiffs. By signing and returning this consent to sue, I understand that, if accepted for representation, I will be represented by the above attorneys without prepayment of costs or attorneys' fees. I understand that if Plaintiffs are successful, costs expended by attorneys on my behalf will be deducted from my settlement or judgment amount on a pro rata basis with all other plaintiffs. I understand that the attorneys may petition the court for an award of fees and costs to be paid by defendants on my behalf. I understand that the fees retained by the attorneys will be either the amount received from the defendant or 1/3 of my gross settlement or judgment amount, whichever is greater.

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