IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, on his own behalf and on behalf of all others similarly situated, Plaintiffs, v. NEW PRIME INC., Defendant.	Civil Action No. 1:15-cv-10603-PBS **Leave to file excess pages granted on September 12, 2019**

PLAINTIFFS' MOTION FOR COLLECTIVE ACTION CERTIFICATION PURSUANT TO 29 U.S.C. § 216(B) AND CLASS CERTIFICATION ON MISSOURI STATE LAW CLAIMS PURSUANT TO FED. R. CIV. P. 23 AND MEMORANDUM IN SUPPORT THEREOF

Plaintiffs seek certification of a collective action and permission to issue notice pursuant to 29 U.S.C. § 216(b) with respect to their claims brought against New Prime, Inc. (doing business as "Prime Inc." and referred to herein as "Prime") under the Fair Labor Standards Act (Count I). Specifically, Plaintiffs request certification of the following collective:

> All individuals who have attended training to become truck drivers for Prime and/or have driven for Prime either as employee drivers or as independent contractor drivers who have leased their trucks through Prime at any time since October 2, 2012.[1]

In addition, pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs seek certification of the following class with respect to their state law claims under the Missouri Minimum Wage Law, MO. Rev. Stat. § 290 (Count II) and Missouri common law (Count III):

[1] The parties agreed to toll the statute of limitations on the FLSA claims for opt-in plaintiffs as of October 2, 2015. *See* Dkt. No. 59. The plaintiffs allege that Prime's violations of the FLSA are willful, so the statute of limitations is three years. 29 U.S.C. §255.

> All individuals who have attended training in Missouri to become truck drivers for Prime at any time since March 4, 2010.[2]

Plaintiffs seek designation of Plaintiff Dominic Oliveira as the class representative and Hillary Schwab, Esq. and Rachel Smit, Esq. of Fair Work, P.C. and Andrew Schmidt, Esq. of Andrew Schmidt Law, PLLC as class counsel.

The proposed FLSA collective and Rule 23 class should both be certified because they are comprised of similarly situated workers who have suffered the same alleged violation of their wage rights. Moreover, certifying the two proposed classes will advance the remedial purposes of the underlying statutes, in that certification will enable a large group of low-wage workers to consolidate resources in order to obtain recovery from their employer. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'"); *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 761 (Mo. 2014) (the Missouri Minimum Wage Law, "is a remedial statute with the purpose of ameliorating the 'unequal bargaining power as between employer and employee' and to 'protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.'"). Accordingly, Plaintiffs respectfully request that the Court grant collective certification pursuant to 29 U.S.C. § 216(b) and class certification pursuant to Rule 23.

---

[2] The statute of limitations for a claim under the Missouri Minimum Wage Law is three years. Mo. Ann. Stat. § 290.527 (West). The statute of limitations on the claims brought under Missouri common law is five years. *Trapp v. O. Lee, LLC*, 918 F. Supp. 2d 911, 915 (E.D. Mo. 2013) (citing Mo. Rev. Stat. § 516.120).

CHALLENGED PRACTICES

The alleged violations in this case fall into three basic categories: claims for unpaid training; minimum wage claims for employee drivers; and minimum wage claims for independent contractor drivers. Specifically, Plaintiffs assert the following claims:

(1) Drivers should have been compensated by Prime for unpaid training and should not have been required to pay a registration fee for training.

(2) For drivers who are classified by Prime as employees and paid on a mileage-based system:

a. Prime should not have made deductions from drivers' wages for cash advances made by Prime during unpaid training, wire charges, ID cards required by the Transportation Security Administration, tire chains, and other "tools of the trade," to the extent that those deductions reduced the drivers' pay below minimum wage.

b. Prime should have counted sleeper berth and other off-duty hours in excess of eight hours during a twenty-four hour shift as working time, for which the drivers must be compensated at least the minimum wage.

c. Prime should not have made deductions from drivers' last paychecks for costs purportedly associated with their Prime training.

d. Prime should not have engaged in post-employment debt collection from drivers for costs purportedly associated with their Prime training.

(3) For drivers who are classified by Prime as independent contractors and paid based on line-haul revenue and who leased their trucks through Prime:

a. Prime should not have made deductions from drivers' wages for the costs of operating a trucking business—including but not limited to tractor lease payments, equipment, repairs, insurance, and fuel—to the extent that those deductions reduced the drivers' pay below minimum wage.

b. Prime should have counted sleeper berth and other off-duty hours in excess of eight hours during a twenty-four hour shift as working time, for which drivers must be compensated at at least the minimum wage.

c. Prime should not have made deductions from drivers' last paychecks for costs purportedly associated with their Prime training and/or for the normal costs of operating a trucking business.

d. Prime should not have engaged in post-employment debt collection from drivers for costs purportedly associated with their Prime training and/or normal costs of operating a trucking business.

OVERVIEW OF PRIME INC.'S BUSINESS MODEL

Prime recruits and trains drivers with all levels of experience, including those who do not yet have a Commercial Driver's License ("CDL"). Affidavit of Rachel Smit, Esq. ("Aff."), ¶ 22.[3] Prime classifies newly recruited drivers based on their level of experience and requires different levels of training depending on the level of experience. Prime has a lengthy training program that includes both orientation classes and on-the-road driving. *Id.* at ¶¶ 28, 39, 51–52, 57, 60. Once drivers complete the training program, they may begin driving for Prime either as employee drivers or as independent contractor drivers and they may drive either as team drivers (meaning one driver is behind the wheel while the other driver is in the sleeper berth or in the passenger seat, which allows the truck to be in almost continuous motion) or as solo drivers. *Id.* at ¶¶ 7, 27, 68.

Prime's classification system for newly recruited drivers is as follows:

Category	**Experience Level (as determined by Prime)**
A seat	Drivers have CDLs and have sufficient driving experience to be a lead driver in a team or a solo driver
B seat	Drivers have CDLs and some driving experience but do not have sufficient driving experience to be a lead driver in a team or a solo driver
C seat	Drivers have CDLs and some driving experience but do not have sufficient driving experience to be a lead driver in a team or a solo driver
D seat	Drivers do not have CDLs or have CDL licenses but no or minimal driving experience

[3] Plaintiffs file herewith the Affidavit of Rachel Smit, Esq., which sets forth the facts relevant to this motion in more detail, along with citations to the relevant documentary evidence and deposition testimony.

Id. at ¶ 22.

Prime's training program has several steps, depending on which category the driver is in. Most of this training is unpaid. Specifically:

Training	**Description/Length**	**Driver Categories**	**Compensation**
Prime's Student Driver ("PSD") orientation	4-5 days of orientation in a classroom setting	D seat	Unpaid
Prime's Student Driver over-the-road instruction ("PSD instruction")	2-4 weeks of over-the-road team driving with experienced lead driver	D seat	Unpaid
Orientation	4-5 days of orientation in a classroom setting	A seat, B seat, and C seat	Unpaid until Sept. 2018, when Prime started paying $70/day
"TNT' over-the-road training	Pre-determined number of miles of over-the-road team driving with experienced lead driver	B seat, C seat, and D seat	Paid
Upgrade Orientation	4-5 days	B seat, C seat, and D seat	Unpaid until approx. 2015

Id. at ¶¶ 28–29, 39, 52, 57, 65–66.

In addition to receiving no compensation, D seat drivers are required to pay a $100 registration fee in order to start the PSD orientation. *Id.* at ¶ 31. Those drivers enter into tuition repayment contracts, which make them responsible for a repayment obligation in an amount that has ranged from $3,500 in 2013 to $4,375 if they do not drive for Prime for at least one year after training. *Id.* at ¶¶ 32–35, Exhibits 7–11. This "tuition" or "program fee" charge, according to Prime, is "inclusive of room and board provided at 2610 N Glenstone Ave, Springfield, MO (65803) a New Prime Inc. owned facility, meals, travel, administrative, and associated processing costs incurred by PRIME during the program orientation and onboarding processes."

See id. at ¶ 35. During the unpaid PSD over-the-road instruction, drivers receive "advances" from Prime of up to $200 per week for meals. *Id.* at ¶ 29.

Drivers are paid mileage-based wages for their driving during the TNT team-driving training. *Id.* at ¶ 58. Drivers who become employee drivers (either after training or upon initial hire) are also paid mileage-based wages, with different rates depending on whether they are team or solo drivers. *Id.* at ¶ 74. Drivers log their time while they are on the road pursuant to Department of Transportation regulations as on-duty time, driving time, sleeper berth time, and off-duty time. *Id.* at ¶ 76. While team driving on trips of greater than twenty-four hours, drivers often log more than eight hours of sleeper berth and other off-duty time during a twenty-four hour period. *See, e.g., id.* at ¶¶ 133–34.

Employee drivers have the following deductions taken from their pay:

- for drivers who attend the PSD training and sign tuition repayment contracts, $25 per week as "repayment" for Prime's advances for meals during the PSD over-the-road instruction period;
- a $1 wire charge for wage advances;
- deductions totaling approximately $130 for an ID card required by the Transportation Security Administration (Transportation Worker Identification Credential or TWIC);
- a $1 deduction per week for use of Prime's fuel card; and
- deductions for costs of tire chains and other "tools of the trade."

Id. at ¶¶ 63, 74, 143. Some of these deductions begin during the TNT over-the-road training period, and others begin after training is complete. *Id.* at ¶¶ 63, 74.

Additionally, if drivers who were recruited as D seat drivers end their employment with Prime before driving for one year, then Prime withholds the amount of "tuition" from drivers' last paychecks. Prime may also pursue post-employment debt collection from those drivers

through its debt collection department. *Id.* at ¶ 147. Prime utilizes a standard form letter to collect on outstanding debt from former drivers. *Id.*, Exhibit 36.

Independent contractor drivers (also referred to as IC drivers) learn how to become an allegedly "independent" business from Prime during their upgrade orientation. During orientation, Prime provides a class on trucking accounting taught by Abacus CPAs, a third-party accounting firm that maintains an office in Prime's Springfield headquarters. *Id.* at ¶ 124. Prime's IC drivers are encouraged to hire Abacus to form their limited liability companies ("LLCs"). *Id.* at ¶ 124–25. IC drivers also go through a leasing class during orientation taught by Success Leasing, which owns all of Prime's tractors and is essentially the same entity as Prime. *Id.* at ¶ 69. The vast majority (90 percent) of Prime's IC drivers ultimately lease their tractors and other required equipment from Success Leasing. *Id.* at ¶ 81. IC drivers then lease their tractors back to Prime in order to drive under Prime's Department of Transportation operating authority. *Id.* at ¶ 19.

Prime has its IC drivers pay for most of the costs of operating its trucking business—through automatic deductions from earnings—including by paying to lease the tractors from Prime/Success Leasing. *Id.* at ¶ 115. The lease agreements are form contracts that include numerous terms favorable to Success Leasing, including a per-mile payment and an excess mileage fee. *Id.* at ¶ 86, 101–03, Exhibit 20. IC drivers must purchase their own tools and numerous forms of insurance (with minimum coverage requirements set by Prime) and must pay for vehicle repairs. *Id.* at ¶¶ 110, 112, 123. IC drivers frequently purchase these items from Prime or through third parties with whom Prime has negotiated, and the amounts are deducted from IC drivers' earnings. *See, e.g., id.* at ¶¶ 16, 103, 113. IC drivers are also responsible for

paying the fuel costs of every load, as well as fuel taxes, tolls, and other variable costs, also through deductions from earnings. *Id.* at ¶ 108.

IC drivers are paid a fixed share of "line-haul revenue" for each load they drive for Prime. *Id.* at ¶ 129. Drivers are paid in weekly "settlements" whereby Prime calculates the driver's share of revenue and then automatically deducts all of the IC drivers' costs—including lease payments to Success Leasing, payments to Abacus CPAs, insurance payments, repairs, accounting services, etc. *See, e.g., id.* at ¶¶ 108, 110, 139. If there is a positive balance, the driver gets paid. If there is a negative balance, the driver receives no compensation, and the negative balance gets carried forward to the next pay period, with interest. *Id.* at ¶ 111. Because drivers owe Prime numerous fixed payments each week (regardless of whether or not they drive that week), in any week when Prime does not have sufficient loads for them or when drivers are sick and cannot drive, they fall into debt with Prime. *Id.*

Although IC drivers are allegedly independent, in reality they have very limited opportunities for entrepreneurial discretion. *Id.* at ¶ 99, 104. Prime negotiates prices for line-haul with its shipping customers, which means that if Prime underprices a job, the IC driver may not be able to cover costs. *Id.* at ¶¶ 100, 109. Prime sets almost all of the prices faced by IC drivers, including the amount of the tractor lease payments, the per-mile lease charge, the excess mile lease charge, as well as numerous other charges that are automatically deducted from the earnings of IC drivers. *Id.* at ¶¶ 100–02, 112–113, 115. These deductions frequently resulted in Mr. Oliveira having negative balances at the end of a pay period. *Id.* at ¶ 138. In other words, instead of receiving compensation for his revenue-generating work for Prime, he owed Prime money.

Prime also exercises extensive control over IC drivers. For example, Prime closely monitors IC drivers' hours-of-service logging. Prime disciplined Mr. Oliveira for improperly using the category "off-duty driving" (also known as "personal conveyance") by suspending his ability to log hours using that category for 30 days. *See i.d.* at ¶ 98; *see also* ¶¶ 95–97.

Upon termination, Prime deducts any balances owed by IC drivers from their revenue in their final settlement. *Id.* at ¶¶ 143–44. This includes amounts owed in connection with the truck lease and, for drivers who attended the PSD training and did not drive for at least one year, the amounts deducted also include the cost of "tuition." *Id.* For example, Opt-in Plaintiff Ferro received no compensation for his hours worked in his last paycheck because, among other charges, Prime deducted $963 for tuition. *Id.* Prime's collections department pursues debt collection from IC drivers after they have stopped driving for Prime. *Id.* at ¶ 147.

ARGUMENT

I. THE COURT SHOULD CERTIFY A COLLECTIVE UNDER THE FLSA OF ALL DRIVERS WHO HAVE NOT BEEN PAID MINIMUM WAGES OWED TO THEM UNDER THE FLSA, 29 U.S.C. § 201, *ET SEQ.*

A. The FLSA permits cases to proceed on behalf of collectives of "similarly situated" workers.

The FLSA authorizes workers "to band together to enforce their rights by initiating or joining a collective action." *Romero v. Clean Harbors Surface Rentals USA, Inc.*, 368 F. Supp. 3d 152, 160 (D. Mass. 2019); 29 U.S.C. § 216(b). Unlike Rule 23 procedures, workers may only join an FLSA collective action if they "give [their] consent in writing to become . . . a party and such consent is filed with the court in which [the] action is brought." 29 U.S.C. § 216(b). Section 216(b) further diverges from Rule 23 by "requir[ing] only that collective action plaintiffs be 'similarly situated.' Thus, the FLSA allows plaintiffs to proceed collectively based on a

lesser showing than that required by Rule 23." *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 359 (D. Me. 2010).

Although many courts use a two-step process to certify a collective action, "there is nothing talismanic about the two-step process, particularly because the First Circuit has never required it." *Montoya v. CRST Expedited, Inc.*, 311 F. Supp. 3d 411, 419 (D. Mass. 2018) (Saris, C.J.). Here, because the initial phase of discovery into class certification issues has been completed and in the interest of judicial economy, Plaintiffs propose that the Court may make the second-step determination now.

While the second-stage is "heavier" than the first-stage inquiry, it is "still not the factor-by-factor calculus comparable to that required for certification of a Rule 23 class." *Prescott,* 729 F. Supp. 2d at n.8. "At this procedural stage, the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations." *CRST*, 311 F. Supp. 3d, *quoting Lynch v. United Servs. Auto. Ass'n*, 491 F. Supp. 2d 357, 368 (S.D.N.Y. 2007). Rather, the burden on plaintiffs is merely "to put forth some evidence that the legal claims and factual characteristics of the class in [the] case are similar." *CRST*, 311 F. Supp. 3d, *quoting Trezvant v. Fidelity Employer Servs. Corp.*, 434 F. Supp. 2d 40, 43 (D. Mass. 2006).

B. The workers in the proposed collective are similarly situated for purposes of the challenged practices.

Dominic Oliveira and the other drivers who attended orientation and/or drove for Prime as employee drivers or IC drivers are similarly situated. They were all subject to Prime's uniform training program and practices with respect to compensation and wage deductions, and the legal issues with respect to the claims are the same for all members of the collective.

1. Unpaid Training

First, as to unpaid training, the following facts are common for the proposed collective:

- The attendance at unpaid orientation programs, including the initial PSD orientation for D seat drivers, the PSD instruction for D seat drivers, initial orientation for A seat, B seat, and C seat drivers, and the final upgrade orientation (prior to 2015) for B seat, C seat, and D seat drivers.

- The substance of those orientation programs.

- The uniform materials used in connection with the orientation programs, including materials describing the orientations, training materials, contracts signed by drivers in connection with the orientation programs, etc.

- The lack of (or insufficient) compensation for those orientation programs.

Aff. at ¶¶ 23, 25–38, 39–47, 64–72. The common legal questions as to unpaid training include:

- Are drivers properly categorized as employees during training, such that they should have been paid at least minimum wage for the training?

- Does the $100 registration fee for the PSD training constitute an improper deduction from wages?

- What is the legal significance, if any, of advances for meals during the PSD over-the-road instruction program?

This Court certified an FLSA collective on nearly identical claims in the *CRST* case. There, the Court identified as a common factual issue "[t]he practice of treating Phase 1 and Phase 2 drivers as unpaid trainees" and identified as a common legal question "Are Phase 1 and Phase 2 drivers properly categorized as employees or non-employees?" *CRST*, 311 F. Supp. 3d 411, 420–21 (D. Mass. 2018). In light of those common factual and legal questions, the Court granted FLSA collective action certification on the unpaid orientation claim. *Id*.

Other courts have certified similar claims in other cases involving truck drivers. In *Nance v. May Trucking Co.*, the court certified an FLSA collective defined as "FLSA Entry Level Driver Subclass: all FLSA Class members who participated in the ELD [training/orientation] Program." *Nance v. May Trucking Co.*, No. 03:12-CV-01655-HZ, 2013 WL 10229756, at *5, *10–11 (D. Or. June 10, 2013), *aff'd*, 685 F. App'x 602 (9th Cir. 2017), and *aff'd*, 685 F. App'x 602 (9th Cir. 2017). The court observed that "[t]he orientation content

and activities did not vary for individual attendees" and therefore held that "[a] determination of whether the attendees were employees and whether they should have been paid for attending the orientation will be resolved uniformly for all potential class members." *Id*. at *7. Similarly, in *Julian v. Swift Transportation Co.*, the court certified a collective action of all individuals who had been employed by Swift as trainees on plaintiffs' FLSA claims relating to unpaid orientation and behind-the-wheel training. *See* 360 F. Supp. 3d 932, 939 (D. Ariz. 2018).

Numerous other courts have also certified FLSA collectives on claims for unpaid training in other industries. In *Crain v. Helmerich and Payne International Drilling Co.*, for example, the court certified an FLSA collective on plaintiffs' claims relating to unpaid training. No. CIV. A. 92-0043, 1992 WL 91946, at *3 (E.D. La. Apr. 16, 1992). The court rejected the defendant's argument that the claim should not be certified because of some variations among collective members regarding where trainings took place and the length of trainings, holding that "what matters is that the fundamental allegation—that according to company policy the time spent in job related meetings and training was uncompensated—is 'common to all the [FLSA] plaintiffs and dominates each of their claims.'" *Id*.[4]

2. Minimum wage/deductions claims for employee drivers

---

[4] *See also, e.g.*, *Astarita v. Menard, Inc.*, No. 5:17-CV-06151-RK, 2018 WL 7048693, at *2 (W.D. Mo. Dec. 7, 2018) (conditionally certifying FLSA collective because "Owens' allegations and evidence indicate Menard may have implemented an unpaid training policy that uniformly results in certain hourly employees being paid for fewer hours than actually worked in violation of the FLSA"); *Whitlock v. Sevier Cty., Tennessee*, No. 3:18-CV-233, 2019 WL 2744195, at *3–4 (E.D. Tenn. Apr. 19, 2019) (conditionally certifying collective of paramedics and EMTS who attended mandatory unpaid training sessions); *Schumann v. Collier Anesthesia, P.A.*, No. 2:12-CV-347-FTM-29CM, 2017 WL 1207263, at *1 (M.D. Fla. Apr. 3, 2017) (conditionally certified FLSA collective of registered nurse anesthetists who participated in unpaid clinical training program); *Krupp v. Impact Acquisitions LLC*, No. 14-C-950-PP, 2016 WL 7190562, at *6 (E.D. Wis. Dec. 12, 2016) (conditional certification granted where "the plaintiff has established that the defendants had a common policy with respect to DSTs . . . engaging in required training outside of regular business hours"); *Williams v. Securitas Sec. Servs. USA, Inc.*, No. CIV.A. 10-7181, 2011 WL 3629023, at *2 (E.D. Pa. Aug. 17, 2011) (granting conditional certification of "a collective action of Securitas employees who did not receive compensation for attending Securitas' initial orientation"); *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1010 (N.D. Cal. 2010) ("The Court . . . grants final certification with respect to the claim that Vector failed to pay trainees minimum wages for the time spent in initial training in violation of the FLSA.").

The following facts are common as to the employee drivers, both during the TNT over-the-road program and during post-training driving:

- They are paid based on mileage.
- They routinely log more than eight hours of sleeper berth and other off-duty time during a twenty-four hour period.
- They have deductions taken from their wages for PSD meal advances, TWIC cards, wire charges, and, once they become A seat drivers, tire chains, and other services necessitated by an over-the-road life such as the ability to communicate with Prime's dispatchers via text message and use of a permanent mail box at Prime's headquarters.
- They have deductions taken from their last paychecks (or their entire last paychecks withheld) in the amount of PSD "tuition" if they participated in the PSD training program and did not complete at least a year of driving.
- They are subject to post-employment collections by Prime if they participated in the PSD training program and did not complete at least a year of driving.

Aff at ¶¶ 58, 61–63, 74. The common legal issues as to employee drivers include:

- Must sleeper berth and other off-duty time in excess of eight hours per twenty-four hours be counted as compensable time?
- Are wage deductions for PSD meal advances and/or wire charges unlawful, to the extent that they reduce drivers' pay below the minimum wage?
- Are wage deductions from final paychecks for "tuition" unlawful, to the extent that they reduce drivers' pay below the minimum wage?
- Is post-employment debt collection for "tuition" amounts unlawful?

In certifying similar claims under the FLSA in *CRST*, this Court identified nearly identical factual and legal issues on these claims, specifically observing:

> The standard policies and practices include:
> - The terms of the Training Agreement and Employment Contract, which bind drivers to work for CRST for eight or 10 months while repaying certain expenses advanced by CRST, or else owe CRST thousands of dollars for tuition and training expenses, plus interest.
> . . .
> - The practice of paying "team drivers" in Phase 3 and Phase 4 according to a "split mileage" pay scale starting at 25 cents per mile.
> - The company's position that sleeper-berth time is never compensable.

> - The practice of deducting costs for training, drug tests, physical examinations, transportation, and lodging from drivers' wages.

311 F. Supp. 3d at 420. The Court further observed that "[t]hese policies and practices, in turn, raise several common legal questions, including:

> . . .
> - Are wage deductions for CRST's up-front costs for a driver's training, drug tests, transportation, and lodging lawful under the FLSA?
> - When such deductions occur, do drivers receive their wages "free and clear" under the FLSA?
> - When, if ever, during a long-haul "team driver" trip can the non-driving partner be considered "on duty"?
> - When, if ever, is sleeper-berth time compensable under the FLSA?
> - Under a piece-rate pay system, what is the proper temporal unit for measuring compliance with the minimum hourly wage requirement of the FLSA?

Id. at 420-21.

The court in *Petrone v. Werner Enterprises, Inc.* certified an FLSA collective on similar claims, concluding: "Plaintiffs have provided evidence that defendant employed a system of tracking compensable hours that failed to comply with the compensation requirements of the FLSA. Such evidence satisfies the plaintiffs' initial burden of showing that the purported class is similarly situated and provides the basis for conditional class certification." No. 8:11CV401, 2012 WL 4848900, *3 (D. Neb. Oct. 11, 2012). A few years later, the *Petrone* court also granted class certification under Rule 23 and denied the defendant's motion to decertify the FLSA collective, explaining: "The plaintiffs can point to a common policy or practice to demonstrate how they were not properly compensated. All student drivers logged their time under the same system. . . Certain off-duty time was not compensated by the defendants." *Petrone v. Werner Enterprises, Inc.*, No. 8:11CV401, 2015 WL 4772830, at *2 (D. Neb. Aug. 12, 2015).

Similarly, the court in *Browne v. P.A.M. Transport, Inc.*, certified an FLSA collective and a Rule 23 class on plaintiffs' claims that the company's failure to compensate them for

certain sleeper berth time and other off-duty time resulted in minimum wage violations. The court held that the class met both the FLSA collective certification standard and the more rigorous Rule 23 class certification standard because the claims were based primarily on "evidence that is common among all class members, such as PAM's driver manuals, trainer manuals, and administrative records, as well as testimony by PAM executives, managers, supervisors, and trainers." No. 5:16-CV-5366, 2019 WL 333569, at *4 (W.D. Ark. Jan. 25, 2019).

In *Gatdula v. CRST International, Inc.*, the court granted conditional FLSA certification on the plaintiff's wage deductions claims, because "Plaintiffs allege Defendants' policy of deducting business expenses from mileage-based compensation was the result of an intentional, company-wide practice." No. CV1101285VAPOPX, 2012 WL 12884919, at *5 (C.D. Cal. Aug. 21, 2012).[5]

As in these other cases, Plaintiffs' claims rely on common evidence, namely Prime's own policies and procedures, logs of hours, payroll records, etc., all of which demonstrate that all

[5] Numerous other courts have granted collective action certification on claims relating to improper deductions reducing employees' wages below minimum wage. *See, e.g.*, *Whalen v. Degroff Indus., Inc.*, No. 1:17-CV-2092, 2017 WL 5588868, at *2 (N.D. Ohio Nov. 21, 2017) (conditionally certifying collective on claim challenging deductions from paychecks based on the plaintiff's declaration, clock-out stubs, and paystubs); *Dualan v. Jacob Transportation Servs.*, LLC, 172 F. Supp. 3d 1138, 1143 (D. Nev. 2016) (conditionally certifying FLSA collective of shuttle-bus drivers who experienced wage deductions and unpaid minimum wage and overtime because "plaintiffs' averments suggest . . . that they were subject to a company-wide pattern, plan, policy, decision, or practice"); *Ballou v. iTalk, LLC*, No. 11 C 8465, 2013 WL 3944193, at *6 (N.D. Ill. July 31, 2013) (conditionally certifying deductions claim where plaintiff has identified that he and other similarly situated employees were all subject to defendant's policy of taking a $125 "on-boarding deduction" from employees' pay); *Griffith v. Fordham Fin. Mgmt., Inc.*, No. 12 CIV. 1117 PAC, 2013 WL 2247791, at *4 (S.D.N.Y. May 22, 2013) (granting conditional certification where plaintiff had shown that defendant "deducts a number of expenses from the commissions earned by stockbrokers, including various types of fees, postage, healthcare costs, and costs for purchasing leads on potential clients and the use of assistants"); *Schemkes v. Presidential Limousine*, No. 2:09-CV-1100-GMN-PAL, 2011 WL 868182, at *3 (D. Nev. Mar. 10, 2011) (granting conditional certification where "[t]he single policy or plan is [] the common claim that Defendants . . . took deductions from the drivers' paychecks in violation of FLSA").

employee drivers are treated the same for purposes of wage deductions and hours logged and compensated. As such, collective action certification is proper on these claims.

3. Independent contractor drivers

The following facts are common as to IC drivers:

- The substance of the orientation/upgrade orientation, including training relating to accounting and leasing.
- The contracts that IC drivers enter into with Prime and its affiliates, including Success Leasing, LLC and Abacus CPAs, LLC.
- Prime's fleet management system and system for assigning loads to particular IC drivers.
- Prime's system of setting prices, compensating IC drivers, and taking deductions from their earnings.
- Prime's policies and procedures and system for logging IC drivers' hours.
- Prime's system of monitoring IC drivers in a myriad of ways, including receipt of critical event alerts, which notify Prime of a truck's sudden movements, close scrutiny of IC drivers hours-of-service logging and reprimands when IC drivers fail to log their hours properly, and maintenance of an "incidence" database associated with each IC driver.
- Prime's system for disciplining IC drivers, including remedial training, shutting off access to hours-of-service logging functionality, suspension, and termination.

Aff. at ¶ 39–42, 44, 65–72, 81–132. The common legal questions for IC drivers include:

- Are IC drivers in fact employees of Prime such that they must be paid at least minimum wage under the FLSA?[6]
- Must sleeper berth and other off-duty time in excess of eight hours per twenty-four hours be counted as compensable time?

---

[6] The test for an employment relationship under the FLSA is based on the "economic realities" of the relationship, which requires an examination of the worker's "'economic dependence on or independence from' the alleged employer." *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019). To this end, courts have developed a six-factor analysis to evaluate the economic reality of the relationship, taking into account: "(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business." *Id.* (citation omitted); *Thomas v. TXX Servs., Inc.*, 663 F. App'x 86, 89 (2d Cir. 2016) (merging factors (2) and (3) into one factor); *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1160 (10th Cir. 2018).

- Are deductions from IC drivers' pay for Prime's costs of doing business unlawful to the extent that they reduce drivers' pay below the minimum wage?
- Are deductions from IC drivers' pay from final paychecks for "tuition" and/or costs relating to drivers' leases unlawful, to the extent that they reduce drivers' pay below the minimum wage?
- Is post-employment debt collection from IC drivers for "tuition" amounts unlawful?
- Is post-employment debt collection from IC drivers for Prime's costs of doing business unlawful?

These claims are appropriately certified for collective treatment. Other courts have certified collectives based on much less proof of similarity among drivers. In *Carter v. Paschall Truck Lines, Inc.*, the court held that conditional FLSA certification was appropriate because "Plaintiffs provided enough evidence of similarities between drivers that signed a lease agreement, including job duties, hours worked, other pay deductions." No. 5:18-CV-041-TBR, 2019 WL 1576572, at *3 (W.D. Ky. Apr. 11, 2019).

Other courts have similarly certified FLSA collectives of drivers on independent contractor misclassification claims based on evidence that the drivers shared similar job descriptions, contracts, applicable policies governing their work, and compensation structures. See, e.g., *Harris v. Express Courier International, Inc.*, No. 5:16-CV-05033, 2016 WL 5030371, at *4 (W.D. Ark. Sept. 19, 2016) (delivery drivers "hold the same job title," "work under the same policies and practices enforced by the company, and are or were subject to the same alleged violations of law during the same period of time," "are generally paid on a per-stop basis, regardless of individual gas or vehicle-maintenance expenses, and all must sign the same contract agreeing they are independent contractors" and "all perform essentially the same job"); *Grady v. Alpine Auto Recovery LLC*, No. 15-CV-00377-PAB-MEH, 2015 WL 3902774, at *2 (D. Colo. June 24, 2015) (tow truck drivers all held similar positions and were compensated in the same way and "Plaintiff argues that defendants hid their misclassification scheme behind a

sham 'truck lease' payment"); *Elmy v. West Express, Inc.*, No. 3:17-CV-01199, 2019 WL 1787664, at *2 (M.D. Tenn. Apr. 24, 2019) ("Plaintiff and the other truck drivers assert they had been presented with the New Horizons Lease and Western 'owner operator' contract at the same time as a package deal, classified as an independent contractor, required to pay for all costs and expenses related to insuring, operating, and maintaining the leased truck, required to follow Defendant Western's policy manuals and procedures for picking up and delivering loads, and were paid less than the federal minimum wage some weeks."); *Scovil v. FedEx Ground Package Systems, Inc.*, 811 F. Supp. 2d 516, 519–20 (D. Me. 2011) (drivers "had similar job duties (delivery drivers for FedEx), were paid according to common policies and practices (payment per-package delivered, pursuant to an "Operator Agreement"), reported to FedEx terminal managers, and were subject to a common FedEx policy, namely, alleged misclassification of employment status").

The evidence in this case more than suffices to establish that Oliveira and other drivers who leased their trucks through Prime are similarly situated for purposes of these claims. All contractor drivers were classified as independent contractors, all underwent a standardized training with Prime, all entered into identical contracts relating to their truck leases, all performed the same job, all were governed by the same policies and procedures, all were paid in the same way, all had the same deductions taken from their pay, etc. These claims should proceed on behalf of a collective under 29 U.S.C. § 216(b).

II. THE COURT SHOULD CERTIFY A CLASS UNDER FED. R. CIV. P 23 OF ALL DRIVERS WHO HAVE ATTENDED ORIENTATION IN MISSOURI.

A. The Court has broad discretion to certify a class under Rule 23.

"District courts have broad discretion concerning issues of class certification." *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985). Under Rule 23, class certification is

appropriate when: (1) the class is so numerous that joinder of all members is impractical (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative party are typical of the class (typicality); (4) the representative party will fairly and adequately protect the interests of the class (adequacy); (5) questions of law or fact common to the members of the class predominate over questions affecting individual members (predominance); and (6) a class is superior to other methods for the fair and efficient adjudication of the controversy (superiority). Fed. R. Civ. P. 23(a), (b)(3).

B. Class certification is appropriate under Rule 23.

Plaintiffs seek certification of a Rule 23 class under Missouri's wage statutes and common law with respect to unpaid training that occurred in Missouri. The Missouri Minimum Wage Law ("MMWL") defines "employee" and "employer" almost identically to the FLSA. *Compare* Mo. Ann. Stat. § 290.500 (West) ("Employee" and "Employer") *with* 29 U.S. Code § 203(d), (e)(1) ("Employer" and "employee"). Like the FLSA, the MMWL is a remedial statute, which should be "construed broadly to effectuate the statute's purpose." *Tolentino*, 437 S.W.3d at 761. Moreover, "except as otherwise provided in Missouri law, the interpretation and enforcement of the [MMWL] will follow the FLSA regulations." *Fields v. Advanced Health Care Mgmt. Servs., LLC*, 340 S.W. 3d 648, 654 (Mo. Ct. App. 2011) (citing Mo. Code Regs. Ann. tit. 8, § 30-4.010(1)). The MMWL provides employees with a private right of action to recover unpaid minimum wages and further provides for mandatory treble damages. Mo. Ann. Stat. § 290.527.

Missouri common law also allows employees to bring an action under a breach of contract or quantum meruit theory for unpaid wages. *See, e.g.*, *Trapp v. O. Lee, LLC*, 918 F. Supp. 2d 911, 914 (E.D. Mo. 2013) (plaintiffs' claims for unpaid straight time wages under

breach of contract, quantum meruit, and unjust enrichment theories may proceed under five-year statute of limitations for common law claims); *Quigley v. Nat'l Asset Recovery Servs., Inc.*, No. 4:13CV00031 ERW, 2013 WL 2099439, at *4 (E.D. Mo. May 14, 2013) (same).

The proposed class meets all requirements for certification under Rule 23.

1. The class is ascertainable.

This Court observed in *CRST* that "[t]he First Circuit . . . requires that a putative class be 'ascertainable' by reference to 'objective criteria.'" 311 F. Supp. 3d at 422 (quoting *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015)). Here, there can be no question that this requirement is satisfied. Prime's records regarding drivers' attendance at orientation and other training provide objective criteria to ascertain the class. *See DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 407 (D. Mass. 2017) ("Border Transfer's driver records should allow an objective determination of who qualifies. . .").

2. The class is too numerous for practicable joinder.

Rule 23 first requires that the proposed class be so numerous that joinder would be impracticable. The evidence establishes that thousands of drivers, including thousands of D seat drivers, attend Prime's orientation each year. Aff. at ¶ 23, Exhibit 23. Until two or so years ago, D seat orientation occurred exclusively at Prime's headquarters in Springfield, Missouri. Aff. at ¶ 24. It is reasonable to infer, therefore, that the class of individuals who have attended orientation for Prime in Missouri since March 4, 2010, numbers several thousands. "Common sense dictates that where the class numbers in the thousands [] 'joinder of all would be impracticable and [] the numerosity requirement has been satisfied.'" *Kerrigan v. Philadelphia Bd. of Election*, 248 F.R.D. 470, 474 (E.D. Pa. 2008); *see also In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 388 (D. Mass. 2011) (numerosity

satisfied where "the Court can reasonably infer that there are at least hundreds, if not thousands of class members").

3. Commonality is satisfied.

"The threshold of 'commonality' is not high," *In re Lupron Marketing & Sales Practices Litigation*, 228 F.R.D. 75, 88 (D. Mass. 2005), requiring only a "single common legal or factual issue," *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003), that is "capable of classwide resolution," *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2551 (2011). Courts usually deem commonality satisfied when the class members' claims arise out of a companywide policy or practice. *See*, *e.g.*, *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 309-10 (D. Mass. 2004).

Plaintiffs' Missouri wage claims are defined by common facts and legal questions. The common facts include: the substance of the orientation programs; the materials relating to the orientation programs; the compensation (or lack thereof) for the orientation programs; etc. Aff. at ¶¶ 23, 25–38, 39–47, 64–72. The common legal questions are: whether the drivers are employees entitled to compensation for the orientation programs; and the calculation of damages owed for unpaid orientation (including the invalidity of the $100 orientation fee paid for PSD training). The analysis of these legal questions will require consideration of uniform policies and practices applicable to all drivers. As such, commonality is satisfied.

4. Plaintiff Oliveira's claims are typical.

"The typicality requirement is satisfied when the [named] plaintiff's injuries arise from the same events or course of conduct as do the injuries that form the basis of the class claims, and when the plaintiff's claims and those of the class are based on the same legal theory." *Guckenberger v. Boston University*, 957 F. Supp. 306, 325 (D. Mass. 1997).

Oliveira is typical of the class. He attended unpaid orientation sessions in Springfield, Missouri, including the PSD training program and an upgrade orientation. *See* Aff., Exhibit 6. The injuries he suffered—namely uncompensated work time during these orientation programs—are the same as those suffered by members of the class. Therefore, his claims are typical of the class because their injuries "arise from the same … course of conduct as do the injuries that form the basis of the class claims," and are "based on the same legal theory." *See Guckenberger*, 957 F. Supp. at 325; *see also CRST*, 311 F. Supp. 3d at 424 ("Montoya fits the bill of typicality . . . Specifically, Montoya, like many other drivers, attended the Phase 2 [orientation] program in Iowa."). As in *CRST*, a finding of typicality is appropriate because "both [Oliveira] and the [other drivers who attended orientation in Missouri] have an interest in convincing the Court to interpret [Missouri's] wage laws to cover their early involvement in [orientation]. Therefore, [Oliveira's] interests closely align with those of the [orientation] class." *Id.*

5. Plaintiff Oliveira and his counsel are adequate class representatives.

Adequacy consists of two factors: "(1) the absence of potential conflict between the named plaintiff and the class members and (2) that counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation." *Adair v. Sorenson*, 134 F.R.D. 13, 18 (D. Mass. 1991).

Oliveira is an adequate class representative. Not only has he brought this lawsuit on behalf of his fellow drivers, he has sought to represent the interests of the class by raising awareness among members of the public about the issues faced by long-haul truckers.[7] If the

[7] *See, e.g.*, NY Times Editorial Board, *The Trouble with Trucking* (Aug. 11, 2018), *available at* https://www.nytimes.com/2018/08/11/opinion/sunday/the-trouble-with-trucking.html.

class is certified and plaintiffs prevail, all class members will benefit from a monetary recovery thanks to his efforts. His adequacy cannot plausibly be questioned. *See McLaughlin*, 224 F.R.D. at 310 (finding adequacy satisfied where "all class members 'have the same interest in being properly compensated'").

Plaintiffs' counsel as well is well qualified to represent the class. Lead counsel Hillary Schwab co-founded Fair Work, P.C. in 2013 and has been representing employees in wage and hour cases against their employers for approximately fourteen years. Over the last ten years alone, Attorney Schwab has represented employees in well more than thirty class action cases in both state and federal court. Her experience has led other courts to conclude that Attorney Schwab is an adequate representative. *See, e.g., Chebotnikov v. LimoLink, Inc.*, No. CV 14-13475-FDS, 2017 WL 2909808, at *2 (D. Mass. July 6, 2017) ("[P]laintiffs' chosen lead counsel, Hillary Schwab, appears to be a qualified and experienced attorney in the areas of employment law and class action litigation."). She is also lead counsel for the plaintiff truck drivers in *Montoya v. CRST*, which involves claims similar to those in this case. Rachel Smit, Esq. works closely with Hillary Schwab, Esq. at Fair Work, P.C. on numerous class actions, including *Montoya v. CRST*; she was also class counsel in *Chebotnikov*.

Andrew Schmidt Law, PLLC is adequate class counsel as well. Andrew Schmidt, Esq. is the principal of Andrew Schmidt Law PLLC and is of counsel for Towards Justice, and innovative impact litigation nonprofit in Denver, Colorado. Attorney Schmidt has represented hundreds of low-wage workers in both individual and class/collective actions. He has been appointed class counsel in several unpaid wages cases, *see Rivera v. Carniceria y Verduleria Guadalajara Inc*. et al, 1:13-cv-02309-REB-MJW (D. Colo.); *Menacol v. The GEO Group, Inc*. 14-cv-02887-JLK (D. Colo.), and is also one of the attorneys for plaintiffs in *Montoya v. CRST*.

He is litigating many other putative class and collective actions for workers and consumers in federal courts in Massachusetts, Colorado, New York, and Florida.

6. Common issues predominate.

Predominance is satisfied where a "sufficient constellation of issues binds the class members together," *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000), "not that all issues be common to the class," *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003). "A 'single, central issue' as to the defendant's conduct vis-a-vis class members can satisfy the predominance requirement even when other elements of the claim require individualized proof." *Payne*, 216 F.R.D. at 26.

Significantly, numerous courts have certified Rule 23 classes for unpaid training claims, holding that common issues predominate on these claims. First, this Court certified a Rule 23 class of CRST drivers who had attended orientation in Iowa and asserted minimum wage claims under the Iowa wage laws. The Court held:

> These drivers apparently performed relatively standardized tasks in Iowa for readily ascertainable periods of time (one to three weeks for Phase 1, and approximately three days for Phase 2). The common question of whether [the Iowa wage laws should apply to these claims] raises few, if any, individual issues. Phase 1 and Phase 2 drivers were not paid at all. If the law required them to be paid, no math is necessary to determine that a minimum-wage violation occurred. Accordingly, . . . the Court finds that common legal and factual questions exist, and they predominate over individual issues.

Montoya v. CRST Expedited, Inc., 311 F. Supp. 3d at 423–24. Similarly, in the *May Trucking* case, the United States District Court for the District of Oregon certified a Rule 23 class for Oregon minimum wage claims relating to unpaid orientation. 2013 WL 10229756, at *6–7. The court held that the predominance factor was met because "whether attendees should be paid for orientation is a common question that will be answered uniformly for all class members" and

"the calculation of damages would be a 'mechanical task' that would be based on Defendant's payroll records." *Id*. at *7.

In *Hawkins v. Securitas Security Services USA, Inc.*, the court certified a Rule 23 class for unpaid training and orientation under the Illinois minimum wage laws. 280 F.R.D. at 396-97. The court held that common issues predominated: "The most significant factual issue is whether Securitas required its employees to undergo training and orientation, and the most significant legal issue is whether the time spent in training and orientation is compensable under IMWL. Both issues can be resolved on a classwide basis. " *Id*. at 396.[8]

Notably, this Court in *CRST* and another court have granted summary judgment to certified Rule 23 classes of drivers on unpaid training claims similar to Plaintiffs' claim here, further demonstrating that these claims are amenable to determination using common classwide proof. *See CRST*, No. 16-10095-PBS, __ F. Supp. 3d __, 2019 WL 4230892, *14 (D. Mass. Sept. 6, 2019) (granting summary judgment to Rule 23 class on unpaid orientation claims under Iowa's minimum wage statute); *Griffus v. Knight Transp. Inc.*, No. 1006-08538, 2012 WL 7784565 (Or. Cir. Mar. 5, 2012) (holding "time spent at Knight's Orientation training program constituted work time and is subject to Oregon's minimum wage requirements").

Plaintiffs' Missouri wage claims are defined by common factual issues and legal questions which may be answered on a class basis. Specifically, Plaintiffs present evidence that Prime required its drivers to attend orientation and training, it was unpaid, Prime's training

---

[8] *See also Rosario-Guerrro v. Orange Blossom Harvesting*, 265 F.R.D. 619, 629 (M.D. Fla. 2010) (holding that plaintiffs had "shown that common questions of fact and law predominate over the issues affecting individual members of the class" when complaint alleged common practice of workers not being paid for viewing training videos); *Courtright v. Bd. of Cty. Comm'rs of Payne Cty., Okla.*, 2009 WL 1076778, at *3 (W.D. Okla. Apr. 21, 2009) ("The Court finds that Plaintiff has sufficiently shown a putative class of Payne County jailers and dispatchers who were subjected to the alleged wage practices of uncompensated training sessions and work in excess of 40 hours per week during the relevant time period.").

materials were used, and it occurred in Missouri as to a large number of the drivers. Aff. at ¶¶ 23–38, 39–47, 64–72. The central legal question applicable to all drivers who attended any of this unpaid training in Missouri is whether or not the drivers were employees at the time of the training such that the training constituted compensable work. Common factual and legal issues predominate.

7. A class action is decidedly superior to the alternatives.

Finally, a class may be certified if it is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This superiority requirement was designed to ensure the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 70 (D. Mass. 2005), *quoting Amchem*, 512 U.S. at 617. Its purpose is to achieve judicial economy by consolidating numerous individual claims, *Overka*, 265 F.R.D. at 24, where denial of class certification would result in a "multiplicity of small individual suits," *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980), and where a class action will serve as a means of privately enforcing a substantive remedial statute. *See* Newberg on Class Actions § 4:66 (5th ed.).

Granting class certification is the superior means of adjudicating this case for at least three reasons. First, this case challenges Prime's uniform policies and practices. Given the common factual circumstances present in this case, it is more efficient and economical to resolve the legality of these challenged practices in one classwide proceeding. This is especially true given the available alternatives, which would be either a series of individual cases or deprival of recovery to many thousands of similarly aggrieved workers. *See CRST*, 311 F. Supp. at 424

(superiority requirement met where "class treatment is more efficient and will promote uniformity of decision as to the drivers' wage claims").

Second, class adjudication is superior in the context of wage claims, and especially so for a transient workforce of truck drivers who are rarely home or may not have a home base. Many of these workers would be unlikely to find a lawyer willing to take their cases on an individual basis. And they may not even seek an attorney's advice for fear of retaliation, which is all too common and all too easily accomplished in at-will employment relationships. Risk of reprisal by an employer weighs in favor of certification. *See Overka*, 265 F.R.D. at 24 ("[C]lass adjudication is superior in the employment context because fear of employer retaliation may have a chilling effect on employees bringing claims on an individual basis"); *McLaughlin*, 224 F.R.D. at 308-09 ("Many courts have suggested that the employer-employee relationship is of such a nature that an employee 'may feel inhibited to sue making joinder unlikely'").

Finally, class certification is the superior outcome in this case because class actions serve as an important vehicle for enforcing remedial statutes such as the FLSA and the MMWL that seek "to offset the superior bargaining power of employers both for particular employees at issue and broader classifications, and to offset the resulting general downward pressure on wages in competing businesses." *Cf. Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 58 (1st Cir. 2007) (class actions "permit citizens to function as private attorneys general."[9]

For all these reasons, the superiority requirement is satisfied here.

---

[9] To the extent that Prime argues that the case should not proceed under Rule 23 and the FLSA simultaneously, this argument must fail. Courts regularly allow FLSA and Rule 23 state-law wage claims to proceed "in tandem," in "hybrid" actions. *Pineda v. Skinner Servs., Inc.*, No. CV 16-12217-FDS, 2019 WL 3754015, *5 (D. Mass. Aug. 8, 2019) (collecting cases).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court:

(1) Certify an FLSA collective defined as:

all individuals who have attended training to become truck drivers for Prime and/or have driven for Prime either as employee drivers or as independent contractor drivers who have leased their trucks through Prime at any time since October 2, 2012.

(2) Certify a Rule 23 class defined as:

all individuals who have attended training in Missouri to become truck drivers for Prime at any time since March 4, 2010.

(3) Appoint Dominic Oliveira as the class and collective action representative;

(4) Appoint Hillary Schwab, Esq. and Rachel Smit, Esq. of Fair Work, P.C. and Andrew Schmidt, Esq. of Andrew Schmidt Law, PLLC as counsel for the FLSA collective and the Rule 23 class;

(5) Order Defendant New Prime, Inc. promptly to produce the names, dates of birth, and contact information (including all addresses, telephone numbers, and email addresses on file) of members of the collective and class; and

(6) Order the parties to confer concerning proposed forms of notice to be issued to the class and collective action members.

Respectfully submitted,

DOMINIC OLIVEIRA,
on behalf of himself
and all others similarly situated,

By their attorneys,

/s/ Hillary Schwab

Hillary Schwab (BBO #666029)
Brant Casavant (BBO #672614)
Rachel Smit (BBO #688294)
FAIR WORK P.C.
192 South Street, Suite 450
Boston, MA 02111
Tel. (617) 607-3261
Fax. (617) 488-2261
hillary@fairworklaw.com
brant@fairworklaw.com
rachel@fairworklaw.com

Andrew Schmidt, Esq.
Admitted *pro hac vice*
Andrew Schmidt, PLLC
97 India St.
Portland, ME 040101
Tel. (207) 619-0320
Fax. (207) 221-1029
Andy@MaineWorkerJustice.com

Dated: September 13, 2019

CERTIFICATE OF CONFERENCE

I hereby certify pursuant to Local Rule 7.1 that I conferred with counsel for Defendant on September 11, 2019, regarding this motion; Defendant does not assent to the relief requested herein.

/s/ Hillary Schwab
Hillary Schwab

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of this document to be served via electronic filing on all counsel of record on September 13, 2019.

/s/ Hillary Schwab
Hillary Schwab