IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-03033-NYW-KLM

James Bowling, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DaVita, Inc.,

Defendant.

PLAINTIFF'S OPPOSED MOTION FOR FLSA CONDITIONAL CERTIFICATION AND COURT-AUTHORIZED NOTICE

Plaintiff James Bowling, individually and on behalf of all others similarly situated, files this Opposed Motion for FLSA Conditional Certification and Court-Authorized Notice under 29 U.S.C. § 216(b) seeking an Order from the Court for the following:

(1) conditionally certifying a collective action on behalf of all current and former nurses and technicians (the "Collective Action Members") for the three years prior to the date this case was filed to the date of the entry of said Order;
(2) ordering Defendant to produce to Plaintiff's counsel a list of all of the Collective Action Members identifying their name, job title, last known mailing address, last known personal email address(es), last known cell phone numbers, dates of employment, location(s) of employment, employee identification number, and last four digits of each Collective Action Member's social security number (the "Class List") within seven (7) days after the entry of said Order;
(3) approving issuance of notice to the collective action members and the form of notice attached hereto as Ex. N within fourteen (14) days after the receipt of the Class List;
(4) permitting a ninety (90) day notice period for the collective action members to determine whether to opt-in to this lawsuit; and
(5) authorizing Plaintiff's counsel or a third-party administrator to issue notice to the collective action members by mail, email, and text message at the beginning of the notice period, with a reminder forty-five (45) days thereafter.

In support of the relief requested, Plaintiff submits the following brief, establishing a nationwide policy or practice that violates the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), and relies on the pleadings and record evidence attached including the depositions of Plaintiff James Bowling, Opt-in Plaintiffs Jacqueline Barbee, Nahkema Clay, Selena Grant, Kenya Hooppell, Jennifer Stirl, and Laura Stewart, and the deposition of Defendant's corporate representative, Shawn Zuckerman, taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Plaintiff respectfully shows as follows:

I. INTRODUCTION

Plaintiff seeks to represent a class of nurses and technicians who worked for DaVita providing care to patients receiving kidney dialysis and other medical attention. DaVita required its nurses and technicians to remain responsible for patient care throughout their shifts, including during meal periods. As a result, DaVita never fully relieved Plaintiff and similarly situated workers of all duties during meal periods, and Plaintiff and the Collective Action Members are due backpay for any time they were "clocked out" for a non-compliant, unpaid meal break. Furthermore, Defendant's records reflect that Plaintiff and similarly situated workers frequently went without pay for short rest breaks of fewer than twenty minutes, which is not permitted under the FLSA.

The Tenth Circuit authorizes issuance of notice to similarly situated employees under a lenient standard requiring "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) (quoting *Bayles v. American Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1066 (D. Colo. 1996))

(discussing two-step FLSA conditional certification/decertification approach in the context of an ADEA collective action); *Gray v. Delta Cnty. Mem'l Hosp. Dist.*, No. 19-cv-02938-RBJ, 2021 WL 1329263, at *3 (D. Colo. Mar. 1, 2021) (noting that the standard at the first step is "lenient" and generally results in conditional certification and issuance of notice).

Here, DaVita employed hundreds of nurses and technicians responsible for direct patient care nationwide, and deposed Plaintiff and Opt-in Plaintiffs who worked for DaVita in the following eleven states:

James Bowling	Texas	(Ex. A, Bowling Dep. 31:8-33:8)
Jacqueline Barbee	Tennessee	(Ex. B, Barbee Dep. 19:14-20:7)
Nahkema Clay	New York	(Ex. C, Clay Dep. 20:17-21, 20:25-21:10, 164:9-22)
Selena Grant	Georgia Virginia	(Ex. D, Grant Dep. 31:21-32:22, 133:15-17)
Kenya Hooppell	Florida	(Ex. E, Hooppell Dep. 43:25-45:14)
Jennifer Stirl	Texas Louisiana Arkansas Oklahoma	(Ex. F, Stirl Dep. 20:19-22)
Laura Stewart	Tennessee	(Ex. O, Stewart Dep. 30:5-25)

DaVita subjected each of these workers and the Collective Action Members to an identical policy and practice with respect to meal and rest breaks, which was implemented identically (and illegally) at all locations. Consequently, notice of this litigation and an opportunity to participate should issue to all nurses and technicians employed by DaVita from three years prior to the filing of this lawsuit through conditional certification.

II. CERTIFICATE OF COMPLIANCE WITH D.C. COLO. L. CIV. R. 7.1(A)

On October 18, 2022, Plaintiff's counsel met and conferred with counsel for DaVita, who confirmed that Defendant is opposed to the relief requested in this Motion.

III. BACKGROUND FACTS

A. DaVita's Business Operations and the Role of Nurses and Technicians.

DaVita provides healthcare services, in particular kidney dialysis.[1] In connection with its healthcare operations, it employs nurses like Plaintiff and certain Opt-in Plaintiffs[2] and Patient Care Technicians/"PCTs" ("technicians") like certain of the Opt-in Plaintiffs[3] to provide care to patients receiving kidney dialysis.[4]

B. DaVita's Application of Its Meal and Rest Break Policy Violates the FLSA.

During the relevant time period, DaVita had a fairly consistent Meal and Rest Break Policy, with four applicable versions and few changes between them.[5] However, DaVita has not followed its own policy, and has undercompensated its employees with respect to overtime earnings.

Specifically, DaVita failed to fully relieve nurses and technicians of their duties during meal periods, and failed to compensate nurses and technicians for short breaks of fewer than twenty minutes. DaVita generally requires nurses and technicians to take a 30 minute unpaid meal break for every six-hour shift worked.[6] Its policy facially requires a time punch out at the beginning of the meal period and a time punch back in once the

---

[1] *See* Ex. K, DaVita Kidney Care, https://www.davita.com/ (last visited Oct. 20, 2022).

[2] Ex. A, Bowling Dep. 33:9-34:10 (Bowling also did spend some time as a technician); Ex. C, Clay Dep. 20:14-16, 25:6-26:24 (Clay also did some work as a technician); Ex. E, Hooppell Dep. 12:6-8, 17:15-19, 53:1-7.

[3] Ex. B, Barbee Dep. 20:12-23; Ex. D, Grant Dep. 12:14-15, 13:1-5, 15:17-16:1; Ex. F, Stirl Dep. 30:14-21. Ex. O, Stewart Dep. 42:11-17.

[4] Ex. A, Bowling Dep. 37:21-38:3; Ex. B, Barbee Dep. 58:16-59:59; Ex. C, Clay Dep. 32:10-33:14; Ex. D, Grant 61:16-62:6.

[5] Ex. H (Policy Exhibit). For the convenience of the Court, Plaintiff has created an exhibit tracking the changes between the various versions in redline.

[6] *Id.*

meal period is finished.[7] But Plaintiff and the testifying Opt-in Plaintiffs all experienced actual interruptions[8] and were also *subject to* interruptions[9] during their meal periods because their continuing duty of care to patients did not end while they were eating which led to under compensation. Furthermore, regardless of whether attributable to meal breaks cut short by an interruption or for other reasons, Defendant's records clearly show impermissible deductions for breaks of fewer than twenty minutes.[10]

Indeed, Defendant's corporate representative confirmed that Plaintiff and the Collective Action Members were never truly relieved of their work duties during meal periods:

> Q: So what's expected of – of this [nurse] while having a sandwich if she comes across a patient life-threatening complication? Should she finish her sandwich and address it after her 30 minute [lunch break]? […]
>
> A: I would say, in my opinion, our expectation of our teammates would be […] I wouldn't expect that teammate to ignore a patient who is having a medical emergency.

---

[7] *Id.*

[8] Ex. A, Bowling Dep. 132:17-21; Ex. B, Barbee Dep. 77:12–78:11; Ex. C, Clay Dep. 97:9-101:11; Ex. D, Grant Dep. 107:10-108:4; Ex. E, Hooppell Dep. 92:12-94:15; Ex. F, Stirl Dep. 72:20-73:16. Ex. O, Stewart Dep. 102:18–104:20.

[9] Ex. A, Bowling Dep. 108:20-25; Ex. C, Clay Dep. 95:14–97:8; Ex. D, Grant Dep. 107:10-108:4; Ex. E, Hooppell Dep. 92:12-94:15; Ex. F, Stirl Dep. 72:20-73:16; Ex. G, Zuckerman Dep. 111:23–113:25. Ex. O, Stewart Dep. 86:3-9.

[10] *See* Ex. J (Short Breaks). *See also* Ex. A, Bowling Dep. 132:17-21 (testifying regarding frequency of lunch breaks cut short due to patient emergencies, at least monthly to three times a week); Barbee Dep. 77:12–78:23 (testifying regarding frequent nonemergency interruptions to meal breaks); Ex. C, Clay Dep. 97:9-101:11 (testifying to extensive interruptions in meal breaks due to answering questions, speaking on the phone, taking order changes, and being called back to answer emergencies on the treatment floor immediately after clocking out for lunch); Ex. D, Grant Dep. 103:17–104:10 (discussing potential for interruptions of off-site lunches); Ex. E, Hooppell Dep. 92:12–94:15 (discussing lunchtime interruptions due to phone in break room); Ex. F, Stirl Dep. 83:6–90:23 (numerous instances of punches for breaks of under twenty minutes).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.