IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al. Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	)	Civil Action No. 1:17-cv-01371

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND ISSUANCE OF NOTICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Conditional certification of Plaintiffs' claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, is appropriate because they have identified a common policy that has adversely affected similarly situated putative collective members. Specifically, Defendant Medical Transportation Management (MTM) failed to discharge its legal obligations to ensure that drivers performing services pursuant to its contracts with the District of Columbia (the D.C. Contracts) were paid for all time worked within the continuous work day, as the law requires. MTM's failure to discharge this obligation to the drivers, created by law and by the D.C. Contracts, constitutes a discrete employment practice that has affected each member of the putative collective action, regardless of whether they worked for different subcontractors or were subject to different compensation schemes. As a joint employer of these drivers, MTM's obligation to ensure compensation for all work performed within the continuous work day existed regardless of any variation in the compensation schemes used by the subcontractors.

The identification of this common practice satisfies the modest requirements for conditional certification. Therefore, the Court should direct the issuance of attached Notice of the pending lawsuit and afford those individuals with an interest in the lawsuit the opportunity to join. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) ("The sole consequence of conditional certification is the sending of court-approved written notice to" putative collective members"); *see* Exh. 6 (attached). Plaintiffs therefore respectfully request that this Court grant their Motion for Conditional Certification and Issuance of Notice.

II. CONDITIONAL CERTIFICATION IS PROPER BECAUSE MTM HAD A COMMON POLICY OR PRACTICE THAT ADVERSELY AFFECTED PUTATIVE COLLECTIVE MEMBERS

Plaintiffs need only provide "a common legal theory upon which each [putative collective] member is entitled to relief" in order to obtain conditional certification. *Stephens v. Farmers Rest.*

Grp., 291 F. Supp. 3d 95, 109 (D.D.C. 2018). They meet this bar by alleging that MTM failed to discharge its legal obligations to ensure that workers for whom it was a joint employer were paid for all time worked during their continuous workdays,[1] as required by law. *See* FLSA, 29 U.S.C. §§ 206, 207; *see also* D.C. Contract, ECF No. 10-2, at ¶¶ H.2 (ECF p. 137) (requiring compliance with Dep't of Labor Wage Determination No. 2005-2103, Revision No. 13), H.8.1-H.8.3, H.8.7-H.8.9 (ECF p. 140-42) (requiring compliance with state wage laws and requiring MTM to include the same requirement in its subcontracts). As the Supreme Court recognized over a decade ago, all work performed from the beginning to the end of a workday constitutes the continuous workday and is presumptively compensable. *See IBP, Inc. v. Alvarez,* 546 U.S. 21, 28, 37 (2005). This obligation is reinforced by the D.C. Contracts, in which MTM committed to ensuring that the work performed by the drivers is lawfully compensated. But MTM has fundamentally failed to discharge this duty, and this failure qualifies as a discrete practice that affects all putative collective members similarly. Nothing more than this evidence is necessary to warrant conditional certification of Plaintiffs' claims. *See, e.g.*, *Stephens*, 291 F. Supp. 3d at 109.

Although MTM cites some authority to contest conditional certification here, its authority is inapposite, and it ignores the substantial body of law within this Circuit that supports conditional certification of collective actions challenging practices similar to the one at issue here.

In *Castillo v. P & R Enterprises, Inc.*, for example, the court certified a collective action of janitorial employees who worked in several commercial real estate buildings in Washington, D.C.

[1] Whether Plaintiffs' and the putative collective members' work constituted a continuous workday presents a mixed issue of fact and law appropriate for resolution after discovery. *See Stephens*, 291 F. Supp. 3d at 105. At this juncture, Plaintiffs have demonstrated sufficiently in their declarations that their schedules involved continuous workdays. *See* Decl. of Isaac Harris (Harris Decl.) ¶ 12, ECF No. 14-3; Decl. of Darnell Frye (Frye Decl.) ¶ 10, ECF No. 14-4; Decl. of Leo Franklin (Franklin Decl.) ¶ 12, ECF No. 14-5; Decl. of Ronald Jackson (Jackson Decl.) ¶ 10, ECF No. 14-6.

The plaintiffs identified their common policy simply: they "were scheduled for, and worked more than, 40 hours per week, and were not compensated for overtime pay." 517 F. Supp. 2d 440, 446 (D.D.C. 2007).[2] The court determined that differences in locations, job titles, and work schedules were immaterial under this policy to the issue of whether putative collective members received adequate pay for their work over 40 hours per week. *Id.* at 447. This is precisely the situation and the type of policy at issue in the present case: Plaintiffs have alleged that MTM failed to comply with its legal obligations, under both law and its contracts, to ensure the proper payment of drivers for work performed during continuous workdays.

Rivera v. Power Design, Inc. similarly involved a generally stated practice whereby the named plaintiffs and putative collective members worked for the defendant on a construction project and were undercompensated in violation of the FLSA. 172 F. Supp. 3d 321, 326 (D.D.C. 2016) (detailing only that collective members "were protected by the same requirements under the FLSA to receive minimum wages and overtime wages unless specifically exempted; . . . were subject to similar pay plans; . . . were required to work and did work in excess of forty hours per weeks; and . . . were not paid for all hours worked"). It was on these straightforward allegations alone that the court granted conditional certification. *Id.* The court noted that "Defendants' pay

[2] *See also Ayala v. Tito Contractors*, 12 F. Supp. 3d 167, 170-71 (D.D.C. 2014) (certifying a collective action of construction workers who alleged simply that they performed construction-related jobs at various worksites, "were often required to work more than 40 hours per week; were routinely not paid for overtime works; and were directed to underreport their hours"); *Douglas v. Chariots for Hire*, No. 12-429, slip op. at 4-5, 7-8 (D.D.C. Oct. 31, 2012) (conditionally certifying collective action of limousine drivers who were treated as independent contractors and subject to common policies designed to avoid paying overtime, including refusing to pay for time spent in the office without passengers, relying in part on company statements that it did not pay overtime and the fact that all drivers were subject to the same handbook); *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 7 (D.D.C. 2010) (certifying a collective action because the defendant had "a company policy of not paying its employees for overtime hours worked . . . and the plaintiffs' and putative class members' FLSA claims stem from this policy" (citing Pls. Compl.)).

records and agreements to subcontract will easily reveal whether a common plan existed to improperly pay overtime salaries. . . . If the allegations regarding the [subcontract] prove to be true, it would be reasonable to conclude that [the company] may have engaged in these same practices with other subcontractors."[3] *Id.* at 328 (internal citations and quotation marks omitted). The court rejected the defendant's argument that it did not control the collective members' work, noting that this potential legal issue was not relevant to the initial conditional certification analysis. *Id.* at 326, 328; *see also Cryer v. Intersolutions, Inc.*, No. 06-2032 (EGS), 2007 WL 1053214, at *2 (D.D.C. Apr. 7, 2007) (conditionally certifying a collective action challenging the policy that collective members were paid hourly and were not paid overtime for hours worked over forty).

As in *Rivera*, Plaintiffs' common policy or plan is based on MTM's contracts with the District of Columbia and its subcontractors, as well as MTM's role as the drivers' joint employer under the FLSA. Each of these sources of legal authority impose obligations on MTM to ensure drivers are paid wages that comply with the law. *See* FLSA, 29 U.S.C. §§ 206, 207; D.C. Contract, ¶¶ H.2, H.8.1-H.8.3, H.8.7-H.8.9; *Rivera*, 172 F. Supp. 3d at 328 (explaining that such common evidence can support a collective action across different subcontractors). Plaintiffs further support the existence of their asserted policy with their declarations and the declaration of an opt-in plaintiff, all of which confirm—via each declarant's personal knowledge—both that MTM engaged in the same practices with several subcontractors and that other putative collective members may have been subject to similar wage schemes that denied legally compliant minimum wage and overtime compensation. *See* Harris Decl. ¶¶ 2, 12, 15-16; Frye Decl. ¶¶ 2, 10, 13-14; Franklin Decl. ¶¶ 2, 12, 14-15; Jackson Decl. ¶¶ 2, 10, 14-15; *see also Galloway v. Chugach Gov't*

[3] That the putative collective members in *Rivera* worked in the same location and were subject to the same compensation scheme, as MTM contends, *see* Opp. at 12-13, was not controlling in the court's decision.

Servs., Inc., 263 F. Supp. 3d 151, 156 (D.D.C. 2017) (concluding that plaintiffs offered sufficient evidence to support their alleged policy when they submitted only one declaration that was based on personal knowledge and spoke "only in general terms"); *Ayala*, 12 F. Supp. 3d at 170 (noting that plaintiffs need only show that putative class members "*may be* similarly situated" (internal quotation marks omitted)).

The authorities on which MTM relies do not dictate a different result. *Dinkel v. MedStar Health, Inc.*, for example, involved a policy or plan that turned on the discretion of individual supervisors and managers across numerous facilities. 880 F. Supp. 2d 49, 57 (D.D.C. 2012); *see also Freeman v. MedStar Health Inc.*, 187 F. Supp. 3d 19 (D.D.C. 2016) (involving "20 department-specific collectives"). In contrast, there is no discretion in MTM's obligation to ensure that drivers are paid for all time worked within the continuous workday, thereby ensuring that the challenged conduct has not varied under individual managers or different subcontractors. *See, e.g.*, FLSA, 29 U.S.C. §§ 206, 207; D.C. Contract, ¶¶ H.2, H.8.1-H.8.3, H.8.7-H.8.9. MTM's default on this obligation constitutes a discrete, nondiscretionary practice that adversely affected all members of the proposed collective.

As such, MTM cannot escape liability to the drivers providing medical transportation services under the D.C. Contracts by seeking to shift responsibility for unlawful pay practices to the individual subcontractors. MTM has a non-delegable obligation to ensure that these drivers, who may or may not be subject to different compensation schemes at different subcontractors, are nonetheless paid for all work performed within the continuous workday.[4] *See* FLSA, 29 U.S.C.

[4] *Cf. Rivera*, 172 F. Supp. 3d at 327, 328 (rejecting at the conditional certification stage defendant's arguments that it was not a joint employer of the putative collective members and that plaintiffs had not properly identified all subcontractors involved, suggesting that these were matters for discovery).

§§ 206, 207; D.C. Contract, ¶¶ H.2, H.8.1-H.8.3, H.8.7-H.8.9. The subcontractors' compensation practices—whether similar or widely variant—do not absolve MTM of its unqualified obligation to ensure that drivers are paid in accordance with the law. Although such differences, if any, may bear on the remedies available to each driver, they have no bearing on the unlawfulness of MTM's conduct or Plaintiffs' ability to prove that unlawfulness collectively. The same is true of the fact that drivers may have worked out of different subcontractors' offices, which numerous courts have held does not undermine conditional certification where the identified common policy applied across these worksites. *See, e.g.*, *supra* at 2-3 & n.2.

The other cases on which MTM relies actually support conditional certification where a common policy affected the putative collective members, notwithstanding differences in work locations or supervisors. *See, e.g.*, *Ayala*, 12 F. Supp. 3d at 170-72 (conditionally certifying a collective action of construction workers who worked at several job sites and were all subject to defendant's failure to pay overtime); *Blount v. U.S. Sec. Assocs.*, 945 F. Supp. 2d 88, 94-97 (D.D.C. 2013) (conditionally certifying a collective action of school security guards who worked in numerous schools but were all subject to the same meal break policy); *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 6-7 (D.D.C. 2010) (conditionally certifying a collective action of construction workers who worked several jobs at different construction sites and who were all subject to "a company policy of not paying its employees for overtime hours worked"); *McKinney v. United Stor-All Ctrs., Inc.*, 585 F. Supp. 2d 6, 8-10 (D.D.C. 2008) (conditionally certifying a collective action of storage facility workers in multiple locations).[5] In none of these cases did the court

[5] *Hunter v. Sprint Corp.*, 346 F. Supp. 2d 113 (D.D.C. 2004), on which MTM relies, is inapposite to the present case. In *Hunter*, the district court rejected the plaintiffs' request to conditionally certify a collective action that included both exempt and non-exempt employees, because including exempt employees would "inject into the case an additional legal question bearing on liability: whether Sprint has correctly classified these particular employees as exempt

require a representative from each location to support the existence of the policy at that location; the courts relied instead on common evidence of the defendant's policies and practices.

Nor does MTM's assertion that Plaintiffs and the putative collective members worked for different subcontractors and may have received different wages for the same work present an obstacle to conditional certification of their claims. *See* Def. Opp. to Mot. for Cond. Cert. (Opp.) at 6-8, ECF No. 33. This position would impose a standard that is impossible to satisfy and, not surprisingly, fundamentally at odds with the overwhelming authority in this district, as described herein. That Plaintiffs and putative collective members may not be entirely uniform in the amount of wages they received for their work does not undermine a finding that these individuals are similarly situated. To the contrary, numerous cases have concluded that conditional certification is warranted when putative collective members are subject to common policies and practices, regardless of differences in the amount of harm they suffered; issues involving the specific wages paid to or hours worked[6] by an individual should arise only in the remedial stage of the litigation.[7]

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under the FLSA." *Id.* at 119. Such considerations are not at issue here, as all putative collective members are similarly classified under the FLSA.

[6] MTM provides only conclusory support from one subcontractor for its passing argument that drivers do not work exclusively under the D.C. Contracts. *See* Opp., Exh. 2, ¶ 5. This declaration, which conflicts with the Plaintiffs' declarations, *see* Mot., Exh. 1-4, simply raises factual issues that are properly resolved after discovery. *See, e.g.*, *Stephens*, 291 F. Supp. 3d at 105 ("district court should ordinarily refrain from resolving factual disputes and deciding matters going to the merits" (quoting *Dinkel*, 880 F. Supp. 2d at 53)); *Galloway*, 263 F. Supp. 3d at 158 (rejecting defendant's evidence that it maintained legally compliant policies and declining to decide factual issues at the conditional certification stage, noting that plaintiffs had no opportunity to obtain evidence supporting their claims through discovery).

[7] Although manageability is not part of the conditional certification analysis, numerous case management techniques are available to the Court to ensure manageable adjudication of any potential individualized disputes that may arise in this case (although Plaintiffs do not concede that any individualized issues exist). The Court has already implemented one such approach, by bifurcating the matter to adjudicate liability and state-law class certification first, then address damages thereafter in the event Plaintiffs establish liability. *See* Order at 1-2, ECF No. 29; *see, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) (establishing this two-stage approach); *Blount*, 945 F. Supp. 2d at 95 (proposing an analogous bifurcated case-management

See, e.g., *Stephens*, 291 F. Supp. 3d at 111 (rejecting a challenge that tip-credit and uniform-maintenance claims were too individualized, noting that this "objection ultimately goes to damages and does not defeat conditional certification"); *Ayala*, 12 F. Supp. 3d at 170-72 (rejecting the argument that collective members were not similarly situated because "their pay policies are dictated by the individual contract for each project and do not operate as a uniform scheme" because "uniformity is not a prerequisite" and plaintiffs need only show that other individuals "*may be* similarly situated" (internal citations and quotation marks omitted)); *Blount*, 945 F. Supp. 2d at 95 (finding that putative collective members were affected by common policies that impacted their meal breaks and pay and that the number of uncompensated breaks each experienced or how those breaks were scheduled differently at different facilities went only to damages).[8] Notably, MTM does not dispute that Plaintiffs and the putative collective members have the same job titles, descriptions, functions, and working conditions[9] or that they are similarly situated in their

plan). In the liability phase, Plaintiffs would need to show only a *pattern* of conduct by MTM that fails to comply with the law. Although the remedial phase *may* include individualized features, the issues raised therein for the most part can be resolved using objective record evidence obtained through discovery of time worked versus time compensated.

[8] *See also Banks v. Wet Dog, Inc.*, No. RDB-13-2294, 2015 WL 433631, at *3 (D. Md. Feb. 2, 2015) (conditionally certifying a collective action of car washers at two different locations run by defendant—notwithstanding "minor inconsistencies" in rates of pay and worksite locations—because "[t]he conceptual and factual core of Plaintiffs' claim is the common employment policies and scheme that led to their alleged undercompensation"); *Galloway*, 263 F. Supp. 3d at 158 (rejecting defendant's argument that the plaintiff's claims were too individualized "due to the numerous individual differences in their positions, pay rates, time periods worked, shift schedules, and supervisors" and conditionally certifying the collective); *Castillo*, 517 F. Supp. 2d at 446-47 (conditionally certifying a collective action of janitors even though the janitors worked in different buildings with different property management companies that supervised and managed their daily schedules, finding that these differences were "immaterial" and did not undermine the argument that defendant "has a role in the determination and calculation of the compensation paid").

[9] MTM provides no factual support for its cursory argument that drivers are subject to different working conditions. *See* Opp. at 9. In any event, any such differences have no bearing on MTM's singular obligation to ensure that drivers are paid fully for all time worked.

relationship with MTM. *See, e.g.*, Mot. for Cond. Cert. & Issuance of Notice (Mot.) at 6-9, ECF No. 14.

Because putative collective members are similarly situated under MTM's common policy of failing to ensure legally compliant wages, this Court should conditionally certify a collective action and issue Notice to all putative collective members as discussed below.

III. THE COURT SHOULD APPROVE PLAINTIFFS' PROPOSED NOTICE AND DISTRIBUTION PROCESS

The parties agree in large part about the content of, and procedure for issuing, the Notice in the event conditional certification is granted. There is no dispute, for example, over the period in which Notice should be provided or some of the basic information about the Notice recipients that should be furnished by MTM.[10]

MTM's challenges to the multiple ways in which Plaintiffs seek to provide Notice are groundless. They also ignore the transient nature of the population targeted for this Notice and the likelihood that no single method of notice would reach all intended recipients. Plaintiffs merely seek to ensure that all members of the proposed collective receive notice of their opportunity to participate and that the content of this Notice be accessible to them. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950) ("notice must be such as is reasonably calculated to reach interested parties"); c*f. Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170

[10] At the very end of MTM's lengthy footnote challenge to features of the proposed Notice, it seeks a right to respond further to the Notice. The Court should reject this request because MTM had every opportunity in its response to fully brief these arguments. *See, e.g.*, *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (denying a surreply and noting that surreplies are appropriate only where a party "would be unable to contest matters presented to the court for the first time in the opposing party's reply"); *Alec L. v. Perciasepe*, No. 11-cv-2235 (RLW), 2013 WL 2248001, at *4 (D.D.C. May 22, 2013) (denying supplemental briefing because the party had the opportunity and obligation to respond to arguments that had been fully briefed before the party filed its response brief).

(1989) (recognizing that the benefits of a collective action "depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate"). Although Plaintiffs offer some compromises on the language of the Notice in an effort to streamline the issues for the Court, for the most part MTM's resistance to plenary forms of Notice may be little more than an effort to suppress the rate of response to the Notice.

A. The Parties' Points of Agreement

Notwithstanding the disputes below, Plaintiffs and MTM agree on numerous points of the Notice process, which Plaintiffs have clarified below for the Court:

First, MTM agrees to provide Plaintiffs within 14 days with a computer-readable database of at least drivers' names, last-known addresses, dates of employment, and dates of birth[11] for all current and former NEMT drivers who have worked for MTM and/or under the D.C. Contracts for three years prior to at least the date on which the Court rules on Plaintiffs' Motion for Conditional Certification.[12] *Second*, the parties agree that the Notice should be disseminated at least via first-class mail and email.[13] *Third*, the parties agree that the Notice period should run for 90 days. *See, e.g.*, *Cryer*, 2007 WL 1053214, at *3 (approving a 90-day notice period). These areas of agreement are substantial and define the broad features of the Notice process in this case. Plaintiffs request that the Court approve these areas of agreement as part of its order granting conditional certification and issuing Notice.

B. Plaintiffs are Willing to Compromise on the Content of the Notice

MTM takes issue with some of the language in Plaintiffs' proposed Notice. First, MTM

[11] MTM disputes other items requested by Plaintiffs, as discussed in Section III.D.1-2.

[12] Plaintiffs dispute this timeline, as discussed further in Section III.C.

[13] MTM disputes other methods of dissemination, as discussed in Section III.D.3.

disagrees with the use of the term "subcontractors." This is the term the District of Columbia and MTM use to describe the entities working under the D.C. Contracts, *see generally* D.C. Contract, ECF No. 10-2, and this Court has further determined that "the transportation companies comfortably fit within the definition[] of . . . subcontractor," *see* Order on Mot. to Dismiss at 19, ECF No. 21. However, in the spirit of compromise and to avoid further delay, Plaintiffs will agree to use the term "transportation providers" instead of "subcontractors" in the Notice.

Similarly, Plaintiffs will agree to remove language in the "No Retaliation Permitted" section that suggests the issue of MTM's employer status has already been resolved by this Court. However, Plaintiffs will not agree to remove the retaliation provision altogether; this provision, which accurately states these legal protections, is critical to minimize the chilling effect on putative collective members' decisions to opt-in to the lawsuit. *See Boyd v. SFS Commc'ns, LLC*, No. PJM 15-3068, 2017 WL 386539, at *5 (D. Md. Jan. 27, 2017) (rejecting defendant's efforts to remove the anti-retaliation provision from the conditional certification notice, commenting that "potential collective action members unfamiliar with the FLSA regime and its prohibition against retaliation may be chilled from participating in the absence of language of reassurance").

Plaintiffs do not agree with MTM that the line in the Notice stating that drivers "worked under the contract(s) between [MTM] and the District of Columbia" in any way implies that drivers had a contractual relationship with either of the contracting parties or that they were not also employed by a subcontractor. There is no dispute that Plaintiffs and putative collective members provided the transportation services authorized in the D.C. Contracts, and that is all this phrase says. Nonetheless, Plaintiffs are willing to revise the header, the section about which MTM raised its concerns, to remove the word "worked," as follows: "who provided transportation services under the contract(s) . . . ."

Plaintiffs have attached as Exhibit 6 a revised Proposed Notice that incorporates the above changes in red-line. The version of the Notice attached in the Exhibit includes tracked changes for the ease of the Court's review. Should Notice be approved, Plaintiffs will accept those tracked changes and input the relevant dates before disseminating the Notice.

C. The Court Should Establish a Limitations Period that is Easy to Administer

Although case authority supports Plaintiffs' request that the limitations period commence with the filing of the complaint, *see Castillo*, 517 F. Supp. 2d at 449 (selecting the complaint filing date for administrative ease, because the date on which notices would be distributed was uncertain), Plaintiffs are prepared as a compromise to agree to a limitations period commencing on October 2, 2017, the date they filed their Motions for Conditional Certification and Tolling and when this issue was presented to the Court for resolution.

D. Plaintiffs Propose Multiple Methods of Disseminating the Notice to Reach a Maximum Number of Putative Collective Members

The proposed collective action is comprised of a highly mobile and transient population. As such, Plaintiffs have proposed several methods of providing Notice to collective members, understanding that no one method is likely to reach the entire group. *Cf. Hoffman-La Roche, Inc.*, 493 U.S. at 170 (recognizing that the benefits of a collective action "depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate"); *Mullane*, 339 U.S. at 318 ("notice must be such as is reasonably calculated to reach interested parties"). Although the parties agree that Notice should be sent by both first-class mail and email, many—if not most—of the putative collective members (particularly those currently driving under the D.C. Contracts or in any other capacity) likely spend little time at home or in front of a computer. Plaintiffs therefore propose the following additional methods of disseminating the Notice in hopes of reaching as many potential collective members as possible.

1. *Plaintiffs Should be Permitted to Employ Text-Message Notice and Follow-up Text-Message Notice for this Collective Population*

The method most likely to reach the majority of collective members is via telephone. Each of the subcontractors at which Plaintiffs worked required Plaintiffs to call into the office for a new trip assignment when they had finished their current trip.[14] *See* Harris Decl. ¶ 12; Frye Decl. ¶ 10; Franklin Decl. ¶ 12; Jackson Decl. ¶ 10. Therefore, even if away from home or other technology, each Plaintiff had ready access to his or her cell phone and text messages.[15] MTM's resistance to producing cell phone numbers misses the important fact that text messages and other forms of cell phone communication may be the primary means by which putative collective members communicate.[16] These forms of communication also are more accessible for individuals who do

[14] It is reasonable at this stage in the proceedings to assume that putative collective members, whose job duties are the same as Plaintiffs', were subject to the same requirements. *See Rivera*, 172 F. Supp. 3d at 328; Harris Decl. ¶¶ 2, 12, 15-16; Frye Decl. ¶¶ 2, 10, 13-14; Franklin Decl. ¶¶ 2, 12, 14-15; Jackson Decl. ¶¶ 2, 10, 14-15.

[15] *Cf. Landry v. Swire Oilfield Servs.*, 252 F. Supp. 3d 1079, 1095, 1129-30 (D.N.M. 2017) (email and text message notice will "increase[] the chance of the class members receiving and reading the notice," where those members are "dispersed to various wellsites around the country"); *Dempsey v. Jason's Premier Pumping Servs., LLC*, No. 15-cv-00703-CMA-NYW, 2015 WL 13121134, at *2 (D. Colo Nov. 11, 2015) (granting permission to send notice to oilfield workers—who primarily work away from home—via mail, email and text message "[d]ue to the fact that workers . . . travel frequently and are away from their homes for long periods of time").

[16] Several studies have demonstrated that text messaging and cell phone use are among the most prominent forms of communication in our modern society. *See, e.g.*, Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/ (last visited May 25, 2018) (discussing the prevalence of cell phone usage and texting); Frank Newport, *The New Era of Communication Among Americans*, Gallup News (Nov. 10, 2014), http://news.gallup.com/poll/179288/new-eracommunication-americans.aspx (last visited May 25, 2018) (discussing the prevalence of cell phone use in individuals under 65 years old); *see also Irvine v. Destination Wild Dunes Mgmt., Inc.*, 132 F. Supp. 3d 707, 711 (D.S.C. 2015) ("This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication."); *cf. Regan v. City of Hanahan*, No. 2:16-cv-1077-RMG, 2017 WL 1386334, at *3 (D.S.C. Apr. 18, 2017) (noting that "individuals are likely to retain their mobile numbers and email addresses even when they move").

not read or speak English as their primary language. *See, e.g.*, *Ayala*, 12 F. Supp. 3d at 172 (directing the production of telephone numbers because "many potential plaintiffs do not speak English as a first language—thus making them harder to contact"). Courts within this district have thus recognized that production of "email addresses and phone numbers [is] nearly as common" as "production of names and addresses." *Eley v. Stadium Grp., LLC*, No. 14-cv-1594 (KBJ), 2015 WL 5611331, at *3 (D.D.C. Sept. 22, 2015).

Plaintiffs therefore propose using the produced cell phone numbers to send a text message to all putative collective members with the following language and a link to an electronic version of the Notice: "As a driver who provided medical transportation services, you may be eligible to join a lawsuit. More info here: bit.ly/xxxxxx or 1-800-xxx-xxxx."[17] Sixty days after disseminating the Notices, Plaintiffs further propose sending the same reminder text message to any putative collective member who has not yet responded.

Finally, to the extent that MTM accuses Plaintiffs' counsel of intending to engage in solicitation or other improper communications with putative collective members, this allegation is entirely baseless and improper. Plaintiffs' counsel are officers of this Court and intend to abide by the Rules of Professional Conduct, the Federal Rules of Civil Procedure, and other rules governing their conduct in this case. They further confirm that they will not engage in solicitation in violation of the Rules and that they will use the telephone numbers produced by MTM only to provide text message notice to putative collective members.

2. *MTM's Privacy Concerns About Disclosing Social Security Numbers are Unfounded*

MTM has contested Plaintiffs' request to obtain social security numbers for the putative

[17] This message is within the 160-character limit for a single text message.

collective members as part of the Notice process. To clarify, Plaintiffs have not sought social security numbers for all putative collective members; instead, they request these numbers only if necessary to locate updated addresses for putative collective members for whom MTM does not have addresses or whose Notices are returned undeliverable. *See* Mot. at 14-15 (citing cases employing a similar process). MTM raised only vague, unfounded privacy concerns in response to this request, but it failed to respond to Plaintiffs' offer to enter into a protective order covering this information. *See* Opp. at 17-18 n.5; Mot. at 15 n.9. Such a protective order would ameliorate MTM's alleged privacy concerns. There is thus no basis to withhold social security numbers from Plaintiffs, and Plaintiffs should be permitted access to this information to effectuate Notice.

3. *MTM is Capable of Directing its Subcontractors to Post the Notice and Should be Ordered to Do So*

Posting notice is one of the oldest and most established methods of legal communication and has been used in this district for at least several decades. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). It is in no way "extraordinary," as MTM baselessly contends. *See* Opp. at 18 n.5. Indeed, Plaintiffs' request for posting falls squarely within MTM's contractual obligation to ensure that all workers under the D.C. Contracts are properly compensated in compliance with the law. *See* D.C. Contract, ¶ H.8.5 (ECF p. 141) ("The Contractor shall include in any subcontract for $15,000 or more a provision requiring the subcontractor to post the [D.C. Wage] Notice in a conspicuous place in its place of business."); *see also id.* ¶¶ H.2, H.8.1-H.8.3, H.8.7-H.8.9. MTM has pointed to no authority suggesting otherwise.

Posting, critically will increase the likelihood that current and future workers (if not also former workers) are aware of the lawsuit and are able to assert their rights herein. This population is transient and on the road most of the day; these offices may be the only common locations the

drivers visit, at least from time to time. For this same reason, posting in their vehicles, where drivers spend most of their days, is also calculated to actually reach workers in the most efficient and effective way possible. *See, e.g.*, *Mullane*, 339 U.S. at 318; *see also* Harris Decl. ¶¶ 10-12 (explaining that he generally worked approximately 65 hours per week at one subcontractor and approximately 52.5 at the other and that he received few, if any, breaks); Frye Decl. ¶¶ 9-10 (explaining that he generally worked approximately 73 hours per week and that he received few, if any, breaks); Franklin Decl. ¶¶ 9-10, 12 (explaining that he generally worked at least 70 hours per week at both subcontractors and received few, if any, breaks); Jackson Decl. ¶¶ 9-10 (explaining that he generally worked at least 65 hours per week and received few, if any, breaks).

MTM has provided no factual or legal support for its speculation that posting notice in offices and vehicles would be duplicative, even if such a challenge were relevant to this analysis, which it is not. *Cf. Hamadou v. Hess Corp.*, 915 F. Supp. 2d 651, 669 (S.D.N.Y. 2013) ("Courts routinely approve requests to post notice . . . on employee bulletin boards and in other common areas, even where potential [collective] members will also be notified by mail." (internal citation and quotation marks omitted)); *Lane v. Atlas Roofing Corp.*, No. 4:11-cv-04066-SLD-JAG, 2012 WL 2862462, at *3 (C.D. Ill. July 11, 2012) ("Courts have ordered duplicative notification by posting and mail where there is some evidence that notice by mail alone would be insufficient to provide prospective collective members with accurate and timely awareness of the pending action"); *supra* at 13 n.15 (citing cases about transient workers who spend time away from home).

Finally, it is not plausible to believe that workers would read a posted Notice as MTM's approval of the Notice or the lawsuit, and MTM has provided no factual basis for this speculation. The Notice clearly indicates that, "A Court authorized this Notice. This is not a solicitation from a lawyer." *See* Exh. 6 at 1. It further states, "MTM denies the allegations and claims that it is not

liable for unpaid wages, damages, fees, or costs in the case." *Id.* And the revised anti-retaliation provision informs workers that, "MTM is prohibited from retaliating against anyone for participating in this lawsuit," which suggests MTM's potential opposition to the lawsuit. *Id.* at 2. Finally, the Notice states that Plaintiffs' counsel will represent any individuals who join the lawsuit against MTM. *Id.* The Notice thus repeatedly dispels any suggestion that MTM favors workers joining the lawsuit.

IV. CONCLUSION

For the reasons presented in their opening and reply briefs, Plaintiffs respectfully request that this Court:

1. Grant Plaintiffs' Motion for Conditional Certification;

2. Conditionally certify a collective of all individuals who provided transportation services under the non-emergency medical transportation (NEMT) contracts between Medical Transportation Management, Inc. and the District of Columbia (the D.C. Contracts) at any time during the period from October 2, 2014 to the present;

3. Direct MTM to provide Plaintiffs within 14 days with a computer-readable database of all current and former NEMT drivers who have worked for MTM and/or under MTM's contract with the District of Columbia for three years prior to October 2, 2017, including the drivers' names, last-known addresses, telephone numbers, dates of employment, and birth dates;

4. Direct MTM to provide Plaintiffs with the social security numbers for any putative collective members without addresses or for whom Notices are returned undeliverable during the Notice Period;

5. Provide for a 90-day notice period;

6. Direct the issuance of the Notice in Exhibit 6 to putative collective members via first-class mail, email, text message, and posting; and

7. Permit Plaintiffs to send reminder Notices via first-class mail, email, and text message to any putative collective members who have not responded within sixty days of the initial Notice mailing.

Dated: May 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of "Plaintiffs' Reply in Support of Plaintiffs' Motion for Conditional Certification and Issuance of Notice" was served via the Court's CM/ECF filing system to all parties of record.

/s/Miriam R. Nemeth
Miriam R. Nemeth