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

THOMAS ZABOROWSKI, *et. al.*, on behalf of  
themselves and a putative class,

Plaintiffs,

v.

MHN GOVERNMENT SERVICES, INC. and  
MANAGED HEALTH NETWORK, INC.,

Defendants.

No. C 12-05109 SI

**ORDER GRANTING PLAINTIFFS’  
MOTION FOR CONDITIONAL FLSA  
COLLECTIVE ACTION  
CERTIFICATION**

Currently before the Court is plaintiffs’ motion for certification of a conditional FLSA collective action and issuance of notice. Pursuant to Civil Local Rule 7-1(b), the Court determines that these matters are appropriate for resolution without oral argument and VACATES the hearing scheduled for April 26, 2013. Having carefully considered the papers submitted, the motion is GRANTED, for the reasons set forth below.

**BACKGROUND**

Plaintiffs, as Military Family Life Consultants (“MFLCs” or “MFL Consultants”), provide financial counseling, child services, and victim advocacy counseling at U.S. military installations across the country and internationally. They filed this suit against their employers, MHN Government Services, Inc. and Managed Health Network, Inc. (collectively “MHN”), alleging that MHN misclassified them as independent contractors, exempt from overtime payment. They argue that they should instead be classified as employees and entitled to overtime compensation. They assert claims

1 under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b), and similar state labor laws.

2 On November 1, 2012, defendants moved to compel arbitration pursuant to an arbitration clause  
3 in the employment contract between the MFL Consultants and MHN. The Court denied the motion on  
4 April 3, 2013, and defendants appealed that order (the “Arbitration Order”).

5 On March 14, 2013, plaintiffs filed a motion for conditional FLSA collective action certification.  
6 The proposed class is defined as: “All individuals who have worked as MFLCs for MHN while  
7 classified as independent contractors, at any time from October 2, 2009 to the time of trial, in any  
8 territory subject to the coverage of the FLSA.” Pls.’ Mot. at 1. Plaintiffs argue that they are similarly  
9 situated to the proposed class members with respect to their FLSA claims, and therefore conditional  
10 certification is warranted. Defendants make two arguments against conditional certification: (1) the  
11 motion for conditional certification is premature because of defendants’ pending appeal of the  
12 Arbitration Order, and (2) the differences between and amongst MFLCs is so great that they are not  
13 “similarly situated.”

#### 14 15 **LEGAL STANDARD**

16 Section 216(b) of the FLSA provides that one or more employees may bring a collective action  
17 “on behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b); *see*  
18 *also Genesis Healthcare Corp. v. Symczyk*, 2013 WL 1567370, at \*3 (U.S. 2013). To determine whether  
19 plaintiffs are “similarly situated,” courts in this circuit have applied a “two-step approach involving  
20 initial notice to prospective plaintiffs, followed by a final evaluation whether such plaintiffs are similarly  
21 situated.” *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004). “The first step  
22 under the two-tiered approach considers whether the proposed class should be given notice of the action.  
23 This decision is based on the pleadings and affidavits submitted by the parties.” *Adams v. Inter-Con*  
24 *Sec. Sys., Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007) (citations omitted). “In the second step, the party  
25 opposing certification may move to decertify the class once discovery is complete and the case is ready  
26 to be tried.” *Id.*

27 “Courts have held that conditional certification requires only that plaintiffs make substantial  
28 allegations that the putative collective action members were subject to a single illegal policy, plan or

1 decision.” *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1071 (N.D. Cal.  
2 2007); *see also Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), cert. denied, 519 U.S.  
3 982 (1996) (finding that “plaintiffs need show only that their positions are similar, not identical, to the  
4 positions held by the putative class members”) (internal citation and quotation omitted). “The standard  
5 for certification at this [first] stage is a lenient one that typically results in certification.” *Russell v.*  
6 *Wells Fargo & Co.*, No. C 07-3993 CW, 2008 WL 4104212, at \*2 (N.D. Cal. Sept. 3, 2008) (citing  
7 *Wynn v. Nat’l Broad. Co. Inc.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002)); *see also Adams*, 242  
8 F.R.D. at 536 (“The court makes this [first stage] determination under a fairly lenient standard due to  
9 the limited amount of evidence before it. The usual result is conditional class certification.”) (citations  
10 omitted).

11 Collective actions under the FLSA are not subject to the requirements of Rule 23 for certification  
12 of a class action. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001).  
13 Indeed, “[t]he requisite showing of similarity of claims under the FLSA is considerably less stringent  
14 than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure.” *Wertheim v.*  
15 *Arizona*, No. CIV 92-453 PHX RCB, 1993 WL 603552, \*1 (D. Ariz. Sept. 30, 1993) (citations omitted)  
16 (finding that “[a]ll that need be shown by the plaintiff is that some identifiable factual or legal nexus  
17 binds together the various claims of the class members in a way that hearing the claims together  
18 promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA”).

## 20 DISCUSSION

### 21 I. Delaying Decision on the Motion During Pending Appeal

22 First, defendants argue that the Court should not consider plaintiff’s motion for conditional  
23 FLSA collective action certification, because it is not “mature.” Defs.’ Opp’n at 1. They argue that the  
24 pending appeal of the Court’s Arbitration Order warrants a delay on the decision of plaintiffs’ motion.  
25 Otherwise, they argue, judicial resources may be wasted and the MFL Consultants will be needlessly  
26 contacted if the Arbitration Order is reversed.

27 The Court is unpersuaded by defendants’ arguments. It is the hallmark of the conditional  
28 certification process that often members will be contacted to opt in to a class, and then the class may

1 later become disbanded. This could occur in many ways, such as if a court grants a defendant's motion  
2 to decertify the class, if claims become moot, or if an appellate court reverses an order of the district  
3 court. The possibility that this Court's Arbitration Order may be reversed is not a persuasive reason to  
4 delay the decision on plaintiffs' motion for conditional FLSA collective action certification, as a class  
5 could not materialize in many other different scenarios.

6 Moreover, plaintiffs have filed declarations from six MFL Consultants and documentary  
7 evidence from MHN. Defendants have also filed declarations from MHN employees and numerous  
8 pieces of documentary evidence. There is sufficient evidence for the Court to decide this motion, and  
9 no need for delay. Furthermore, a prompt decision will promote justice and efficiency by notifying  
10 potential class members of this action early so that documents and memories can be more carefully  
11 preserved, and discovery can proceed forward. Prompt notification advances "the principal  
12 congressional purpose in enacting the Fair Labor Standards Act of 1938 [which] was to protect all  
13 covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best*  
14 *Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

## 16 **II. Similarly Situated Class Members**

17 The Court finds that the MFL Consultants are similarly situated to plaintiffs. Plaintiffs and other  
18 MFL Consultants all share the same job title and similar duties. MHN has standard policies, set forth  
19 in the MFLC Provider Manual and MFLC Program Summary, that apply to all MFL Consultants.  
20 Sagafi Decl., Exs. A & B. They also are all subject to the same employment agreement with MHN, the  
21 Provider Services Task Order Agreement. Second Amended Complaint ("SAC"), Ex. A. MHN  
22 classifies all MFL Consultants as exempt employees, and therefore does not pay them for overtime  
23 hours. SAC ¶ 48.

24 Additionally, plaintiffs have made a showing that the MFL Consultants have similar duties,  
25 regardless of the type or location of assignment they are given. One MHN document explains that the  
26 MFL Consultants' main role is to "[p]rovide short term, situational, problem solving non-medical  
27 counseling services in support of military personnel and their families." SAC ¶ 54. MFL Consultants  
28 testify that their work on different assignments is fundamentally similar, and MHN treated them as

1 interchangeable units. *See* Supp. Gliedt-Peter Decl., ¶¶ 9-14 (describing working “interchangeably”  
2 with an MFLC doing an adult assignment while he was working on a child assignment, and also  
3 participating in training with MFLCs on rotational, embedded, and surge assignments); Supp. Platt  
4 Decl., ¶¶ 6, 9, 12-13 (describing the work performed on rotational, embedded, and surge assignments,  
5 and services for children and adults, as “fundamentally the same”). Indeed, one MFL Consultant  
6 explained that the “MFLC position was, by design, standardized so that any fully trained MFLC could  
7 step in and perform the job duties of any other MFLC with little to no disruption in services.” Hennis  
8 Decl. ¶ 8.

9 Defendants argue that the individual differences among the MFL Consultants’ work experiences  
10 means that they are not “similarly situated” for the purposes of conditional FLSA collective action  
11 certification. They point to the changing goals of the military, declarations from MHN supervisors that  
12 dispute the fact that MHN had control over the MFL Consultants, and the different locations, types of  
13 clients, and types of assignments that varied amongst the MFL Consultants.

14 The Court is unpersuaded that these differences preclude a finding that the MFL Consultants are  
15 similarly situated under the lenient FLSA standards. *See, e.g., Hill v. R+L Carriers, Inc.*, 690 F. Supp.  
16 2d 1001, 1004 (N.D. Cal. 2010) (certifying FLSA class of individuals who were “City Dispatchers”  
17 “and any other position(s) who are either called, or work(ed) as, dispatchers”); *Adams*, 242 F.R.D. at  
18 537-38 (certifying a nationwide FLSA class of employees working in over “500 different locations,  
19 under more than fifty different contracts and in thirty-six different states,” and emphasizing that the  
20 plaintiffs were similarly situated because they were “subject to the same alleged policy”). Here, the  
21 MFL Consultants have the same job title; perform substantially similar activities; are governed by the  
22 same Provider Services Task Order Agreement, Provider Manual, and Program Summary; and, most  
23 importantly, are all considered exempt employees that MHN does not pay for overtime. Plaintiffs have  
24 made the requisite showing that the MFL Consultants are in a substantially similar position; they need  
25 not show that the position is identical.

## 26 27 CONCLUSION

28 For the foregoing reasons, the Court GRANTS plaintiffs’ motion for conditional FLSA collective

1 action certification. The Court ORDERS the parties to meet and confer regarding the notice and notice  
2 procedures, and jointly file a proposed notice **by no later than May 3, 2013.** Additionally, the Court  
3 ORDERS defendants to produce to plaintiffs in Microsoft Excel or comparable format the names, all  
4 known addresses, all known e-mail addresses, and all known telephone numbers of all known MFLCs,  
5 **by no later than May 17, 2013.** This resolves Docket No. 54.

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7 **IT IS SO ORDERED.**

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9 Dated: April 25, 2013



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SUSAN ILLSTON  
United States District Judge

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**United States District Court**  
For the Northern District of California