

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JUSTIN TAROVISKY, ET AL.	:	
	:	Civil Action No. 19-4C
Plaintiffs,	:	
v.	:	Judge Patricia E. Campbell-Smith
	:	
THE UNITED STATES OF AMERICA	:	Collective Action
	:	
Defendant.	:	
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PLAINTIFFS’ STATUS REPORT

Plaintiffs submit this status report pursuant to the Court’s November 18, 2020 Order. ECF No. 61. Specifically, the Court ordered Plaintiffs “to file a status report informing the Court of what additional steps they believe are required to preserve Plaintiffs’ claims, and the timeline available for accomplishing the same.” *Id.* The concerns about preserving plaintiffs’ claims vary for existing and putative plaintiffs.

Steps to Preserve Claims of Plaintiffs Who Have Completed Consent Forms

It is necessary to file the consent forms for each person who has submitted a consent form opting-in to the case prior to the expiration of the statute of limitations. The Court’s November 18, 2020 Order directed Plaintiffs to file consent forms on or before December 1, 2020. ECF No. 61. Plaintiffs are filing today 32,195 consent forms received as of November 29, 2020, bringing the total number of plaintiffs to 32,212. Notably, between October 28, 2020 and November 29, Plaintiffs received an additional 1,524 non-duplicative consent forms and anticipate that they will continue to receive additional forms. For example, just today, two federal employees contacted us by email stating that they were not previously aware of the case and asking how to join. As such, absent leave of the court, Plaintiffs intend to file a motion requesting leave to file additional consent forms.

Steps to Preserve Putative Plaintiffs' Claims

Plaintiffs' have a pending motion requesting conditional certification of a collective action, equitable tolling of the FLSA statute of limitations, approving proposed notice and consent forms, and directing issuance of notice primarily via email, which is necessary to preserve the claims of putative plaintiffs. ECF No. 59. If the court grants the motion and orders the issuance of notice, putative plaintiffs will be notified of the pendency of this action and their right to submit consent to sue forms opting-in to this case. The Government filed its opposition on November 23, 2020, ECF No. 63, and Plaintiffs filed their reply on November 30, 2020, ECF No. 72. Briefing is complete.

Plaintiffs' also requested in their motion that the Court equitably toll the statute of limitations simultaneously with a decision conditionally certifying this case. ECF No. 59. If the Court determines that Plaintiffs' motion for equitable tolling is premature, plaintiffs requested that notice still issue to putative plaintiffs because the statute of limitations may not expire in full until January 2022. ECF No. 59 at 22–23.

The statute of limitations does not begin to run until an employee's regularly scheduled pay date for each pay period. *See Moreno v. United States*, 82 Fed. Cl. 387, 404 n. 37 (2008) (noting that an FLSA claim accrues at the end of each pay period when it is not paid and the statute of limitations begins to run when the claim accrues). If the court determines that the Government's violation was willful, the three-year statute of limitations will begin to run on December 28, 2021—three years after the earliest missed pay day.¹ *See* ECF No. 74 at 11 (declining to rule on the issue of whether the government acted in good faith until after discovery).

¹ It appears that some agencies have different pay dates. Plaintiffs believe December 28, 2018 was the first possible date on which employees missed a pay check. *See* GOV'T SERVS. CALENDAR 2018, https://www.gsa.gov/cdnstatic/GSA_Payroll_Calendar_2018.pdf (last visited Dec. 1, 2020).

The lapse in appropriations began on December 22, 2018 at 12:01 a.m – the last day of pay period 25 – and continued until January 25, 2019 – midway through pay period 2.² For example, the GSA pay calendar sets forth Friday, December 28, 2019, as the official electronic funds transfer (EFT) payday for pay period 25. Thus, if an employee was scheduled to be paid on Friday, December 28, 2019, and the government missed this payment, the two-year statute of limitations for Saturday, December 22, 2018 (the only date in this pay period affected by the lapse in appropriations) would expire on Friday, December 28, 2020. If the government also failed to make the payment due the next pay period on Friday, January 11, 2019, the two-year statute of limitations for this particular pay period would expire on January 11, 2021.³

If the statute of limitations is not extended to three years following the conclusion of discovery, Plaintiffs and the opt-in plaintiffs should be allowed to renew this motion for equitable tolling at that time.

² The Pay Period Calendars issued by the U.S. Department of Agriculture, National Finance Center, covering the 2018-2019 Government Shutdown are publicly available at https://www.nfc.usda.gov/Publications/Forms/1217n_19.pdf (last visited Dec. 1, 2020) and https://www.nfc.usda.gov/Publications/Forms/1217n_18.pdf (last visited Dec. 1, 2020); *see also* Amended Complaint, ECF No. 17 at 2–4 (discussing pay calendars).

³ *See* GOV'T SERVS. CALENDAR 2019, https://www.gsa.gov/cdnstatic/GSA%20Payroll%20Calendar%202019_0.pdf (last visited Dec. 1, 2020).

December 2, 2020

Respectfully submitted,

s/ Heidi R. Burakiewicz
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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Federal Claims by using the CM/ECF system. I also certify that the foregoing document is being served on Defendant's counsel of record and that service will be accomplished by the CM/ECF system.

Respectfully,

s/ Heidi R. Burakiewicz

Heidi R. Burakiewicz

December 2, 2020