

Review of Opt-ins when a Class has been Conditionally Certified

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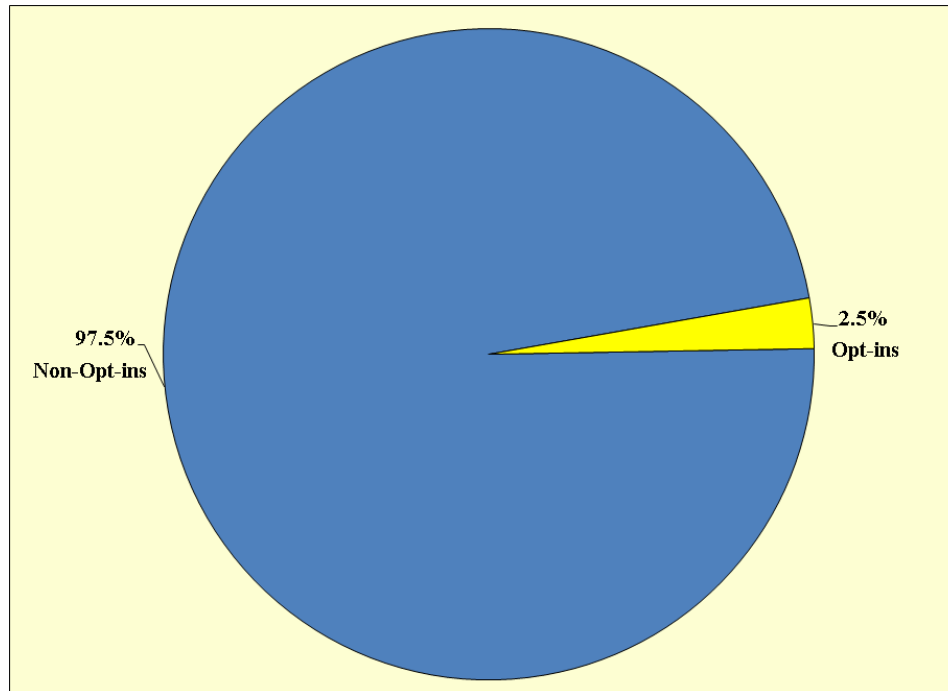
After a federal wage and hour matter has been conditionally certified, the individual putative class members decide whether to opt into the class. After the opt-in date has passed it is often useful to conduct analyses of the opt-in class and its characteristics relative to the population from which the class was derived.

- First, it is informative to analyze what proportion of the conditionally certified class opted in order to determine how many actually consider themselves to have been impacted by the alleged wage and hour issue. A small proportion may invite motions to decertify the class and investigate each individual separately.
- Second, it is useful to determine whether the numerosity, typicality, and commonality requirements that some courts apply to these matters are still met by the opt-in class. These conditions may have been applied to the putative class at the time of conditional certification but if the proportion who choose to opt-in is relatively small and/or the opt-ins' characteristics are not representative of the class there may be support for class decertification. In *Johnson v. Big Lot Stores, Inc.*, a misclassification matter, the court decertified the opt-in class after it was determined that there was substantial variation in the responsibilities of the opt-in employees.

Statistics can be used to examine these issues. Tests can be performed to ascertain whether the opt-ins are representative of the putative class on which the conditional certification was based. To do this the characteristics of the opt-in group are examined to determine whether they are statistically similar to those of the non-opt-ins. The characteristics tested will depend in part on the employer and the claims, but there are some that are generally useful to examine regardless of the claim and employer.

A hypothetical class in a wage and hour case may help to illustrate the use of statistical analysis in ascertaining whether there is statistical support for possible decertification of a conditional class certification. Assume that an employer has 350,000 employees who are subject to an alleged violation of wage and hour law. From this conditional class of 350,000, there are 8,600 opt-ins which results in an opt-in proportion of 2.5%. If the alleged activity was widespread, it could be argued that a higher response rate would be expected. In cases where the opt-ins are only a few people the class may evolve into several plaintiff lawsuits instead of a class action. The graph below illustrates the opt-ins' share of the putative class.

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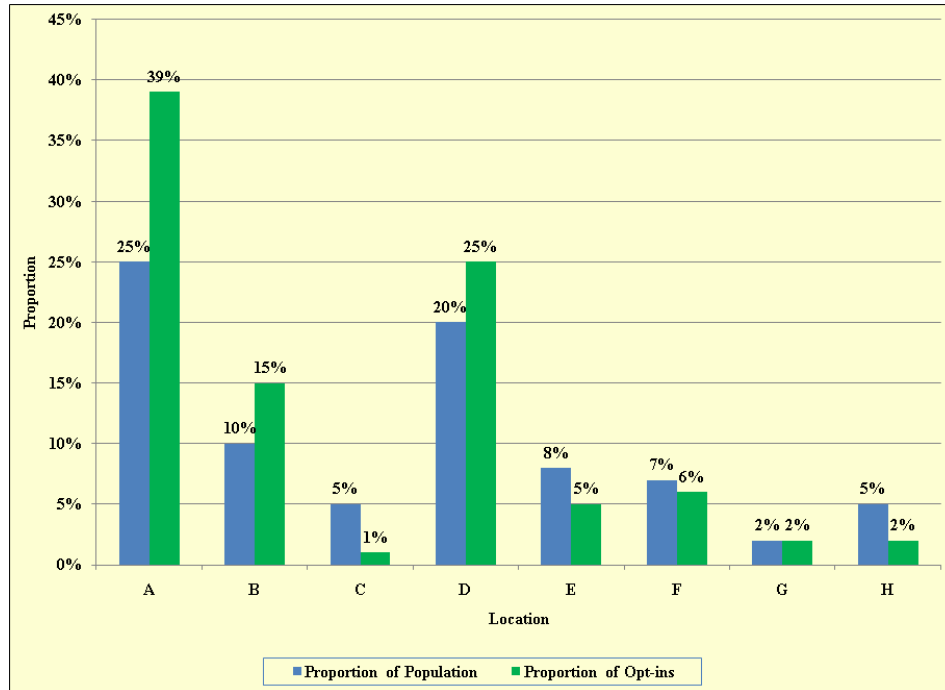
Although this opt-in group is a small proportion of the putative class it is still large enough to support class management, might still be representative of the larger population and, therefore, still statistically meet the criteria necessary for a class action. That is, if the opt-ins are indeed typical of the population, then they are expected to be distributed similarly by those factors that may be related to the wage and hour claim such as, among other things, organizational units (such as location or store), job, shift, hours worked, and seniority group.

Statistical tests can be used to determine if the distributions of these factors are indeed similar. The following hypothetical examples illustrate such a comparison of proportions. Suppose that the 350,000 employees were located at 10 locations (other organizational units such as geographical areas, regions, districts, stores, etc. may be relevant to a particular employer) and the alleged wage and hour decisions are made at each location. By comparing the percentage of opt-ins to the population of employees in each of the locations, it can be determined if the opt-ins are typical of the conditionally certified population with respect to location. The following provides two scenarios, one in which the distributions of the opt-ins' locations are statistically different and the other in which they are statistically similar.

In the first example at Company ABC, the distribution of the proportion of the 8,600 opt-ins in each of the 10 locations is statistically significantly different from the distribution of the 350,000 employees: 25% of all of the conditionally certified employees work at location A, yet this location comprises 39% of the opt-in class. In contrast, while 15% of the population works at location I, 4% of the opt-in class works at this location. These differences suggest that a class definition that includes the entire organization is not appropriate if the alleged activity was not uniform across the organization or there were other influences that were not common or typical across the organization. While some of the percentages are similar, as a whole, the distribution

of the proportions is statistically significantly different with a probability of occurring by chance that is less than 0.001%.²

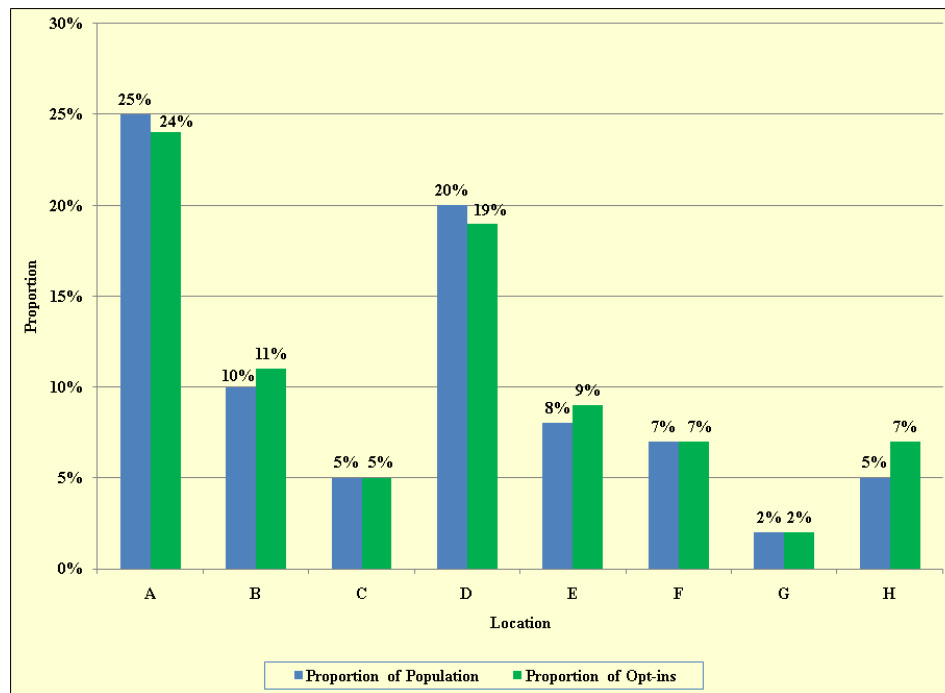
Hypothetical Example of Distribution by Location: Company ABC—Opt-ins are Not Representative of Population by Location



In the second example at Company ABC, the opt-in class is distributed similarly to the population across each of the locations. At each location the difference in the proportion of the total population in that location compared to the opt-in class proportion is less than one percentage point. These differences in the distributions are *not* statistically dissimilar – i.e., they have a probability of occurring by chance that is greater than the typical standard for significance of 5%. The graph below illustrates the similarity in the location distribution of opt-ins and the putative class population.

² A Chi-Square test may be used to determine if the distribution of the two groups is statistically similar to the overall distribution across the two groups (expected distribution). Social scientists and statisticians have used criteria of less than 5% or less than 1% probability of occurring by chance (“greater than two or three standard deviations”) to categorize a result as “statistically significant” for over 75 years. See, for example, Statistics by Freedman, Pisani, and Purves. Courts adopted this standard in voting rights cases (e.g., Castaneda v. Partida) and carried the standard over to equal employment issues in such cases as Hazelwood School District v. U.S., 433 U.S. 299, 308 n.14 (1977) and Teamsters v. U.S., 431 U.S. 324; 97 S. Ct. 1843 (1977). See also: EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983), where the Court indicated that only a difference greater than 3 standard deviations confirms an inference of adverse disparity.

**Hypothetical Example of Distribution by Location:
Company ABC—Opt-ins are Representative of the Population by Location**



Similar comparisons may be prepared by job, grade, part time/full time status, or other employee characteristics, depending upon their relevance to the claims and whether the plaintiffs’ claims are typical of all the opt-ins. In addition to looking at these distributions it may also be informative to determine if there are sizable and significant differences in work patterns and history within and between the employee groups compared. To the extent that the amount of seniority is statistically significantly different between these groups of employees, it can again be potentially argued that the opt-ins are not representative of the conditionally certified class.³ In general, when opt-ins are found to have more seniority, it may be indicative of a group of employees who have had more work experiences with the employer and are more vested in the company. These comparisons may be made overall or by organizational unit, job characteristic, or other component. For non-exempt employees it may be useful to examine the hours worked by opt-ins compared to the hours worked by non-opt-in employees.

In order to examine the ability of the opt-ins to represent a class, consideration of whether the opt-ins are statistically similar to each other (i.e., a cohesive class) may be appropriate. In *McDermott, et al. v. Cracker Barrel Country Stores*, the statistical analysis by ERS Group was used to argue that the opt-ins, declarants and those opt-ins responding to interrogatory requests were statistically atypical to each other because their characteristics and claims were highly variable both within and among the groups themselves. It was concluded that investigating the plaintiffs’ claims would require individual evaluations to make certain that the variation among the groups and within each group of potential class members was adequately addressed.

³ A t-Test may be used to determine if the average seniority of one group is statistically similar to another group.