

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JASON BERK, individually and on
behalf of all similarly situated individuals,

Plaintiff,

Case No. 0:14-cv-01008

Hon.

v.

EXPRESS SCRIPTS, INC.,
a Delaware Corporation, and **EXPRESS
SCRIPTS PHARMACY, INC.** a
Delaware Corporation,

Defendants.

**COLLECTIVE / CLASS ACTION COMPLAINT
AND DEMAND FOR JURY TRIAL**

Plaintiff, Jason Berk (“Plaintiff”), by and through his undersigned counsel, hereby brings this Collective/Class Action Complaint against Defendants Express Scripts, Inc. and Express Scripts Pharmacy, Inc. (hereinafter “Defendants” or “Express Scripts”), and states as follows:

I. FACTS AND BACKGROUND

1. This is a collective and class action brought by Plaintiff, Jason Berk, on behalf of himself and all similarly situated current and/or former employees of Defendants to recover for their willful violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* and attendant contractual obligations.

2. Express Scripts is one of the nation’s leading pharmacy benefit managers, “manag[ing] prescription benefits for tens of millions of Americans on behalf of thousands of clients, including health plans and plan sponsors.”¹

3. Express Scripts ships to all 50 states. They can ship to homes or a variety of

¹ <http://www.express-scripts.com/aboutus/> (last visited on April 8, 2014).

alternate addresses including physician's offices, pharmacies, post offices, or to another family member's address.

4. The employees on the front line of Defendants' business are a group of employees called Prescription Benefit Specialists. Defendants' Prescription Benefit Specialists work in call centers and at-home positions across the country. Regardless of the physical location of their employment, Defendants' Prescription Benefit Specialists perform the same or similar job duties.

5. The individuals Plaintiff seeks to represent in this action are current and former similarly situated employees of Defendants who were not properly compensated as required under federal and state law. The U.S. Department of Labor has recognized that call center jobs are homogenous and it issued Fact Sheet #64 in July 2008 to alert call center employees to some of the abuses which are prevalent in the industry. One of those abuses occurring in this case is an employer's refusal to pay for work "from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday." Fact Sheet #64 at 2 (attached hereto as *Exhibit A*).

6. Defendants knew or should have known it failed to properly compensate employees for the work they performed. On his own behalf and on behalf of the thousands of other similarly situated employees of Defendants, Plaintiff seeks to recover the full measure of back-pay and damages allowed by law.

II. JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over Plaintiff's FLSA claim pursuant to 28 U.S.C. § 1331 because Plaintiff's claim raises a federal question under 29 U.S.C. § 201, *et seq.*

8. This Court has jurisdiction over Plaintiff's Collective Action FLSA claim

pursuant to 29 U.S.C. § 216(b), which provides that suit under the FLSA “may be maintained against any employer . . . in any Federal or State court of competent jurisdiction.”

9. Each of Defendants’ annual sales exceeds \$500,000 and they each have more than two employees, so the FLSA applies in this case on an enterprise basis. Defendants’ Prescription Benefit Specialists engage in interstate commerce and therefore they are also covered by the FLSA on an individual basis.

10. This Court has jurisdiction over Plaintiff’s state law class claims pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). The aggregate claims of the individual Class members exceed the sum value of \$5,000,000 exclusive of interest and costs, there are believed to be in excess of 100 Class members, and this is a case in which more than two-thirds of the proposed Class members and Defendants are citizens of different states.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the actions and omissions giving rise to the claim pled in this Complaint substantially occurred in this District.

III. PARTIES

12. Plaintiff, Jason Berk, is an individual who resides in Port St. Lucie, Florida. Plaintiff is currently employed by Defendants as a Prescription Benefit Specialist since January 2011² and executed his consent to sue form (attached hereto as *Exhibit B*).

13. The individuals Plaintiff seeks to represent in this action are all similarly situated current and former Prescription Benefit Specialists employed by Defendants to provide call center support services in the United States at any time in the past three years. Plaintiff reserves the right to change or expand the class definition as facts and circumstances require.

² Plaintiff was initially hired by Medco Health Solutions, Inc., which Express Scripts, Inc. purchased in the summer of 2011 for \$29.1 billion. See <http://www.workforce.com/articles/express-scripts-to-buy-medco-health-solutions-in-29-1-billion-deal> (last visited on April 8, 2014).

14. Defendant, Express Scripts, Inc. is a publicly traded company incorporated under the laws of the State of Delaware. Express Scripts is headquartered in the State of Missouri, with its principal address at One Express Way, St. Louis, Missouri 63121.

15. Defendant, Express Scripts Pharmacy, Inc. is a subsidiary of Express Scripts, Inc. and is also incorporated under the laws of Delaware. Express Scripts Pharmacy is headquartered in the State of Minnesota, with its principal address at 6625 West 78th Street, Bloomington, Minnesota 55439.

16. Defendants can be served by way of their registered agent, Corporation Service Company, located at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.

17. At all relevant times, Defendants jointly employed Plaintiff, and all members of the putative Class, under the FLSA. As the joint employers of Plaintiff and all Class members, Defendant was responsible for compliance with all applicable FLSA provisions. 29 C.F.R. § 791.2(a) and (b).

18. Plaintiff's injuries were caused by Defendants' application of common and uniform time-keeping and pay policies in the same manner as they were applied to putative Class members. These policies resulted in Defendants' failure to pay Plaintiff, and all putative Class members, for all work performed as set forth in this Complaint.

IV. GENERAL ALLEGATIONS

19. Defendants' Prescription Benefit Specialists are essentially customer service representatives with the following job responsibilities: (1) Handle inbound calls and facilitate outbound calls from/to patients inquiring about their home delivery benefit; (2) Explain the advantages of home delivery prescription services (mail order); (3) Identify patient needs and present savings and convenience of receiving medications via home delivery; (4) Accurately

complete and document patient interactions and transactions in company databases; (5) Ensure accurate and complete documentation is entered into the appropriate systems for all contacts (internal/external) to maintain the quality of the home delivery process; (6) Document HIPAA compliance and reduce potential legal concerns; (7) Navigate multiple on-line systems to capture and interpret basic patient/physician information and document the information in company data systems; (8) Resolve questions and/or issues that may be preventing shipment of an order; (9) Uphold quality and productivity standards on all transactions; (10) Work collaboratively with other employees to ensure that best practices are shared.

20. Defendants' Prescription Benefit Specialists are required to navigate multiple computer and phone systems in the course of performing their job responsibilities. These systems are an integral and important part of their work as they cannot perform their job without them.

21. Defendants' Prescription Benefit Specialists perform the same basic job duties and are required to use the same computer and software programs.

22. Call center jobs, like those of Defendants' Prescription Benefit Specialists, are non-exempt positions that typically pay a few dollars more than the federally mandated minimum wage of \$7.25 per hour.

23. The U.S. Department of Labor has recognized that call center jobs are homogenous and it issued Fact Sheet #64 in July 2008 to alert call center employees to some of the abuses which are prevalent in the industry. One of those abuses, which is occurring in this case, is an employer's refusal to pay for work "from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday." Fact Sheet #64 at p. 2 (*Exhibit A*).

24. In order to perform his job as a Prescription Benefit Specialist, Plaintiff is required to start up and log into various secure computer systems and servers in order to access information such as pertinent client data, sales records, credit card information, prescription drug plans, and shipping data.

25. One of the primary computer programs utilized by Defendants is “JDialer”, a professional phone-dialing software system that allows people to talk using their speakerphone modem and also provides a phonebook. As the first principal of their workday, Defendants’ Prescription Benefit Specialists are required to open and login to this software program.

26. Due to the complexity of the JDialer software system, substantial “off-the-clock” time is needed to boot it up and log-in prior to an employee’s shift.

27. Once the Prescription Benefit Specialists are finally logged into JDialer, they are automatically logged into an “E-Time” program, which provides capabilities for Defendants’ human resources department to manage thousands of employee records.

28. Defendants use E-Time to track their Prescription Benefit Specialists’ punch-in and punch-out times to create timecards and time-detail reports for payroll purposes. The timecards must be approved by Defendants’ managers prior to the employees being paid.

29. Defendants’ Prescription Benefit Specialists are not actually “punched in” for their shifts until *after* the JDialer boot-up and log-in process is complete and they are logged into the E-Time system, meaning that Plaintiff and all other Prescription Benefit Specialists work an average of 10-15 minutes per shift they are never compensated for. This off-the-clock time spent setting up and logging into each session directly benefits Defendants and the process is an essential part of the Prescription Benefit Specialists’ job responsibilities.

30. Using these complex computer software systems, Defendants also maintain a

“schedule adherence” policy, which tracks the time Defendants’ Prescription Benefit Specialists are on the phones and provides individualized “adherence scores” on a weekly and monthly basis. Poor adherence scores may result in discipline including but not limited to termination. Events that affect an employee’s adherence score include not starting calls on time, going to lunch/break at the wrong time, going to lunch/break for the wrong amount of time, leaving one’s desk to use the restroom, leaving one’s desk to perform other work-related tasks, and otherwise not using the phone system correctly.

31. Defendants provide their Prescription Benefit Specialists with one unpaid 30-minute lunch break per shift.

32. In order to deduct a 30-minute lunch break from an employees’ compensable time the employee must be completely relieved of his or her employment duties for the entire 30 minutes. 29 CFR 785.19 states:

- (a) Bona fide meal periods. Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be *completely relieved* from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (emphasis added).

33. However, Defendants do not provide their Prescription Benefit Specialists with a legitimately unpaid bona fide meal period. Instead, Defendants require their Prescription Benefit Specialists to have their computer and phone systems up and running *before* the end of their 30-minute lunch break so they can immediately make/take calls; thus, the Prescription Benefit Specialists are required to return to their desks during their lunch breaks in order to commence the same computer and phone login processes.

34. Additionally, Defendants require their Prescription Benefit Specialists to finish all customer calls even though they ran past the end of their scheduled shifts. The Prescription Benefit Specialists are punched out when they close out the JDialer, but they often spend additional “off-the-clock” time closing down their computer programs. While the Prescription Benefit Specialists were apparently paid for time spent finishing phone calls, they were not compensated for the postliminary time spent closing down their computer programs. These postliminary activities are an essential part of Prescription Benefit Specialists’ job responsibilities and directly benefit Defendants.

35. If Prescription Benefit Specialists’ customer calls run past the end of their scheduled shifts, Defendants consider them to be “out of adherence” for not clocking out on time.

36. The Department of Labor’s Fact Sheet #64 specifically condemns an employer’s non-payment of an employee’s necessary pre-shift and post-shift activities: “An example of the first principal activity of the day for agents/specialists/representatives working in call centers includes starting the computer to download work instructions, computer applications and work-related emails.” See *Exhibit A*, Fact Sheet at 2. Additionally, the FLSA requires that “[a] daily or weekly record of all hours worked, including time spent in pre-shift and post-shift job-related activities must be kept.” *Id.*

37. Defendants knew or could have easily determined how long it takes for their Prescription Benefit Specialists to complete the preliminary boot-up and login process and Defendants could have properly compensated Plaintiff and the putative Class for the preliminary boot-up and login work they performed, but did not. Defendants also knew or could have easily provided Plaintiff and the Class with their full and uninterrupted 30-minute lunch breaks, but did

not. On behalf of himself and hundreds or thousands of others similarly situated Prescription Benefit Specialists, Plaintiff seeks to recover the full measure of back-pay and damages allowed by law.

38. Throughout his employment with Defendants, Plaintiff regularly worked off-the-clock as part of his job as a Prescription Benefit Specialist. At an estimated 10-15 minutes per day of unpaid preliminary computer boot-up time and additional login time during his unpaid lunch break, Plaintiff is owed back pay prior to liquidation and interest.

39. At all relevant times, Defendants were jointly Plaintiff's "employer" and Defendants directly benefited from the preliminary, lunch break, and postliminary activities Plaintiff performed.

40. At all relevant times, Defendants controlled Plaintiff's work schedule, duties, protocols, applications, assignments and employment conditions.

41. At all relevant times, Defendants were able to track the amount of time that Plaintiff spent logged in to Defendants' computer systems; however, Defendants failed to document, track, or pay Plaintiff for 10-15 minutes of boot-up and login time that Plaintiff spent working off the clock every shift, including during his lunch break.

42. At all relevant times, Plaintiff was a non-exempt hourly employee, subject to the requirements of the FLSA.

43. At all relevant times, Defendants used their adherence and attendance policies against Plaintiff for his off-the-clock time worked and failed to pay for that time.

44. At all relevant times, Defendants' policies and practices deprived Plaintiff of wages owed for the off-the-clock activities Plaintiff performed. In workweeks where Plaintiff worked 40 hours or more, Defendants' policies and practices also deprived Plaintiff of overtime

pay at a rate of 1.5 times his regular rate of pay.

45. Express Scripts is a leader in its field knew or should have known that Plaintiff and other Prescription Benefit Specialists' computer boot-up and login time is compensable under the FLSA. Defendants also knew or should have known that the Plaintiff's time spent logging into his computer systems during his lunch break is compensable under the FLSA.

V. COLLECTIVE ACTION ALLEGATIONS

46. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA on his own behalf and on behalf of all similarly situated current and former Prescription Benefit Specialists who worked for Defendants in its call centers or at their homes at any time during the last three years (the "Class").

46. Excluded from the Class are all of Defendants' executive, administrative and professional employees, including computer professionals and outside sales persons.

47. With respect to the claims set forth in this action, a collective action under the FLSA is appropriate because the employees described above are "similarly situated" to Plaintiff under 29 U.S.C. § 216(b). The class of employees on behalf of whom Plaintiff brings this collective action are similarly situated because (a) they have been or are employed in the same or similar positions; (b) they were or are subject to the same or similar unlawful practices, policy, or plan; and (c) their claims are based upon the same factual and legal theories.

48. The employment relationship between Defendants and every Class member is exactly the same and differs only in name, location and rate of pay. The key issues -- the amount of uncompensated preliminary boot-up and login time, the boot-up and login time during lunch breaks, and the amount of postliminary logout time owed to each employee -- does not vary substantially from Class member to Class member.

49. The key legal issues are also the same for every Class member, to wit: whether the 10-15 minutes of preliminary boot-up and login time required to commence a shift, boot-up and login during lunch, and several minutes of postliminary logout activities after their shifts are compensable under the FLSA.

50. Plaintiff estimates that the Class, including both current and former employees over the relevant period, will include several thousand members. The precise number of Class members should be readily available from a review of Defendant's personnel and payroll records.

VI. CLASS ACTION ALLEGATIONS

51. Plaintiff brings this action pursuant to Rule 23(b)(2) and (b)(3) on his own behalf and on behalf of all similarly situated current and former employees who worked for Defendants as Prescription Benefit Specialists at any time during the applicable statutory period (the "Class").

52. The members of the Class are so numerous that joinder of all Class members in this case would be impractical. Plaintiff reasonably estimates there are over 1,000 current and former Prescription Benefit Specialists who reside and work in call centers and in their homes across the country. Class members should be easy to identify from Defendants' computer systems and electronic payroll and personnel records.

53. There is a well-defined community of interest among Class members and common questions of law and fact predominate in this action over any questions affecting individual members of the Class. These common legal and factual questions, include, but are not limited to, the following:

- a. Whether the preliminary time Class members spend on boot-up and login activities prior to each shift is compensable time;

- b. Whether the time Class members spend on boot-up and login activities during their lunch break is compensable time;
- c. Whether the postliminary time Class member spend on logout activities after each shift is compensable time;
- d. Whether Class members are owed wages (above the federally mandated minimum wage and overtime due under the FLSA) for time spent performing preliminary, lunch break, or postliminary activities, and if so, the appropriate amount thereof; and
- e. Whether Defendants' non-payment of wages amount to a breach of contract.

54. Plaintiff's claims are typical of those of the Class in that Plaintiff and all other Class members suffered damages as a direct and proximate result of the Defendants' common and systemic payroll policies and practices. Plaintiff's claims arise from Defendants' common policies, practices, promises, and course of conduct as all other Class members' claims and Plaintiff's legal theories are based on the same legal theories as all other Class members.

55. Plaintiff will fully and adequately protect the interests of the Class and Plaintiff retained counsel who are qualified and experienced in the prosecution of nationwide wage and hour class actions. Neither Plaintiff nor his counsel has interests that are contrary to, or conflicting with, the interests of the Class.

56. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because, *inter alia*, it is economically infeasible for Class members to prosecute individual actions of their own given the relatively small amount of damages at stake for each individual along with the fear of reprisal by their employer. Prosecution of this case as a Class action will also eliminate the possibility of duplicative lawsuits being filed in state and federal courts throughout the nation.

57. This case will be manageable as a Class action. Plaintiff and his counsel know of

no unusual difficulties in this case and Defendants and their corporate clients all have advanced, networked computer and payroll systems that will allow the class, wage, and damages issues in this case to be resolved with relative ease.

58. Because the elements of Rule 23(b)(3) are satisfied in this case, class certification is appropriate. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1437 (2010) (“[b]y its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action”).

59. Because Defendants acted and refused to act on grounds that apply generally to the Class and declaratory relief is appropriate in this case with respect to the Class as a whole, class certification pursuant to Rule 23(b)(2) is also appropriate.

COUNT I

(Collective Action)

VIOLATION OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201, et seq. FAILURE TO PAY WAGES AND OVERTIME

60. Plaintiff re-alleges and incorporates all previous paragraphs herein and further alleges as follows.

61. At all times relevant to this action, Defendants were joint employers under 29 U.S.C. § 203(d) of the FLSA, subject to the provisions of 29 U.S.C. § 201, *et seq.* See also 29 C.F.R. § 791.2(b).

62. Defendants are engaged in interstate commerce, or in the production of goods for commerce, as defined by the FLSA.

63. At all times relevant to this action, Plaintiff was an “employee” of Defendants within the meaning of 29 U.S.C. § 203(e)(1) of the FLSA.

64. Plaintiff either (1) engaged in commerce; or (2) engaged in the production of

goods for commerce; or (3) was employed in an enterprise engaged in commerce or in the production of goods for commerce.

65. At all times relevant to this action, Defendants “suffered or permitted” Plaintiff and all similarly situated current and former employees to work and thus “employed” them within the meaning of 29 U.S.C. § 203(g) of the FLSA.

66. Plaintiff and all similarly situated employees worked for Defendants in excess of forty (40) hours per week.

67. At all times relevant to this action, Defendants required Plaintiff and all similarly situated current and former Class members to perform unpaid computer boot-up, login, and logout work, but failed to pay these employees the federally mandated overtime compensation for any of the services performed.

68. At all times relevant to this action, Defendants required Plaintiff and all similarly situated Class members to perform boot-up and login time during their unpaid lunch break, but failed to pay these employees the federally mandated overtime compensation for any of the services performed. As a result, Defendants owe Plaintiff and the Class wages for the full 30 minutes of their lunch breaks.

69. At all times relevant to this action, Defendants required Plaintiff and all similarly situated current and former Class members to perform additional postliminary computer logout activities, but failed to pay these employees the federally mandated overtime compensation for any of the services performed.

70. This off-the-clock work performed by Plaintiff and all similarly situated Class members every day is an essential part of their jobs and these activities and the time associated with these activities is not *de minimis*.

71. In workweeks where Plaintiff and other Class members worked 40 hours or more, the uncompensated preliminary boot-up and login time, the uncompensated setup and login time during lunch breaks, the uncompensated postliminary logout time, and all other overtime should have been paid at the federally mandated rate of one and one-half times each employee's regularly hourly wage. 29 U.S.C. § 207.

72. Plaintiff and other Class members, by virtue of their job duties and activities actually performed, are all non-exempt employees.

73. Defendants' violations of the FLSA were knowing and willful. Defendants knew or could have determined how long it takes for a Prescription Benefit Specialist to complete the preliminary boot-up and login process, how long it took to boot-up and login during their lunch breaks, and how long it took to logout after a Prescription Benefit Specialist's shift, and it could have properly compensated Plaintiff and the Class for these activities, but did not.

74. The FLSA, 29 U.S.C. § 216(b), provides as a remedy for a violation of the Act, an employee is entitled to his or her unpaid wages (and unpaid overtime if applicable) plus an additional equal amount in liquidated damages (double damages), plus costs and reasonable attorneys' fees.

Count II

(Class Action)

Breach of Contract

75. Plaintiff re-alleges and incorporates all previous paragraphs herein and further alleges as follows.

76. At all times relevant to this action, Defendants had contracts with Plaintiff and every other Class member to pay them for each hour they worked at a pre-established

(contractual) regularly hourly rate.

77. Each Class member's contractual hourly rate is identified in paystubs and other records that Defendants prepare as part of their regular business activities.

78. Plaintiff and every other Class member performed under the contract by carrying out their job duties as Defendants required, permitted, or suffered.

79. By not paying Plaintiff and every other Class member the agreed upon hourly wage for the preliminary boot-up and login activities, the boot-up and login activities performed during each lunch break, and the postliminary log-out activities performed at the end of each shift, Defendants systematically breached their contracts with Plaintiff and each other member of the Class.

80. Plaintiff's and Class members' remedies under the FLSA may be inadequate in this case to the extent they are paid more than the federally mandated minimum wage of \$7.25 per hour but less than 40 hours per week (i.e., pure "gap time" claims).

81. Defendants also breached their duty of good faith and fair dealing by failing to keep track of the time Plaintiff and other Class members spent doing preliminary and postliminary activities, which is a fundamental part of the Prescription Benefit Specialists' job duties.

82. The contract and contractual obligations in question are not employment contracts in that they do not relate to or guarantee that any services will be performed in the future; rather, Defendants' contractual obligations are to pay an hourly wage in exchange for the employee's time already worked.

83. As a direct and proximate result of Defendants' breaches of the contracts alleged herein, Plaintiff and every other member of the Class have been damaged in an amount to be determined at trial.

84. These claims are appropriate for nationwide class certification under Rules 23(b)(2) and (b)(3) because the law of contracts is substantially the same throughout the United States.

WHEREFORE, Plaintiff requests that this Honorable Court:

- a. certify this case as a collective action in accordance with 29 U.S.C. § 216(b) with respect to the FLSA claims set forth herein (Count I);
- b. certify this action as a class action pursuant to Rule 23(b)(2) and (b)(3) with respect to Plaintiff's state law claim (Counts II);
- c. order Defendants to disclose in computer format, or in print if no computer readable format is available, the names, addresses, and e-mail addresses of all Class members, and permitting Plaintiff to send notice of this action to all those similarly situated individuals, including the publishing of notice in a manner that is reasonably calculated to apprise the Class of their rights by law to join and participate in this lawsuit;
- d. designate Plaintiff as the representative of the Class;
- e. appoint Sommers Schwartz, P.C. and Johnson Becker, PLLC as Interim Co-Class Counsel;
- f. declare that Defendants violated the FLSA and the Department of Labor's attendant regulations as cited herein;
- g. declare that Defendants' violation of the FLSA was willful;
- h. grant judgment in favor of Plaintiff and against Defendants, and award Plaintiff and the Class the full amount of damages and liquidated damages available by law;
- i. award reasonable attorney fees and costs incurred by Plaintiff in filing this action as provided by statute;
- j. award pre- and post-judgment interest to Plaintiff on these damages; and
- k. award such other and further relief as this Court deems appropriate.

DATED: April 8, 2014

Respectfully Submitted,

s/Timothy J. Becker

Timothy J. Becker

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JASON BERK, individually and on
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EXPRESS SCRIPTS, INC.,
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Defendants.

Case No. 0:14-cv-01008

Hon.

JURY DEMAND

NOW COMES Plaintiff, JASON BERK, by and through the undersigned counsel, and hereby demands a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure and the court rules and statutes made and provided with respect to the above entitled cause.

DATED: April 8, 2014

Respectfully Submitted,

s/ Timothy J. Becker

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Trial Counsel for Plaintiffs

EXHIBIT A

U.S. Department of Labor
Wage and Hour Division



(Revised July 2008)

Fact Sheet #64: Call Centers under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the FLSA to employees working in call centers.

Characteristics

A call center is a central customer service operation where agents (often called customer care specialists or customer service representatives) handle telephone calls for their company or on behalf of a client. Clients may include mail-order catalog houses, telemarketing companies, computer product help desks, banks, financial services and insurance groups, transportation and freight handling firms, hotels, and information technology (IT) companies.

Coverage

If the annual dollar volume of a call center's sales or business is \$500,000 or more, and the enterprise has at least two employees, all employees of the enterprise are covered by the FLSA on an "enterprise" basis. An enterprise may consist of one establishment, or it may be made up of multiple establishments.

Additionally, the FLSA also provides an "individual employee" basis of coverage. If the gross sales or volume of business done does not meet the requisite dollar volume of \$500,000 annually, employees may still be covered if they individually engage in interstate commerce, the production of goods for interstate commerce, or in an occupation closely related and directly essential to such production. Interstate commerce includes such activities as transacting business via interstate telephone calls, the Internet or the U.S. Mail (such as handling insurance claims), ordering or receiving goods from an out-of-state supplier, or handling the accounting or bookkeeping for such activities.

Requirements

Covered nonexempt employees are entitled to be paid at least the federal minimum wage as well as [overtime](#) at time and one-half their regular rate of pay for all hours worked over 40 in a workweek. (This may not apply to certain executive, administrative, and professional employees, including computer professionals and outside sales, as provided in Regulations [29 CFR 541](#)).

The FLSA requires employers to keep records of wages, hours, and other items, as specified in the recordkeeping regulations. With respect to an employee subject to both [minimum wage](#) and [overtime](#) provisions, records must be kept as prescribed by Regulations [29 CFR 516](#). Records required for exempt employees differ from those for non-exempt workers.

The FLSA also contains youth employment provisions regulating the employment of minors under the age of 18 in covered work, as well as recordkeeping requirements. Additional information on the youth employment provisions is available at www.youthrules.dol.gov.

Typical Problems

Hours Worked: Covered employees must be paid for all hours worked in a workweek. In general, “hours worked” includes all time an employee must be on duty, or on the employer’s premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work. **An example of the first principal activity of the day for agents/specialists/representatives working in call centers includes starting the computer to download work instructions, computer applications, and work-related emails.**

Rest and Meal Periods: Rest periods of short duration, usually 20 minutes or less, are common in the industry (and promote employee efficiency), and must be counted as hours worked. *Bona fide* meal periods (typically 30 minutes or more) generally need not be compensated as work time as long as the employee is relieved from duty for the purpose of eating a regular meal.

Recordkeeping: A daily and weekly record of all hours worked, including time spent in pre-shift and post-shift job-related activities, must be kept.

Overtime: Earnings may be determined on an hourly, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the regular hourly rate derived from all such earnings. This is calculated by dividing the total pay (except for certain statutory exclusions) in any workweek by the total number of hours actually worked. See Regulations [29 CFR 778](#).

Salaried Employees: A salary, by itself, does not exempt employees from the [minimum wage](#) or from [overtime](#). Whether employees are exempt from [minimum wage](#) and/or [overtime](#) depends on their job duties and responsibilities as well as the salary paid. Sometimes, in call centers, salaried employees do not meet all the requirements specified by the regulations to be considered as exempt. Regulations [29 CFR 541](#) contain a discussion of the requirements for several exemptions under the FLSA (i.e., executive, administrative, and professional employees – including computer professionals, and outside sales persons).

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JASON BERK, individually and on behalf
of all similarly situated individuals,

Case No.:

Plaintiff,

Hon.

v.

EXPRESS SCRIPTS, INC.,
A Delaware Corporation,

Defendant.

CONSENT TO JOIN

1. Pursuant to the Fair Labor Standards Act, 29 U.S.C. §216(b), I hereby consent to join and act as a plaintiff in the above-captioned lawsuit.

2. I agree to be bound by any adjudication or court rulings in the lawsuit, whether favorable or unfavorable.

3. I hereby designate the Sommers Schwartz, P.C. and Johnson Becker, PLLC law firms to represent me in the lawsuit under the terms and conditions set forth on the following page.

Signature:



Print Name:

Jason Berk

Street Address:

1315 N US Hwy 1

City, ST, Zip:

Fort Pierce, Florida 34950

Telephone:

772 985 1164

Date Signed:

4/08/2014

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
JASON BERK, individually and on behalf of all similarly situated individuals
(b) County of Residence of First Listed Plaintiff St. Lucie, FL
(c) Attorneys (Firm Name, Address, and Telephone Number) Timothy J. Becker and Jacob R. Rusch, Johnson Becker, PLLC, 33 South Sixth Street, Suite 4530, Minneapolis, MN 55402; 612-436-1800

DEFENDANTS
EXPRESS SCRIPTS, INC., a Delaware Corporation, and EXPRESS SCRIPTS PHARMACY, INC., a Delaware Corporation
County of Residence of First Listed Defendant St. Louis, MO
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1 Incorporated or Principal Place of Business In This State 4 4
Citizen of Another State 2 2 Incorporated and Principal Place of Business In Another State 5 5
Citizen or Subject of a Foreign Country 3 3 Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 29 U.S.C. § 201, et seq.
Brief description of cause: Violation of FLSA

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 04/08/2014 SIGNATURE OF ATTORNEY OF RECORD Timothy J. Becker

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.