

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
LAS CRUCES DIVISION**

<b>FERNANDO GUTIERREZ-PONCE and</b>	§	
<b>JARAD WILLIAMS-MILLER,</b>	§	
<b>Individually and On Behalf of All Others</b>	§	
<b>Similarly Situated,</b>	§	<b>Civil Action No.</b>
	§	
<b>Plaintiffs,</b>	§	<b>2:18-CV-786-WJ-SMV</b>
	§	
<b>v.</b>	§	
	§	
<b>FTS INTERNATIONAL SERVICES,</b>	§	
<b>LLC,</b>	§	
	§	
<b>Defendant.</b>	§	

**PLAINTIFFS’ FIRST AMENDED COMPLAINT**

Plaintiffs Fernando Gutierrez-Ponce and Jarad Williams-Miller (“Named Plaintiffs”) on behalf of themselves and all others similarly situated (“Class Members” herein) (Named Plaintiffs and Class Members are collectively referred to herein as “Plaintiffs”) bring this wage theft suit against the above-named Defendant under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, as amended and the New Mexico Minimum Wage Act (“NM Wage Act”), N.M. STAT. § 50-4-19, *et seq.* Named Plaintiffs file this Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(1)(B).<sup>1</sup> Named Plaintiffs show as follows:

**I. NATURE OF SUIT**

1. The FLSA was passed by Congress in 1938 to eliminate low wages and long hours and to correct

<sup>1</sup> Rule 15(a)(1)(B) provides, in relevant part, “[a] party may amend its pleading once as a matter of course within . . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading[.]” Here, Defendant served its Answer to the Original Complaint on September 21, 2018 (Dkt. No. 8), and Plaintiffs are filing this Amended Complaint within 21 days of that day.

conditions that were detrimental to the health and well-being of workers. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). To achieve its humanitarian goals, the FLSA “limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed.” *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944) (discussing the requirements of 29 U.S.C. § 207(a)).

2. Likewise, the NM Wage Act requires that employees who work more than forty hours in a week be paid one and one-half their regular hourly rate for hours worked in excess of forty hours. N.M. STAT. § 50-4-22.
3. Defendant FTS International Service, LLC (“Defendant”) has violated the FLSA and the NM Wage Act by failing and refusing to include non-discretionary job bonuses paid to Plaintiffs in calculating the regular rates of pay (or regular hourly rates of pay) on which the overtime calculation is based. As a result, Defendant has not paid Named Plaintiffs and Class Members for all overtime hours they have worked at a rate not less than time and one-half their regular rates of pay. Because there are other putative plaintiffs who are similarly situated to the Named Plaintiffs with regard to the work performed and the Defendant’s compensation policies, Named Plaintiffs bring this action as an opt-in collective action pursuant to 29 U.S.C. § 216(b) and as an opt-out class action under Federal Rule of Civil Procedure 23.

## **II. PARTIES**

4. Named Plaintiff Fernando Gutierrez-Ponce is an individual who resides in Maricopa County, Arizona and has been employed by Defendant within the meaning of the FLSA. Named Plaintiff Gutierrez-Ponce was employed by Defendant from February 2018 to July 2018. He has consented to be a party-plaintiff in this action. His signed consent form is attached to Plaintiffs’ Original

Complaint as “Exhibit A” (Dkt. No. 1-1), and is incorporated herein by reference pursuant to Federal Rule of Civil Procedure 10(c).

5. Named Plaintiff Jarad Williams-Miller is an individual who resides in Tarrant County, Texas (but currently lives and works most of the time in and around Reeves County, Texas). He has been employed by Defendant within the meaning of the FLSA. Named Plaintiff Williams-Miller was employed by Defendant off and on from 2012 until July 13, 2018, and he was continuously employed by Defendant from April 2017 until July 13, 2018. His signed consent form is attached to Plaintiffs’ Original Complaint as “Exhibit B” (Dkt. No. 1-2), and is incorporated herein by reference pursuant to Federal Rule of Civil Procedure 10(c).
6. The Named Plaintiffs and Class Members are Defendant’s current and former frac operators who were paid one or more bonuses, and who worked for Defendant in New Mexico in at least one workweek in the last three years.
7. Defendant FTS International Services, LLC is a Texas limited liability company that is doing business in New Mexico. Defendant has been served with process in this action and it has made an appearance by and through its counsel of record.

### **III. JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction in this matter because Plaintiffs assert claims arising under federal law. Specifically, Plaintiffs assert claims arising under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.* This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs’ NM Wage Act claims form part of the same case or controversy under Article III of the United States Constitution. Therefore, this Court has supplemental

jurisdiction over Plaintiffs' NM Wage Act claims pursuant to 28 U.S.C. §1367(a). This Court also has personal jurisdiction over all parties to this action.

9. Venue is proper in this district and division as a substantial part of the events forming the basis of this suit occurred in and around Lea County, New Mexico, which is in this District and Division. Named Plaintiffs were employees of Defendant, and they performed most of their work for Defendant, in and around Lea County, New Mexico. Defendant is subject to this Court's personal jurisdiction with respect to this civil action. Defendant thus resides in this district and division. 28 U.S.C. §1391(c). Venue in this Court is therefore proper under 28 U.S.C. § 1391(b).

#### **IV. COVERAGE UNDER THE FLSA**

10. At all relevant times, Defendant has acted, directly or indirectly, in the interest of an employer with respect to Named Plaintiffs and the Class Members.
11. At all times hereinafter mentioned, Defendant has been an "employer" within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d).
12. At all times hereinafter mentioned, Defendant has been engaged in an "enterprise" within the meaning of Section 3(r) of the FLSA, 29 U.S.C. § 203(r).
13. At all times hereinafter mentioned Defendant has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that Defendant is an enterprise and has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that said enterprise has had and has an annual gross volume of sales made or business done of not less than \$500,000 (exclusive of excise taxes at the retail level which are separately stated).

14. At all times hereinafter mentioned, Named Plaintiffs and Class Members were individual “employees” (as defined in Section 3(e)(1) of the FLSA, 29 U.S.C. § 203(e)(1)) who were engaged in commerce or in the production of goods for commerce as required by 29 U.S.C. §207 and whom Defendant at all relevant times “employ[ed]” within the meaning of Section 3(g) of the FLSA, 29 U.S.C. § 203(g).

#### **V. COVERAGE UNDER THE NM WAGE ACT**

15. At all times hereinafter mentioned, Defendant has been an “employer” within the meaning of Section 50-4-21(B) of the NM Wage Act.

16. At all times hereinafter mentioned, Named Plaintiffs and the NM Class Members (defined below) were individual “employees” within the meaning of Section 50-4-21(C) of the NM Wage Act, and whom Defendant at all relevant times “employ[ed]” within the meaning of Section 50-4-21(A) of the NM Wage Act.

#### **VI. FACTUAL ALLEGATIONS**

17. Defendant provides hydraulic fracturing and wireline services to oil companies working in major shale basins across the United States.

18. Named Plaintiffs has worked as an operator for Defendant from February 2018 to the present.

19. In the performance of their work, Plaintiffs handle tools, equipment, and other materials that were manufactured outside of the State of New Mexico.

20. Named Plaintiffs were employed by Defendant as operators at Defendant’s worksites in and around the Permian Basin in New Mexico. The Class Member employees are and have been employed in all of the Defendant’s locations.

##### **A. The Named Plaintiffs and Class Members Are Non-Exempt Employees.**

21. Defendant classified Plaintiffs and the Class Members as “non-exempt” from the overtime

protections of the FLSA and NM Wage Act.

22. For all times relevant to this action, as operators, the Plaintiffs' primary job duty for the Defendant has been the performance of manual, non-management work. The Plaintiffs' primary job duty is not the performance of office, or non-manual work directly related to Defendant's management or general business operations, or those of its customers.
23. Plaintiffs spend most of their time performing manual tasks outside at jobsites in the oilfield.
24. The daily and weekly activities of Plaintiffs were routine and largely governed by standardized plans, procedures, and checklists created by Defendant. Virtually every job function was predetermined by Defendant, including the data to compile and schedule of work and related work duties. The Plaintiffs were prohibited from varying their job duties outside of the predetermined parameters.
25. Plaintiffs did not direct the work of two or more employees at any time during their employment. Plaintiffs did not have the authority to hire or fire other employees, and their suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees were not given particular weight.
26. Plaintiffs did not perform work that required knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; and they do not perform work in a recognized field of artistic or creative endeavor.
27. Defendant did not pay Named Plaintiffs or Class Members on a salary or a fee basis pursuant to 29 C.F.R. §541.600. Instead, Defendant paid Named Plaintiffs and Class Members an hourly wage, plus bonuses.
28. Defendant considers Named Plaintiffs and the Class Members to be—and treats them as—non-exempt employees under the FLSA and NM Wage Act.

**B. Defendant Did Not Include Bonuses in Calculating the Plaintiffs' Regular Rate of Pay**

29. Named Plaintiffs and Class Members worked long hours. During all times relevant to this action, in weeks in which they perform work for Defendant, Plaintiffs typically worked more than forty hours per week, and they often worked very long hours and much more than forty hours in a week. For example, during the two-week pay period May 27, 2018 through June 9, 2018, Defendant paid both Named Plaintiff Gutierrez-Ponce and Named Plaintiff Williams-Miller for 181.5 hours each, or an average of 90.75 hours for each of those two weeks.
30. However, Defendant did not pay Plaintiffs at a rate of not less than one and one-half their regular rates of pay (or regularly hourly rate) for all hours that they worked in excess of 40 hours in a week for the Defendant. Specifically, Defendant did not include any job bonuses when calculating the regular rate of pay (or regular hourly rate).
31. Defendant paid the Plaintiffs these bonuses regularly and it did so roughly every other pay period. The Plaintiffs' pay periods were two-week pay periods. Consequently, Defendant regularly paid bonuses to the Plaintiffs at least one time per month. For example, Defendant paid Plaintiff Gutierrez-Ponce bonuses totaling \$490.00 on April 20, 2018, \$640.00 on May 18, 2018, and \$1,440.00 on June 15, 2018. Similarly, Defendant paid Plaintiff Williams-Miller bonuses totaling \$700.00 on November 17, 2017, \$2,965.00 on December 15, 2017, and \$1,270.00 on January 12, 2018. These are only a few examples of the bonuses that Defendant regularly paid to the Plaintiffs.
32. Defendant coded these bonuses in their payroll system as either "Bonus-Job" or "DEVON FUNDED." Both "Bonus-Job" and the "DEVON FUNDED" bonuses were non-discretionary bonuses.
33. However, Defendant failed to include any such bonuses in calculating the regular rate of pay under the FLSA (or the regular hourly rate of pay under the NM Wage Act) for purposes of calculating

the Plaintiffs' overtime compensation for all hours worked over 40 in a workweek. Consequently, Defendant failed and refused to pay Plaintiffs at a rate that is not less than one and one-half the Plaintiffs' regular rates of pay for all hours worked over 40 in a workweek.

34. Defendant provided vehicles for Plaintiffs to drive to and from the jobsites. For example, Defendant provided Named Plaintiffs a 15-passenger General Motors Econoline van. The Plaintiffs drove these vehicles with no trailer of any kind attached. The motor vehicles that Defendant provided to Named Plaintiffs and Class Members to drive had a gross vehicle weight rating (GVWR) of 10,000 pounds or less.
35. Attached to Plaintiffs' Original Complaint as Exhibit "C" is a true and correct copy of a photograph of the placard affixed to the vehicle that Defendant provided to Named Plaintiff Gutierrez-Ponce. Plaintiffs incorporate that Exhibit herein by reference pursuant to Federal Rule of Civil Procedure 10(c).
36. Named Plaintiffs and Class Members operated vehicles with a GVWR of 10,000 pounds or less during every workweek during their employment with Defendant.
37. Defendant has employed and is employing other employees who have performed the same or similar job duties under the same pay provisions as Named Plaintiffs, in that they have performed, or are performing, non-exempt work, have consistently worked in excess of forty hours in a workweek, are paid non-discretionary job bonuses, but have been denied overtime compensation at a rate of not less than one-and-one-half times their regular rates of pay (or regular hourly rate) for all overtime hours worked.
38. Defendant has knowingly, willfully, or with reckless disregard carried out, and continues to carry out, its illegal pattern or practice of failing to pay overtime compensation to Named Plaintiffs and the Class Members.

## VII. FLSA COLLECTIVE ACTION ALLEGATIONS

39. Named Plaintiffs seek conditional certification pursuant to 29 U.S.C. § 216(b) of the following class (the “FLSA Class Members”):

**All current and former frac operators of Defendant who were paid one or more bonuses, and who worked for Defendant in New Mexico in at least one workweek in the last three years.**

40. Named Plaintiffs and the FLSA Class Members performed the same or similar job duties as one another in that they worked as, and performed the duties of non-exempt employees on Defendant’s worksites, including worksites in New Mexico. Further, Named Plaintiffs and the FLSA Class Members were subjected to the same pay provisions in that they were all paid on an hourly basis plus bonuses but were not compensated at the rate of at least one and one-half their regular rates of pay for all hours worked in excess of 40 in a workweek, as specifically discussed above.

41. Defendant’s failure to compensate employees for hours worked in excess of 40 in a workweek as required by the FLSA results from a policy or practice of paying its employees non-discretionary bonuses not including those sums in calculating the regular rate of pay or overtime rate. This policy or practice is applicable to the Named Plaintiffs and all FLSA Class Members. Application of this policy or practice does not depend on the personal circumstances of the Named Plaintiffs or those joining this lawsuit. Rather, the same policy or practice that resulted in the non-payment of overtime compensation to Named Plaintiffs also applied to all FLSA Class Members.

## VIII. NM WAGE ACT RULE 23 CLASS ALLEGATIONS

42. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Named Plaintiffs, individually and on behalf of all other similarly situated employees, pursue NM Wage Act claims against Defendant.

43. Named Plaintiffs seek certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure (the “NM Class Members”) as follows:

**All current and former frac operators of Defendant who were paid one or more bonuses, and who worked for Defendant in New Mexico in at least one workweek in the last three years.**

44. Named Plaintiffs, individually and on behalf of all other similarly situated employees, seek relief on a class basis challenging Defendant's practice of knowingly permitting its non-exempt employees to work more than forty hours per week but failing to pay Named Plaintiffs and other similarly situated employees one and one-half times their regular hourly rate of pay for all hours worked over forty in a week.
45. Named Plaintiffs and the NM Class Members performed the same or similar job duties as one another in that they worked as, and performed the duties of non-exempt employees on Defendant's worksites in New Mexico. Further, Named Plaintiffs and the NM Class Members were subjected to the same pay provisions in that they were all paid on an hourly basis, plus bonuses, but were not compensated at the rate of at least one and one-half their regular rates of pay for all hours worked in excess of 40 in a workweek, as specifically discussed above.
46. Defendant's failure to compensate employees for hours worked in excess of 40 in a workweek as required by the NM Wage Act results from a policy or practice of not including non-discretionary job bonuses in the regular hourly rate of pay. This policy or practice is applicable to the Named Plaintiffs and all NM Class Members. Application of this policy or practice does not depend on the personal circumstances of the Named Plaintiffs or those joining this lawsuit. Rather, the same policy or practice that resulted in the non-payment of overtime compensation to Named Plaintiffs also applied to all NM Class Members.
47. Therefore, throughout the relevant period, Defendant knew that Named Plaintiffs and NM Class Members were not being properly compensated for all of their hours worked.

48. Defendant maintained common work, time, and pay policies and procedures throughout its New Mexico locations. As a result, Named Plaintiffs and NM Class Members are similarly situated regardless of their location and have been regularly deprived of pay for workweeks during which they worked more than forty hours.

49. Plaintiffs' NM Wage Act claims against Defendant satisfy the numerosity, commonality, typicality, adequacy, and superiority requirements for the certification of a class action under Federal Rule of Civil Procedure 23.

50. **Numerosity.** The class satisfies the numerosity standard as it is believed that there are at least 100 NM Class Members. Consequently, joinder of all NM Class Members in a single action is impracticable. The data required to calculate the size of the class is within the sole control of Defendant.

51. **Commonality.** There are questions of law and fact common to the class that predominate over any questions affecting individual members. The questions of law and fact common to the class arising from Defendant's actions include, without limitation, the following:

- a) Whether Defendant violated the NM Wage Act by failing to pay the NM Class Members the proper overtime compensation for their work hours;
- b) Whether Defendant violated the NM Wage Act by failing to include non-discretionary bonuses in the regularly hourly rate of pay;
- c) Whether Defendant's violation of the NM Wage Act constituted a continuing course of conduct; and
- d) The proper measure of damages sustained by the NM Class Members.

52. **Typicality.** Named Plaintiffs' claims are typical of those of the class because Named Plaintiffs' claims arise from the same course of conduct and legal theories as the claims of the prospective

NM Class Members. Like the NM Class Members, the Named Plaintiffs worked as non-exempt employees on Defendant's New Mexico jobsites. Like the NM Class Members, Named Plaintiffs regularly worked in excess of forty hours per week. Like the NM Class Members, Named Plaintiffs were not compensated for at proper overtime rates for all overtime hours worked. The other facts outlined above likewise apply equally to both Named Plaintiffs and the NM Class Members.

53. **Adequacy.** Named Plaintiffs are adequate representatives of the class because their interests do not conflict with the interests of the NM Class Members they seek to represent. The interests of the members of the class will be fairly and adequately protected by Named Plaintiffs and the undersigned counsel, who have experience in employment and class action lawsuits.

**Superiority.** A class action is superior to other available means for the fair and efficient adjudication of this lawsuit. Even in the event any member of the class could afford to pursue individual litigation against a company the size of Defendant, doing so would unduly burden the court system. Individual litigation of many of these claims would magnify the delay and expense to all parties and flood the court system with duplicative lawsuits. Prosecution of separate actions by individual members of the class would create risk of inconsistent and varying judicial results and establish incompatible standards of conduct for Defendant. A single class action can determine the rights of all NM Class Members in conformity with the interest of efficiency and judicial economy.

**IX. CAUSE OF ACTION ONE: FAILURE TO PAY WAGES IN ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT**

54. During the relevant period, Defendant violated Section 7 of the FLSA, 29 U.S.C. §§ 207, and 215(a)(2), by employing employees, including Named Plaintiffs and the FLSA Class Members, in an enterprise engaged in commerce or in the production of goods for commerce within the meaning

of the FLSA as stated herein above, for workweeks longer than 40 hours without compensating such employees for their work in excess of forty hours per week at rates no less than one-and-one-half times their regular rates for which they were employed. Defendant has acted willfully in failing to pay Named Plaintiffs and the Class Members in accordance with applicable law.

**X. CAUSE OF ACTION TWO: FAILURE TO PAY WAGES IN ACCORDANCE WITH NEW MEXICO MINIMUM WAGE ACT**

55. During the relevant period, Defendant violated the New Mexico Minimum Wage Act, N.M. STAT. § 50-4-22 (West 2018), by employing employees, including Named Plaintiffs and the NM Class Members, for workweeks longer than 40 hours without compensating such employees for their work in excess of forty hours per week at rates no less than one-and-one-half times their regular hourly rate. Defendant's violation of New Mexico Minimum Wage Act occurred as part of a continuing course of conduct.

**IX. PRAYER FOR RELIEF**

WHEREFORE, cause having been shown, Named Plaintiffs pray for judgment against Defendant as follows:

- a. For an expedited Order certifying a class and directing notice to putative class members pursuant to 29 U.S.C. § 216(b), and individually, and on behalf of any and all such class members.
- b. For an Order certifying the NM Wage Law claims as a Class Action pursuant to Fed. R. Civ. P. 23, for designation of Named Plaintiffs as Class Representatives under applicable NM law, and for designation of Plaintiff's counsel as class counsel;
- c. For an Order pursuant to Section 16(b) of the FLSA, 29 U.S.C. §216(b), finding Defendant liable for unpaid back wages due to Named Plaintiffs (and those who may join

in the suit) and for liquidated damages equal in amount to the unpaid compensation found due to Named Plaintiffs (and those who may join the suit);

d. For an Order awarding Named Plaintiffs and the NM Class Members damages pursuant to N.M. Stat. 50-4-26;

e. For an Order awarding Named Plaintiffs and the NM Class Members damages for all violations, regardless of the date on which they occurred, as a result of Defendants' continued course of conduct pursuant to N.M. Stat. Ann. 50-4-32;

f. For an Order awarding Named Plaintiffs (and those who may join in the suit) the taxable costs and allowable expenses of this action;

g. For an Order awarding Named Plaintiffs (and those who may join in the suit) attorneys' fees; and

h. For an Order awarding Named Plaintiffs (and those who may join in the suit) pre-judgment and post-judgment interest at the highest rates allowed by law;

i. For an Order awarding Named Plaintiffs declaratory and injunctive relief as necessary to prevent the Defendant's further violations, and to effectuate the purposes, of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*; and

j. For an Order granting such other and further relief, at law or in equity, as may be necessary and/or appropriate.

Respectfully Submitted,

**MORELAND VERRETT, P.C.**

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 5th day of October, 2018, I electronically submitted the foregoing document for filing using the Court's CM/ECF system. The following counsel of record shall be served with a true and correct copy of the foregoing document by operation of the Court's CM/ECF system:

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