Alert

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COZEN O'CONNOR

Watershed Fifth Circuit Opinion Raises Bar for FLSA Collective Actions

On January 12, 2021, the U.S. Fifth Circuit Court of Appeals issued a landmark ruling in *Swales v. KLLM Transport Servs., LLC*, wherein the court did away with the two-step *Lusardi* framework that most Fair Labor Standards Act (FLSA) collective actions have followed for the last 33 years, and established a clarified — albeit more demanding — new process that plaintiffs will need to complete in order to bring their claims as a class.

Although FLSA § 216(b) makes clear that "similarly situated" individuals *can* litigate their claims collectively in a single case, the law does not provide instructions on *how* those claims are to proceed, nor does it define similarly situated. As a result, the courts were left to develop the procedures and standards for certifying that litigants are, in fact, similarly situated. This task has challenged litigants and the courts alike for decades, and has yielded widely divergent approaches among the circuits, and even between the district courts within the circuits.

For the most part, federal district courts have applied a two-step process first established in the 1987 New Jersey district court opinion in *Lusardi v. Xerox Corporation*. In general, the *Lusardi* two-step framework involves an initial "conditional certification" or "notice stage" determination where the court decides whether the proposed members of a class of employees are similar enough to receive notice of and the right to "opt-in" to the pending action. This initial determination, however, is usually based on nothing more than the pleadings and requires only "substantial allegations" that the putative members were all the "victims of a single decision, policy, or plan." If the plaintiff meets this modest burden, the court "conditionally certifies" the collective action, authorizes the representative plaintiff to send notice of the case to potential opt-in members, and permits the parties to proceed with discovery. Only after all of this has occurred will the court engage in a second and final "decertification" determination, "using a stricter standard" to decide whether the putative members are, in fact, similar enough to proceed to trial as a collective. Although the plaintiff's burden at the first step is not entirely "toothless," many employers argue that it is so low as to virtually guarantee conditional certification, giving plaintiffs considerable leverage to negotiate a settlement once they have cleared that hurdle.

In *Swales*, the Fifth Circuit rejected *Lusardi*, observing that it "has no anchor in the FLSA's statutory text or in Supreme Court precedent interpreting it." The court concluded that "a district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.' Only then can the district court determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs."

The Fifth Circuit stated that, in conducting its "rigorous scrutiny," a district court must (1) identify for itself, at the outset of the case, what facts and legal considerations will be material to determining whether a group of employees is similarly situated; and (2) authorize preliminary discovery necessary to make that determination, which will vary by case. The initial determination must be made as early as possible and the district court (not the standards laid out in *Lusardi*) should dictate the amount of discovery needed to determine if and when to send notice to potential opt-in plaintiffs.

By mandating a rigorous evaluation and moving discovery on the issue of similarity to the forefront of the § 216(b) certification process, the Fifth Circuit has signaled a significant departure from the prevailing collective action procedure. Past criticisms of *Lusardi* suggest this change is likely to inure to the benefit of employers, or at the very least, restore fairness to the conditional certification process.

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Related Practice Areas

- Labor & Employment

The case is *Swales v. KLLM Transport Servs., LLC*, 5th Cir., No, 19-60847, 1/12/21.

The court's opinion can be accessed here.