Legal Update Article

Fifth Circuit Rejects Two-Step Approach for Certifying FLSA Collective Actions

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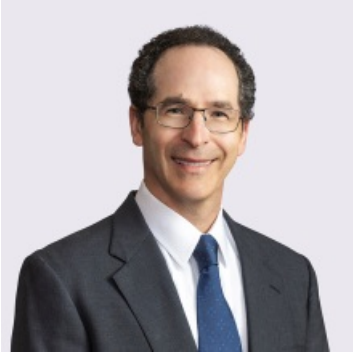

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On "how stringently, and how soon, district courts should enforce [Fair Labor Standards Act] Section 216(b)'s 'similarly situated' mandate" when considering motions for certification of collective actions, the U.S. Court of Appeals for the Fifth Circuit has rejected the familiar two-step, conditional certification-followed-by-decertification approach that is common across the country in collective actions. ***Swales v. KLLM Transport Services, LLC***, No. 19-60847 (Jan. 12, 2021).

The Court made clear that district courts must review the factual record developed by the parties to determine whether plaintiffs meet the "similarly situated" standard *before* notice goes out to potential opt-in plaintiffs. This holding rejects the commonplace doctrine that courts should avoid considering discovery at the conditional certification stage and should rather assume that the allegations in the plaintiffs' complaint are valid.

The suit was brought by truck drivers alleging they were misclassified as independent contractors and are "employees" under the FLSA. The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

Implications

The immediate effect of *Swales* is that, for FLSA cases in the Fifth Circuit, plaintiffs will not be able to issue notice to potential opt-in plaintiffs based merely on allegations. Rather, the district courts will have to assess discovery to determine whether plaintiffs are actually "similarly situated" to the collective they purport to represent.

Open Questions

The decision leaves many questions unanswered in the Fifth Circuit, including whether decertification motions remain part of FLSA collective cases. If courts are to determine whether plaintiffs satisfy the "similarly situated" standard in order for notice to be issued using a standard akin to that for traditional class actions under Federal Rule of Civil Procedure 23, with its "well-established procedural safeguards to ensure that the named plaintiffs are appropriate class representatives," 216(b) certification may become a single-step, definitive determination.

Gatekeeping Framework

Considering the case on interlocutory review, the appeals court addressed head-on the extent to which a district court may examine the factual circumstances of whether potential opt-in plaintiffs are "similarly situated" before conditionally certifying a collective action. It adopted a "definitive legal standard," setting what it called a "gatekeeping" framework: assessing whether putative opt-in plaintiffs are similarly situated "*before* notice is sent to potential opt-ins ... not abstractly but actually."

In hearing motions for conditional certification, district courts in the circuit have used "ad

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hoc tests of assorted rigor" in deciding whether employees are similarly situated, the appeals court observed. In the case at hand, it explained, the district court had applied "a Goldilocks version of *Lusardi* [two-step certification], something in between lenient and strict." The Fifth Circuit panel wanted to adopt a more precise approach while expressly rejecting *Lusardi*, which it had "carefully avoided adopting" in the past. The problems that standard creates "occur not at decertification, but from the beginning of the case," the panel stressed. Namely: "The leniency of the stage-one standard, while not so toothless as to render conditional certification automatic, exerts formidable settlement pressure."

Two-stage certification "may be common practice," the court noted. "But practice is not necessarily precedent."

As the judges pointed out during oral argument in August, it would be of little benefit to let plaintiffs proceed collectively based on a single common fact or issue in dispute if the record as a whole indicates the employees have demonstrably different material facts or legal claims at issue. The opinion reflects that sentiment. It also heeds the U.S. Supreme Court's binding and "unequivocal" admonition, in its 1989 decision in *Hoffman-LaRoche, Inc. v. Sperling*, against stirring up litigation.

The appeals court vacated the district court's grant of conditional certification.

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If you have questions about how this decision affects collective actions in the Fifth Circuit and elsewhere, contact a Jackson Lewis attorney.