Updates
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Panel Upends the Rules of FLSA Collective Actions in the Fifth Circuit

In an unexpected shift, the U.S. Court of Appeals for the Fifth Circuit in *Swales v. KLLM Transport Services, LLC*, ordered courts to abandon the commonly followed "two-step" certification process for collective actions under the Fair Labor Standards Act. This procedure had grown to near "universal" acceptance since the 1987 New Jersey district court opinion that first introduced it, *Lusardi v. Xerox Corporation*. The panel, composed of Judges E. Grady Jolly, Edith H. Jones, and Don R. Willett, noted that district courts now apply "ad hoc tests of assorted rigor in assessing whether potential members [of a collective action] are 'similarly situated'—a phrase that § 216(b) of the FLSA leaves undefined." Now, in place of this two-step process, courts must do something different.

Litigants of collective actions may easily relate to the frustration resulting from trial courts authorizing sweeping notice to hundreds or thousands of individuals about the right to "opt in" to a collective action on a "conditional" basis, where the standard of review is "fairly lenient" and may be based on little more than pleadings and a few affidavits. In major collective action cases, years of broad and expensive class discovery follow step one, after which the court may be presented with a motion to "decertify" the collective action at step two. Because discovery regularly exposes the individualized differences that were overlooked or minimized at the conditional certification stage, decertification motions are often granted because there is no single issue that disposes of the merits of the claims of all collective action members.

In the wake of conditional certification, notice and opt-in process, and decertification, courts are often faced with a flood of decertified individual litigants seeking to pursue their own claims outside of the collective. The procedure, on its own, is often a litigation-generating machine.

The Fifth Circuit noted that this process generates an outcome where "FLSA collective actions rarely (if ever) reach the courts of appeals at the notice stage because 'conditional certification' is not a final judgment" and the mere act of conditional certification "exerts formidable settlement pressure" on defendants. In fact, "misclassification cases rarely make it to trial on a collective basis" because they are regularly decertified before trial or are too costly and risky to litigate through trial. In practice, the *Lusardi* two-step collective action procedure has resulted in perhaps the most costly, inefficient, and one-sided procedural mechanism ever implemented.

The Fifth Circuit has historically "carefully avoided adopting" *Lusardi* and, in this case, "now that the question is squarely presented," it unambiguously "reject[s] Lusardi." In place of a "conditional certification" using a lenient first-stage approach to authorizing notice, the Fifth Circuit charged district courts with a new responsibility: to "identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.'" This determination is to be followed by preliminary discovery on those issues and the amount of discovery needed may vary. Only then should the district court "determine if and when to send notice to potential opt-in plaintiffs."

The focal point of the new approach is addressing, at an early stage in the case, "whether merits questions can be answered collectively." The Fifth Circuit noted that this "has nothing to do with endorsing the merits" of the claims. Now, in the Fifth Circuit, the "FLSA's similarity requirement is something that district courts should

rigorously enforce at the outset of the litigation," rather than at the conclusion of an arduous notice, opt-in, and class discovery process.

Takeaways

It is unknown whether the Fifth Circuit's new approach will be adopted by other district courts or courts of appeal outside Texas, Louisiana, and Mississippi, but it is sure to be presented elsewhere for consideration. This opinion represents a decision of seismic importance, and it is no overstatement to observe that employers have been looking for courts to issue opinions like this one for decades. Conversely, it can be expected that litigants in the Fifth Circuit may not be so quick to assert collective action allegations, knowing that the lenient granting of notice rights is no longer permitted.

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