Blogs
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The U.S. Court of Appeals for the Sixth Circuit recently held in *Clark v. A & L Homecare and Training Center*, that plaintiffs must show a "strong likelihood" that other employees are "similarly situated" to the plaintiffs for a court to certify a Fair Labor Standards Act (FLSA) collective action and facilitate notice of the action. The "strong likelihood" standard has the potential to make it more difficult for plaintiffs to facilitate notice of their FLSA collective actions to other potential collective members.

The case involved former employees who alleged claims on a collective basis under the FLSA and asked the district court to conditionally certify their FLSA claim and facilitate notice of their action to other employees. The district court utilized the widely followed two-step conditional FLSA certification process adopted in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). Under this approach, an initial collective certification

determination is made using a lenient standard—that proposed members of a collective are similar enough to receive notice of the lawsuit so the proposed collective member may decide whether to affirmatively join the lawsuit. In the second step, which occurs after collective certification discovery has been completed, the district court makes a second decision when the employer moves for "decertification" of the collective, using a stricter standard, to determine whether the named plaintiffs and opt-in members are "similarly situated."

The district court observed the Sixth Circuit had not addressed the *Lusardi* two-step "certification" approach and that such approach had been rejected by the U.S. Court of Appeals for the Fifth Circuit in 2021 in *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021). The Fifth Circuit in *Swales* held that district courts should identify what facts and determinations will be material to determining whether a group of employees are "similarly situated" and then authorizing any preliminary discovery before notice of the lawsuit is provided to potential collective members. Some courts have followed this approach including a recent decision by the U.S. District Court for the Eastern District of Virginia which is highlighted here. The district court, however noted the two conflicting approaches for notification of FLSA collective actions and certified its decision for immediate interlocutory review by the Sixth Circuit.

The Sixth Circuit did not follow either *Lusardi* or *Swales*. Rather, the Sixth Circuit held that, for purposes of facilitating notice of an FLSA suit to other employees, the plaintiffs must show a "strong likelihood" that employees are similarly situated to the plaintiffs themselves. The Sixth Circuit noted that this standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance. The Sixth Circuit instructed district courts to expedite their decision to the extent practicable noting that the FLSA claim period is typically two years. (Which can be extended to three years if willful.)

Additionally, the plaintiffs challenged the district court's refusal to send notice to other employees who have signed arbitration agreements. The Sixth Circuit rejected the standard applied by the Fifth and Seventh Circuits which provided that a district court could determine by a preponderance of the evidence whether absent employees have agreed to arbitrate their claims for purpose of FLSA notification. The Sixth Circuit, however, noted that the arbitration defense could be considered along with all the other evidence in determining whether the plaintiffs met the strong likelihood standard.

This decision, along with other recent decisions, demonstrates that courts are willing to break away from the long-followed, lenient *Lusardi* standard for facilitating notice in FLSA actions.

Employers with questions about the FLSA collective certification process should contact experienced counsel.

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