Fifth Circuit Rejects *Lusardi* Two-Step Collective Action Certification

DunbarMonroe, PLLC obtains significant decision upending the FLSA collective action certification process.

Upending decades of practice in the federal courts, a three-judge panel from the Fifth Circuit in *Swales v. KLLM Transport Services, LLC,* 985 F.3d 430, 2021 WL 98229 (5th Cir. 2021) rejected the typical process used by federal courts in Fair Labor Standards Act ("FLSA") cases for authorizing notice to potential class members commonly called "conditional certification." Because the "conditional certification" and "opt-in" process has evaded review by the United States Supreme Court and Courts of Appeals, in a decision that stands to be the first of its kind, the Fifth Circuit has directed district courts to "rigorously scrutinize the realm of 'similarly situated' workers," and to "do so from the outset of the case, not after the lenient step-one 'conditional certification.'" *Id.*

The Fifth Circuit in *Swales* noted it was outright rejecting the long-standing approach from *Lusardi v. Xerox Corp.,* 99 F.R.D. 89 (D.N.J. 1983), "for the first time," and articulated a new standard for district courts to utilize in determining whether to distribute notice to the potential class members: "[A] district court should 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." And then it should authorize preliminary discovery accordingly….[And] the initial determination must be made, and as early as possible. In other words, the district court, not the standards from *Lusardi,* should dictate the amount of discovery needed to determine if and when to send notice to potential opt-in plaintiffs." *Swales,* 2021 WL 98229, at *8.

Possible impact of Swales opinion in future cases

While *Swales* is now controlling on any FLSA collective action within the Fifth Circuit, it could have far-reaching impact beyond, as it is likely district courts in other jurisdictions, now under no compulsion to follow *Lusardi,* elect to follow *Swales*. Likewise, while technically limited to strictly matters proceeding as a collective under the Fair Labor Standards Act, the *Swales* opinion could also be used as compelling persuasive authority for matters under the Age Discrimination in Employment Act of 1967 ("ADEA"), as the ADEA explicitly references and adopts the "similarly situated" standards associated with § 216(b) litigation.

What does this then mean for these types of cases moving forward, whether within the Fifth Circuit or beyond?

It is probable that discovery will proceed earlier and with more disputes over the scope of the discovery. While this may be viewed as problematic by some, it gives employers an early opportunity to control the focus of the inquiry, possibly limit the scope of any future class, and certainly allow a real shot at defeating notice to a large class of possible plaintiffs. It will

invariably increase some costs up front, but in many FLSA cases because of the low bar for conditional certification and overbroad classes being identified, discovery was a fact of life in this litigation before *Swales* and will continue to be after it.

Another useful outcome for employers is that the early discovery and closer scrutiny by the district court concerning whether the parties are similarly situated may lead to a narrower defined class if notice does go out. This will then result in less discovery and theoretically a more manageable trial if the matter does not settle.

On the other hand, turning back to the specifics of the *Swales* facts, authorization of notice to a potential class of independent contractors might be daunting for plaintiffs' counsel. The Fifth Circuit highlighted in the opinion KLLM's position that "the individualized nature of the economics-realities test is why misclassification cases rarely make it to trial on a collective basis." Ultimately, it will be harder now to conditionally certify a class of independent contractors because the tests required to reclassify are so fact dependent and it is much harder to argue the contractors are all similarly situated.

Practically, this will likely shift the majority of the "similarly situated" inquiry to the first half of the litigation as the plaintiff and employer jockey to define the extent of the class and the court holds the plaintiff to a much higher burden to show similarly situated. This likely means that fewer cases will now get to the step of authorizing class-wide notice, but those that do get to that step could have a harder time getting de-certified on the defendant's later motion. Ultimately, this could serve to re-balance the bargaining power in FLSA litigation which typically was more favorable for the plaintiffs, and level the playing field for both parties. There is no doubt it will transform independent contractor collective action litigation under the FLSA in the Fifth Circuit.

Clark Monroe & Christopher Dunnells represent KLLM Transport Services, LLC in this matter. Nothing contained herein is stated on behalf of KLLM nor should it be construed as an opinion of counsel regarding current or future positions that may be taken in the pending matter. All statements are general in nature and made for academic discussion only.

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