

Fifth Circuit Sets New Framework for Fair Labor Standards Act Certification Analysis

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Yesterday, the United States Court of Appeals for the Fifth Circuit rejected the commonly used and admittedly lenient *Lusardi* framework for Fair Labor Standards Act (FLSA) conditional certification and set a new framework for courts to determine whether and to whom collective action notice should be issued. *Swales, et al. vs KLLM Transport Servs., LLC*, No. 19-60847 (5th Cir. Jan. 12, 2021), available [here](#). In a significant departure from the current practice, the Fifth Circuit directed the United States District Courts to “rigorously enforce” the “similarly-situated” requirement *prior* to authorizing notice of the opportunity to join a collective action to potential FLSA claimants. The practical result of this framework: The potential to reduce the number of FLSA collective actions or at least the scope of FLSA collective actions.

The FLSA statutory framework provides for individuals raising wage and hour claims to litigate those claims on behalf of others who are “similarly situated” through collective action litigation. To be included as a plaintiff in a collective action, an individual must opt-in—he or she must sign a written consent to join the litigation. As a result, courts have engaged in a “conditional certification” process by which the court approves a notice to potential class members explaining the collective action and opt-in process. This notice does not address the merits of the underlying FLSA claims.

As the *Swales* court explains, the process to determine whether and to whom this notice should be issued has not been expressly set by statute or the United States Supreme Court. Most federal district courts use a two-step process stemming from a 1987 United States District Court for the District of New Jersey opinion, which is referred to by the name of that opinion as the *Lusardi* test. Under the *Lusardi* test, courts first make a “notice stage” determination that proposed members of the class are sufficiently similar to receive notice of the litigation. This determination is often made based on the pleadings and with minimal, if any, discovery on whether the proposed class members are similarly situated. Under *Lusardi*’s second step, which occurs after discovery, the court may decertify the class if discovery demonstrates that class members are not sufficiently similar, leaving only the original plaintiffs to pursue the litigation.

The *Swales* court rejected use of the *Lusardi* test, noting that “*Lusardi* has no anchor in the FLSA’s text or in the Supreme Court precedent interpreting it.” *Id.* at 3. Instead, the court sought to answer

the “threshold dispute of any wage-claim collective: How rigorously, and how promptly, should a district court probe whether potential members are ‘similarly situated’ and thus entitled to court-approved notice of a pending collective action?” with a “workable gatekeeping framework.” *Id.* at 2.

In creating the framework, the court noted the goals and dangers of the collective action mechanism: the goals of enforcement and efficiency (allowing plaintiffs to pool resources and resolve common issues in a single action) and the dangers of abuse (intensifying settlement pressure through a large class of plaintiffs regardless of the merits) and the appearance of court-endorsement of the claims. To meet the goals and avoid the dangers, courts should “rigorously enforce” the FLSA’s similarity requirement “at the outset of the litigation.” *Id.* at 21.

Under the new framework, courts should determine whether and to whom notice should be sent by first “identif[ing], 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.” *Id.* at 17. The amount of discovery needed to make the determination will depend on the facts of the case, and may implicate merits issues to the extent that they affect the scope of the potential class. See *id.* at 18 (“When a district court ignores that it can decide merits issues when considering the scope of a collective, it ignores the ‘similarly situated’ analysis and is likely to send notice to employees who are not potential plaintiffs.”).

Following approval of preliminary discovery on the scope of the class, the district court should “consider all of the available evidence” to determine “whether and to whom notice should be issued.” *Id.* at 19. Ultimately, “the district court has broad, litigation-management discretion” early in FLSA collective action litigation to ensure that any potential class members meet the FLSA’s similarly situated requirement. While this decision will result in greater discovery at the beginning of the case, the end result will be a heightened look at whether certification will be issued and who will receive notice and the ability to opt-in to the lawsuit.

A meaningful and stringent analysis by the Court at the *onset* of the litigation potentially impedes the current trend of FLSA litigants seeking such a broad and diverse class with numerous positions, responsibilities and other “dissimilarities.” By resetting the focus on whether potential class members are similarly situated to earlier in the litigation process, the Court’s decision will greatly impact employer’s litigation strategy in pending and future FLSA collective actions.

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