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Fifth Circuit Rejects Longstanding 'Lenient' Standard for Deciding Whether to Authorize Notice of a FLSA Collective Action

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Employers have faced a tidal wave of Fair Labor Standards Act (FLSA) collective action litigation in the last 15 years, fueled in large part by courts that have made it easy for plaintiffs to quickly obtain "conditional certification," under a "lenient" standard that results in a grant in the large majority of cases. If the court indeed grants "conditional certification," it means eligible workers are going to receive court-authorized notice of the lawsuit inviting them to join it and sue the company. Even though many conditional certification decisions can be undone later in the case under a more rigorous test, this "two-step" approach that most courts follow inevitably creates large settlement pressure and potential procedural complications resulting from what some (including the late Justice Scalia) have called court-sponsored solicitation of claims. But a recent decision from the Fifth Circuit Court of Appeals, Swales v. KLLM Transp. Servs., L.L.C., No. 19-60847, 2021 WL 98229 (5th Cir. Jan. 12, 2021), may signal the beginning of the end of the plaintiff-friendly two-stage process.

Swales began as a typical FLSA case. Five plaintiff truck drivers sued the defendant trucking company asserting that they had been misclassified as independent contractors and therefore denied minimum wages and overtime pay that they would have received as employees. They sought "conditional certification" of a collective action and notice to all of the defendant's many thousands of truckers of the opportunity to join the suit. Plaintiffs argued that all of the drivers were similarly situated because they all performed similar work. The District Court, although granting the motion because plaintiffs had met their relatively light burden of showing some similarity of working conditions, took the unusual step of certifying the issue on its own for interlocutory appeal to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals vacated the certification decision. The court flatly rejected the two-step approach in favor of a new test requiring district courts to enforce rigorously the FLSA's "similarly situated" standard before allowing *any* certification or notice. District courts should identify, at the outset of a case, "what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated,'" and "authorize preliminary

discovery accordingly." *Swales*, 2021 WL 98229, at *7. Only after considering the *evidence* should a district court decide whether and to whom to send notice. "After considering all available evidence," a district court has three options: One, it can decide plaintiffs are too diverse to be "similarly situated" and thus entitled to bring their claims in a single collective action under the FLSA. Two, it can decide it needs more discovery and hold off on deciding whether to issue notice. Or three, it can find some or "only certain subcategories" of potential collective group members are "similarly situated" such that they should receive notice. *Id*. at *8.

Making notice dependent on more than just plaintiffs' allegations and a modest showing that their claims are similar to those of others is a seismic shift in FLSA collective action litigation that should result in fewer grants of "conditional certification." It also affords employers an opportunity to defend themselves without paying the prices near-automatic notice can exact (e.g., bad publicity, harm to employee morale, business disruption, and the stirring up of claims) and should lessen the "formidable settlement pressure" the lenient standard exerted. *See id*. at *3 (recognizing settlement pressure inevitably resulting from lenient standard).

The precise impact of *Swales* remains to be determined. Although the case is certainly a positive development for employers, for now it is only binding on judges in the Fifth Circuit (Louisiana, Mississippi, and Texas). In some circuits, there are precedential decisions contrary to *Swales*. Stay tuned though. Employers are sure to bring *Swales* to the attention of any district court considering "conditional certification" of a FLSA collective action. It should not take long to know whether the Fifth Circuit's new approach will begin to erode the plaintiff-friendly two-step process. In the long run, the U.S. Supreme Court may need to address this important issue of collective actions, just as it has addressed class certification issues under the different procedures of Rule 23.

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