Fifth Circuit Establishes New Standard For FLSA Collective Actions

January 19, 2021

Key Points:

- In *Swales v. KLLM Transport Services, LLC*, the U.S. Court of Appeals for the 5th Circuit established a new standard for determining whether, and to whom, court-authorized notice of a collective action lawsuit filed under the FLSA should be sent.
- The 5th Circuit rejected what has become the widely-used two-stage process for "certification" of a collective action first articulated in *Lusardi v. Xerox Corp*., instead directing courts to consider merits-based evidence before notice of a collective action is sent to putative plaintiffs.
- The 5th Circuit's rejection of *Lusardi* is likely to result in a more detailed review of FLSA collective actions by district courts in the 5th Circuit and may reduce the number or scope of collective actions.

On January 12, 2021, the U.S. Court of Appeals for the 5th Circuit issued a decision that significantly alters the process for litigating wage and hour collective actions in the 5th Circuit. In *Swales v. KLLM Transport Services, LLC*, No. 19-60847, the 5th Circuit established a new legal standard for determining whether putative plaintiffs are "similarly situated" such that they should receive court-authorized notice of a Fair Labor Standards Act (FLSA) collective action lawsuit and have an opportunity to join the lawsuit.

The FLSA requires that covered employers pay non-exempt employees the federal minimum wage and overtime compensation for work beyond 40 hours per week. Aggrieved employees may bring a lawsuit on behalf of themselves "and other employees similarly situated" through a "collective action" under Section 216(b) of the statute. Unlike Rule 23 class actions, employees must affirmatively "opt in" to the collective action lawsuit as party plaintiffs by filing a written consent with the court.

The FLSA does not define "similarly situated" or prescribe a process by which a court should determine whether a plaintiff is similarly situated to other individuals. Most courts, however, follow a two-stage process described in *Lusardi v. Xerox Corp*., 118 F.R.D. 351 (D.N.J. 1987) in deciding whether an FLSA lawsuit should proceed as a collective action.

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Under *Lusardi's* first stage, which often occurs at the outset of the lawsuit after little, if any, discovery, the plaintiff needs to make only a minimal showing that the putative plaintiffs are sufficiently similar to obtain "conditional certification" and have notice of the pending lawsuit sent to the putative plaintiffs. In practice, this lenient standard routinely results in notice being issued regardless of the merits of the claims. At the second stage, after discovery has been completed, the employer has an opportunity to move for decertification, at which point the court considers additional evidence and utilizes a stricter standard in determining whether to permit the lawsuit to proceed to trial as a collective action or to instead dismiss the opt-in plaintiffs from the case.

In *Swales*, several truck drivers who contracted with the defendant KLLM Transport Services claimed that KLLM misclassified them and "similarly situated" drivers as independent contractors and failed to pay them minimum wages as required by the FLSA. The district court authorized discovery to determine whether to conditionally certify a collective and facilitate notice to putative plaintiffs. Following this discovery, the plaintiffs moved for conditional certification.

Because significant (though not complete) discovery had taken place, the district court applied what the 5th Circuit termed a "Goldilocks" version of *Lusardi*, in between the standards applied at stage one and stage two. Specifically, the district court required that the plaintiffs show more than minimal evidence of their similarities. It noted that the named and opt-in plaintiffs all drove trucks for KLLM under an independent-contractor agreement, were compensated based on the number of miles they drove, and leased their trucks from KLLM. Despite differences that included different per-mile compensation rates and hours worked, the district court concluded that the claims and defenses in the case largely turned on the same questions, including whether the drivers were misclassified, a decision determined by the multi-factor "economic-realities test."[1]

KLLM argued that the application of the economic-realities test to the named and opt-in plaintiffs would require a highly individualized inquiry inconsistent with a collective action. The district court acknowledged that KLLM may "ultimately have a point," but nevertheless granted the plaintiffs' motion because the economic-realities test was a "merits issue" that, under *Lusardi*, should be addressed only after fact discovery is finished. The district court then sua sponte certified its decision for interlocutory appeal to obtain guidance as to the standards applicable to conditional certification, especially when some amount of discovery has occurred.

On appeal, the 5th Circuit determined that *Lusardi* "frustrates, rather than facilitates, the notice process" for two reasons. First, in the view of the court, the *Lusardi* test is amorphous and ad-hoc and "provides little help in guiding district courts in their notice-sending authority." Second, because the FLSA does not discuss conditional certification, the court reasoned that the statute does not support any certification tests previously created by district courts, including the two-stage *Lusardi* process.

The court likened the question of whether to consider evidence as to the economic-realities test prior to notice to the question of whether to send notice to putative plaintiffs subject to arbitration agreements, which the 5th Circuit previously ruled must be addressed prior to the sending of notice. The court reasoned that both issues are potentially dispositive, threshold matters. Accordingly, just as it was held to be improper for a court to ignore evidence of arbitration agreements, it would be improper to ignore evidence pertinent to other threshold matters, including whether the plaintiffs

are employees protected by the FLSA. The court thus rejected *Lusardi's* rigid process, which distracts district courts from the ultimate issues before them, and stressed that the "fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out."

The 5th Circuit then articulated a new standard for certifying FLSA collective actions:

> Instead of adherence to *Lusardi*, or any test for "conditional certification," 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. The amount of discovery necessary to make that determination will vary case by case, but 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.

The 5th Circuit held that the district court in *Swales* should consider all of the available evidence, including evidence related to merits issues, to determine whether and to whom notice should be issued. After considering all such evidence, the district court may decide not to permit the case to proceed on a collective basis, may order further discovery, or may authorize notice. "The bottom line is that the district court has broad, litigation-management discretion here." The case was remanded for further proceedings consistent with the opinion.

Swales upends what had become a fairly standardized process in the 5th Circuit for collective actions. Although *Swales* ensures employers will be able to more meaningfully oppose the issuance of notice in FLSA collective actions, the decision leaves many questions unanswered and raises several issues, including what discovery, if any, should be permitted before a plaintiff files a motion to facilitate notice. Despite these open issues, *Swales* is likely to have a profound impact on collective actions in the 5th Circuit and could lead to courts outside of the 5th Circuit to revisit the generally-accepted "two-stage" *Lusardi* process for adjudicating collective actions.

[1] In the 5th Circuit, the economic-realities test utilizes five non-exhaustive factors to determine if a worker is an employee or an independent contractor: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. See *Hobbs v. Petroplex Pipe & Constr., Inc*., 946 F.3d 824, 829 (5th Cir. 2020). The U.S. Department of Labor (DOL) recently codified its own test in new regulations. Our alert on the DOL's test is available here.

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