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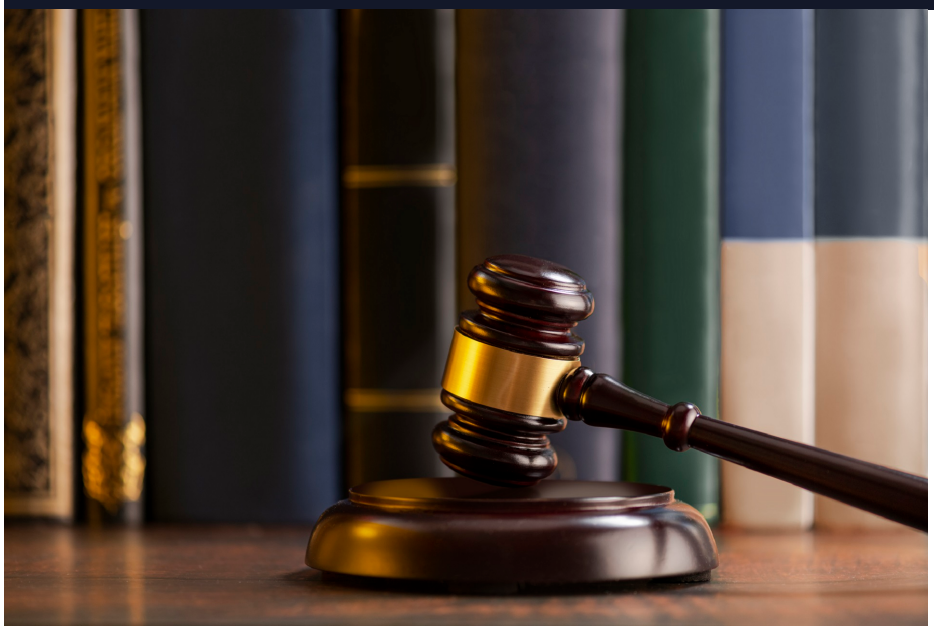

Don’t Call It ‘Conditional Certification’: Sixth Circuit Sets New Heightened Standard For Notice In FLSA Collective Actions

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Several years after the Fifth Circuit Court of Appeals abandoned the two-step *Lusardi* certification approach in *Swales v. KLLM Transport Services*, the U.S. Court of Appeals for the Sixth Circuit has now rejected the well-trodden “lenient” standard of the first step – though it also reject the standard set out in *Swales*. The Sixth Circuit in *Clark, et al., v. A&L Homecare and Training Center, LLC, et al.*, held that notice to potential plaintiffs should only be sent if plaintiffs show a “strong likelihood” that such absent employees are similarly situated to the named plaintiffs themselves. In so holding, the court also explained that such motions to authorize notice are not properly referred to as “certification” motions (conditional or otherwise), as the mechanism is different in substance and in process from class certification under Federal Rule of Civil Procedure 23.

The court expressly rejected the *Lusardian* notion that district courts should facilitate notice with merely a “modest showing” or under a “lenient standard” of similarity. This should be welcome news for employers in Michigan, Ohio, Kentucky and Tennessee.

For more than 30 years, federal district courts have generally applied the two-step certification approach to Fair Labor Standards Act (FLSA) collective actions first described by the *Lusardi* case from the District of New Jersey. In the first step, commonly referred to as conditional certification, the district

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court may facilitate notice of the FLSA lawsuit to other current and former employees based upon a "modest factual showing" that such employees are "similarly situated" to the named plaintiffs. Then, when discovery is complete, the court will take a closer look at whether such other employees are in fact similarly situated, and will then either decertify the collective or grant final certification to proceed as a collective.

A New Standard For Notice: Strong Likelihood

In revisiting this procedure, the Sixth Circuit in *Clark* acknowledged the substantial pressure to settle placed upon employers once plaintiffs meet their modest burden of achieving conditional certification. The court first analyzed *Swales* and found that the burden imposed by the Fifth Circuit, requiring a showing of "similarly situated" by the preponderance of the evidence, was not supported by U.S. Supreme Court precedent, or the practical realities of litigation where such employees are not yet part of the action and the contours of their potential claims (or lack of claims) are wholly unknown.

On the other side of the coin, the court also rejected the "lenient standard" that has developed since *Lusardi*, explaining that court-approved notice sent to employees who are not, in the end, eligible to join the suit amounts to solicitation of those employees to bring their own suits, which is contrary to the Supreme Court's explanation that notice must not resemble solicitation of claims.

Instead, attempting to clear a middle path, the *Clark* court analogized the facilitation of notice to the grant of a preliminary injunction. The court explained that both decisions (collective action notice and preliminary injunction) are provisional, with the final decision on the issue being made only after the record is fully developed. And like the preliminary injunction decision, notice requires that the movant demonstrate some degree of probability that the plaintiff will prevail on the issue in question.

As such, borrowing from the preliminary injunction standard, the court held that, for a district court to facilitate notice, the plaintiffs must show a "strong likelihood" that such other employees are similarly situated to the named plaintiffs. The court explained that this familiar standard, which is less than a showing by the preponderance of the evidence, strikes the right balance to confine issuance of notice to employees who are in fact similarly situated.

Factoring in the Statute of Limitations

Acknowledging the two-year statute of limitations, the court indicated that such decisions should be made on an expedited bases, where possible. However, the court further stated that discovery should also be initiated promptly, by court order if necessary, indicating that discovery should be taken in advance of the plaintiff's motion to facilitate notice. Indeed, the court reasoned the parties may present whatever evidence they like on the issue, which the district court should consider in determining whether the plaintiffs met their burden of showing similarity.

In the concurring opinion, the Judge John K. Bush joined the majority in full, but explained that, given the general limitations period of two years for FLSA actions, district courts should consider and freely grant equitable tolling. The concurring opinion reasoned that, in light of the heightened standard set forth

by the majority, which will require discovery and the litigation of defenses, it will likely take longer before notice is sent to potential plaintiffs. Thus, equitably tolling claims for potential plaintiffs will ensure that they are not prejudiced.

In her dissent, Judge Helene N. White explained that while she agreed with the majority's rejection of *Swales*, among other things, the majority's reliance on the undue pressure to settle conditionally certified collective actions is unfounded. The dissent also noted the lenient standard accurately captured the remedial purpose of the FLSA, and, although Congress has amended the FLSA on three occasions since the *Lusardi* approach came into vogue, it has not changed the collective action mechanism. In essence, the dissent stated that the new standard, though not unreasonable, is not necessary.

As most employers who have faced FLSA collective actions know, the threat of conditional certification typically comes from plaintiffs' counsel at the earliest opportunity. In that regard, the *Clark* decision is significant. Not only does it impose a heightened standard, but it expressly contemplates discovery concerning whether other employees are "similarly situated" and the development of a record to combat court-facilitated notice. Under the lenient standard, many courts reject efforts to take pre-conditional certification discovery and any evidence presented by employers during briefing to show that plaintiffs are not similarly situated with other employees.

More broadly, the question will now become whether the Supreme Court will take up this issue at some point, as the Circuit Courts of Appeal have begun to diverge in their application of these procedural mechanisms. Regardless, employers in the Sixth Circuit now have an additional tool in their toolbox to defend themselves against FLSA collective actions.