

## Fifth Circuit Endorses One-Step Process for Collective Certification under FLSA

### Related Attorneys

Adam J. Rocco

Michael J. Shoenfelt

### Related Services

Labor and Employment

**CLIENT ALERT** | 1.15.2021

In what will be welcome news for employers who have been on the receiving end of Fair Labor Standards Act (FLSA) collective action complaints, the Fifth Circuit (covering Louisiana, Mississippi, and Texas) recently issued an opinion adopting a more employer-friendly process for certifying a collective action.

### Current Precedent across the Circuit Courts

Because the FLSA does not set forth the procedural requirements for bringing and certifying a collective action, federal courts have been left to develop their own certification procedures. Employers familiar with these claims will recognize the current majority position adopted by most federal courts.

The majority position calls for a two-step process, in which the class is initially “conditionally certified” if the plaintiff(s) can meet what often amounts to an extremely low threshold that the plaintiffs are “similarly situated.” Once plaintiffs pass this threshold, they are entitled to often burdensome, collective-wide discovery. Courts then move on to the second step, in which the conditionally-certified class is compared against the evidence raised in discovery to determine if certification is appropriate, or if the conditionally-certified class should be decertified. Most circuits use some expression of this two-step process.

### The New Fifth Circuit Precedent: One-Step Certification

The practical implication of the two-step approach is that simply alleging the existence of a collective is sometimes enough to secure conditional certification. In the recent decision *Swales v. KLLM Transport Services, LLC*, however, the Fifth Circuit adopted a more employer-friendly test.

The Fifth Circuit in *Swales* rejects the two-step certification process, instead requiring district courts to identify facts and legal considerations necessary to determining whether putative plaintiffs are

“similarly situated” before notice is sent to the putative collective. To this end, the decision calls for trial courts to authorize limited discovery of facts relevant to the certification determination. The trial court must then analyze all evidence (including “merits-based” evidence) to determine whether the putative collective and plaintiff are similarly situated. Only after that determination may notice be provided to the putative collective. The Court believes that this one-step process is more efficient, and alleviates the costs of discovery that typically occurred between steps one and two of the two-step process.

### Conclusion

The new test is certainly a welcome decision for employers. Obtaining early certification in the Fifth Circuit will require a greater showing by plaintiffs than is currently required in other circuits. However, other implications of the decision are still unclear. For example, how “limited” will the early discovery proposed in the one-step process actually be, especially in large, nationwide collective actions? How will the decision impact the normal decertification/final certification process?

Additionally, the Fifth Circuit’s position is firmly in the minority, and the two-step method remains the default procedure in most district courts. However, the case opens the door for new arguments and examination of the two-step method.

Employers facing pending FLSA litigation in the Fifth Circuit and recipients of new claims there should consult their Vorys lawyer to discuss the impact of this new precedent on those claims.