Sixth Circuit Raises the Bar on FLSA Collective Actions

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Employers defending Fair Labor Standards Act (FLSA) claims in Kentucky, Michigan, Ohio, and Tennessee breathed a collective sigh of relief following a recent key victory at the Sixth Circuit Court of Appeals. In *Clark v. A&L Home Care and Training Center,* the Sixth Circuit adopted a heightened "certification" standard for FLSA collective actions.

One of the most important, and often dispositive, disputes in FLSA collective actions is over when and how other employees receive notice of and the opportunity to join the lawsuit, typically referred to as the "conditional certification" stage. Once an action is conditionally certified, notice is sent to purported similarly situated individuals and plaintiffs' ranks can expand "a hundredfold." A loss at the conditional certification stage can be expensive and often "forc[es] a defendant to settle." Thus, from the outset of the case, employers have to be prepared to spend the time and money necessary to try defeat conditional certification or, instead, to settle.

This settlement dilemma often has less to do with the merits of the claims than it does with the lenient two-step certification standard that permits plaintiffs to expand their numbers early and easily. In 1984, a New Jersey district court held in *Lusardi v. Xerox Corp.*, that upon a "modest factual showing" that a plaintiff is similarly situated to the group they seek to represent, a court can conditionally certify the collective action and provide notice to potential parties. The *Lusardi* standard was subsequently widely adopted by district courts around the country. As a practical matter, this meant plaintiffs could notify and involve hundreds, if not thousands, of employees in the collective action through barebones allegations in the complaint and a handful of declarations from other employees. Time has shown that more often than not plaintiffs can meet the low bar set by *Lusardi*.

However, two recent Court of Appeals decisions signal a potential change in the tides. In 2021, the Fifth Circuit became the first appellate to reject outright the *Lusardi* framework. In *Swales v. KLLM Transport Services, LLC*, the Court rejected the "modest factual showing" framework. Instead, the Court held that notice can only be sent to

similarly situated individuals once the court had exercised its duty to "consider all of the available evidence."

On May 19, 2023, the Sixth Circuit became the second appellate court to reject the *Lusardi* standard. In *Clark*, the Sixth Circuit essentially split the difference between *Lusardi* and *Swales,* and announced a third standard. Under *Clark,* a plaintiff now must show a "strong likelihood" that the employees they seek to represent are similarly situated to them before a court may facilitate notice.

It remains to be seen how lower courts will apply the new *Clark* standard. The overarching takeaway is that it appears that courts in the Sixth Circuit will no longer simply issue notice without discovery. As such, employers should expect that plaintiffs will seek discovery before trying to pursue conditional certification, in order to meet their heightened burden. Correspondingly, employers will need to be prepared to engage in discovery (including electronic discovery) at a much earlier stage in the case.

Contact your Vorys lawyer if you have questions about *Clark* or any other wage and hour issues.