



THE FIFTH CIRCUIT UPENDS THE WAGE AND HOUR CLASS CERTIFICATION PROCESS

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Did the Court Give Employers a Better Opportunity to Fight Certification Earlier?

Almost hidden amongst the COVID-dominated headlines of the first quarter in 2021 is one of the most consequential decisions addressing wage and hour disputes in a generation. The Fifth Circuit—the federal circuit covering disputes in Texas, Louisiana and Mississippi—rejected the widely accepted and adopted two-step class certification procedure.

Class Action Lawsuits in the Wage and Hour Context – Wage and hour disputes are some of the trickiest and most expensive minefields for businesses to navigate. The size of the case is often the biggest expense variable. The difference between a single or even double-plaintiff action versus a collective action lawsuit (involving potentially thousands of similarly situated plaintiffs) can range between one with relatively modest exposure and one that threatens a business' survival. Class certification is the process where courts make this determination. The ultimate consideration includes, among other things, whether the people on whose behalf the lead plaintiff(s) sues perform similar jobs and are compensated similarly as the lead plaintiff(s).

The “Two Step” – Many courts across the country apply a “two step” class certification process framed after a decision by a New Jersey district court in 1987, *Lusardi v. Xerox Corporation*. The first step occurs at the outset of litigation, when the court makes an initial determination whether the potential class members are “similarly situated” based on little more than pleadings and affidavits. The court then can grant “conditional certification,” where the employer-defendant sends notice of the lawsuit to all those who are potential class members. These potential class members have the opportunity to “opt-in” to the lawsuit, after which they become part of a “conditionally certified” class of plaintiffs.

After the notice period and the establishment of the conditionally certified class, the parties embark on discovery at a class scale. This lasts months and, in some cases, takes years to complete. The scale and scope drive up litigation costs significantly. At the conclusion of discovery, the second step occurs, when the plaintiffs move for formal certification of the conditionally certified class or the defendant moves to decertify the conditional class. Regardless of the court's decision, by this time in the litigation, the parties already expended substantial time and financial resources into class discovery. This is, simply put, defending employers already paid to defend against a collective action lawsuit even if the court rejects final class certification.

No More “Two Step” – Good for Employers? In *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430 (5th Cir. 2021), the Fifth Circuit rejected this process. In *Swales*, a group of truck drivers sued on behalf of other truck drivers, claiming KLLM misclassified them as independent contractors. The district court granted plaintiffs' request for conditional certification applying the two-step approach. On appeal the court declared, “the word ‘certification,’ much less ‘conditional certification,’ appears nowhere in the FLSA.” Grasping onto the statute's text, the court further reasoned only those “similarly situated” may proceed as a collective action, and it directed the district court to “rigorously scrutinize the realm of ‘similarly situated’ workers . . . from the outset of the case, not after a lenient, step-one ‘conditional certification.’”

The Fifth Circuit directed the district court to determine what material facts and legal considerations are needed to determine whether the employee class is “similarly situated” at the ***outset of the case***. The Fifth Circuit effectively made the district court the arbiter of how to manage a collective action case, untethered to the two-step framework of *Lusardi*. By eliminating the need for conditional certification, the Fifth Circuit armed courts with the ability to drastically alter the scope of discovery in litigating these cases.

What This Means for Employers Fighting Wage and Hour Cases – With this ruling, businesses facing FLSA litigation within the Texas, Louisiana and Mississippi corridor now may choose to resist class certification from the outset instead of waiting until the end of discovery. How far-reaching this decision will be is undetermined. So far at least three employer defendants raised *Swales* arguments to contest class certification in district courts in Arkansas, Illinois and New Hampshire (outside of the Fifth Circuit where *Swales* is not binding). While those district courts rejected the defending employer arguments, the *Swales* decision may carry greater weight should another circuit court adopt the Fifth Circuit's approach or there becomes a noticeable circuit split the Supreme Court must ultimately resolve.

For employers having additional questions about this Alert, please feel free to contact Jay Wallace or Brent Hockaday.

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