Tucker Ellis LLP

Sixth Circuit Upends FLSA Collective Actions

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On May 19, the Sixth Circuit issued a decision in *Clark v. A&L Homecare and Training Center* that will fundamentally change the framework for Fair Labor Standard Act (FLSA) collective actions in Michigan, Ohio, Kentucky, and Tennessee to the benefit of employers named as defendants in FLSA cases.

FLSA collective action framework prior to *Clark*

One critically important aspect of an FLSA collective action is the issuance of notice to potential opt-in class members who are alleged to be "similarly situated" to the plaintiff. For nearly 30 years, the question of whether to issue notice has been decided early in a collective action, typically with little to no discovery or opportunity for the defendant to present any argument over whether the individuals who are to receive notice are truly "similarly situated" to the named plaintiff. This stems from the federal courts' nearly uniform adoption of the two-stage framework first established in *Lusardi v. Xerox Corp.*, a 1987 decision from the District of New Jersey. Under *Lusardi*'s first stage, known as conditional certification, the burden on plaintiffs to prove substantial similarity is lenient, requiring only a "modest" showing that putative class members are, in fact, similarly situated. As a result, conditional certification under the *Lusardi* framework is nearly always granted without the benefit of discovery or examination by the court as to whether the proposed opt-ins are truly similarly situated.

Then, once a plaintiff satisfies this relatively easy standard for conditional certification, the court directs that all potential members of the collective action receive notice, inviting them to opt-in to the suit. Given the low evidentiary burden at the first stage of the *Lusardi* framework, conditional certification has become akin to a "rubber stamp" in many FLSA actions, with notices being issued to current and former employees in an overwhelming majority of cases.

It is only after the completion of most if not all discovery that defendant employers are able to fully challenge whether those employees are actually similarly situated under the second stage of the *Lusardi* framework. By that point in an FLSA collective action, however, an employer has likely already spent months or even years conducting costly, disruptive, and time-consuming discovery. As a result, under the traditional *Lusardi* approach, employers face significant pressure to settle FLSA collective actions early in the proceedings – well before the plaintiffs establish any likelihood of prevailing with respect to their claims.

How *Clark* will reshape FLSA collective actions in the Sixth Circuit

The *Clark* decision changes that calculus for employers named in FLSA collective action cases in courts within the Sixth Circuit's jurisdiction – *i.e.,* federal courts in Michigan, Ohio, Kentucky, and Tennessee.

In *Clark v. A&L Homecare and Training Center*, the court rejected *Lusardi*'s two-stage certification framework altogether. Noting that nothing in the FLSA requires "certification" of a "class" (terms the court describes as improperly borrowed from Rule 23 processes), much less the two-stage process that has burdened defendant employers for decades, the Sixth Circuit spelled out a streamlined approach. Under *Clark*, before potential opt-in plaintiffs receive notice of a collective action, the court more substantively asks the question of whether that notice should issue to potential opt-in plaintiffs. Importantly, the court makes that decision after the parties have engaged in discovery about whether the individuals the plaintiff is seeking to include are actually similarly situated to the named plaintiff.

Rejecting the two-stage certification framework from *Lusardi*, the Sixth Circuit increased the burden for issuing notice. Now, under *Clark* – in contrast to the low threshold for issuing notice under *Lusardi* – a court should issue notice only where the plaintiffs show a "strong likelihood" that they are similarly situated to the individuals who will be provided the opportunity to opt-in to the lawsuit. The court also explained that establishing that showing will typically require some discovery on that issue, which will provide employers with the opportunity to mount real defenses regarding the similarity between the named plaintiff and potential opt-in plaintiffs before notice issues.

Clark continues a recent trend of courts rejecting the *Lusardi* framework. Most notably, in 2022, in *Swales v. KLLM Transport Services, LLC*, the Fifth Circuit – which encompasses Texas, Louisiana, and Mississippi – rejected *Lusardi*, abandoning the two-stage process for certification and requiring courts to analyze available evidence to determine whether putative class members are similarly situated. And following *Swales*, in April 2023, a federal district court in Virginia likewise rejected *Lusardi*'s two-step approach in *Mathews v. USA Today Sports Media Group, LLC*, directing that some discovery be conducted prior to the court's determination of whether potential opt-in plaintiffs are, in fact, similarly situated. Taken together, those cases combined with the recent *Clark* decision suggest that federal courts may be keen to take a closer look at whether the *Lusardi* approach is the appropriate approach for deciding this fundamental question in FLSA collective actions. They also provide defendants and other federal courts a blueprint for challenging the *Lusardi* approach and give employers an earlier chance at making meaningful arguments against traditional "conditional certification" and the early issuance of notice that follows. In short, *Clark* is a watershed moment for employers facing FLSA collective actions in the Sixth Circuit and could be a signal of more to come.

Additional Information

For more information, please contact:

- Gregory P. Abrams | 312.256.9444 | gregory.abrams@tuckerellis.com
- Ndubisi (Bisi) A. Ezeolu | 213.430.3239 | ndubisi.ezeolu@tuckerellis.com
- Christine M. Snyder | 216.696.5593 | christine.snyder@tuckerellis.com
- Melissa Z. Kelly | 216.696.2067 | melissa.kelly@tuckerellis.com
- Edward W. Racek | 213.430.3405 | edward.racek@tuckerellis.com

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