# 6th Circ. FLSA Class Opt-In Ruling Levels Field For Employers

By **Melissa Kelly and Gregory Abrams** (June 22, 2023)

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On May 19, the U.S. Court of Appeals for the Sixth Circuit issued a decision in Clark v. A&L Homecare and Training Center LLC that raises the bar for what a plaintiff must show before a court will allow allegedly similarly situated employees to opt into a proposed collective action under Section 216(b) of the Fair Labor Standards Act.[1]

In Clark, the Sixth Circuit criticized and rejected a judicially created approach that has prevailed for some 30 years, whereby courts typically have allowed so-called conditional certification of an FLSA collective action to proceed based on only lenient or modest showings that other potential opt-ins are similarly situated.

Instead, the Sixth Circuit has made clear that to the extent practicable, court-approved notice should be sent only if there is a strong likelihood that other employees are, in fact, similarly situated.[2]

The Clark decision will reshape how FLSA collective actions proceed — at a minimum for cases filed in Michigan, Ohio, Kentucky and Tennessee federal courts — to the benefit of employers named as defendants in such cases.

Employer-defendants will now have stronger bases to resist the early issuance of notice, greater leeway to develop a factual record to oppose such efforts and more power to resist undue exertion to settle due to the threat of court-issued notice.

**FLSA Section 216(b) and the Judicially Created Notice Process**

Under Section 216(b) of the FLSA, a suit claiming FLSA minimum wage or overtime violations may be brought on behalf of other employees similarly situated.[3] But no individual can become such a party plaintiff unless they give written consent, with the consent filed in court.[4]

Therefore, unlike a Federal Rule of Civil Procedure 23 class action, a Section 216(b) collective action requires an individual to opt in to the litigation. But also unlike a Rule 23 class action, the statute of limitations is not tolled or stayed upon the plaintiff's filing of an FLSA complaint. The FLSA is silent on how to enable others to receive notice of such suits in a timely manner so they may join before their claims go stale, while also ensuring that only those who are similarly situated under the Section 216(b) are allowed to do so.

In Hoffmann-La Roche v. Sperling in 1989 — which concerned analogous procedures under the federal Age Discrimination in Employment Act — the U.S. Supreme Court recognized that courts have what Clark calls "an implied judicial power" to facilitate notice to potential plaintiffs.[5][6] But the Supreme Court did not explain what standards a plaintiff must meet before the court allows this notice.

Thereafter, for 30 or so years, courts have nearly uniformly applied a two-step approach,

first recognized by the U.S. District Court for the District of New Jersey in 1987 in Lusardi v. Xerox Corp., that starts with conditional certification.[7]

For the first step, courts regularly have allowed notice of the FLSA suit to issue to other employees at an early juncture in the litigation, with little to no discovery, upon only a modest or lenient showing that these employees are similarly situated.[8]

At the second stage — at or near the close of merits discovery — the court more closely evaluates whether those who joined the case are, in fact, similarly situated to the original plaintiffs under the FLSA, Section 216(b).[9]

The upshot of this approach is that notice often issues early in the case, on an under-developed — or entirely nonexistent — factual record. Notice then allows a case to, as the Clark opinion put it, "easily expand the plaintiffs' rank a hundredfold."[10] Consequently, as the Clark court explained:

The decision to send notice of an FLSA suit to other employees is often a dispositive one, in the sense of forcing a defendant to settle.[11]

**Rejection of the Established Lenient Approach to Allowing Notice of FLSA Collective Actions**

In Clark, former home-health aides alleged that the company violated the FLSA's overtime and minimum wage provisions. The U.S. District Court for the Southern District of Ohio utilized the routine, two-step approach to conditionally certify a collective action and allow notice of the suit to be issued.

Recognizing, though, that the Sixth Circuit had not yet addressed the merits of this two-step certification process — and that the U.S. Court of Appeals for the Fifth Circuit had rejected it in Swales v. KLLM Transport Services LLC in 2021[12] — the court certified its order for interlocutory review under Title 28 of the U.S Code, Section 1292(b), and the Sixth Circuit permitted appeal.[13]

The Sixth Circuit rejected this two-step method. In doing so, it emphasized the distinction between a Rule 23 class action and an FLSA collective action. As the court explained, nothing in the FLSA requires certification of a class, much less the two-stage process that has burdened defendant-employers for decades. Rather, under Section 216(b), other employees

> become parties to an FLSA suit (as opposed to mere recipients of notice) only after they opt in and the district court determines — not conditionally but conclusively — that each of them is in fact "similarly situated" to the original plaintiffs.[14]

The Sixth Circuit therefore articulated an approach that, in the court's view, is more faithful to the Section 216(b) "similarly situated" requirement in which employees become party plaintiffs, without the encroachment of Rule 23's representative action framework.

The court also emphasized that determining whether other employees are similarly situated for purposes of joining a collective action must be factbound, because it "depend[s] on specific facts pertaining to those employees."[15]

The Clark court therefore directed district courts to undertake a more substantive analysis of whether notice should issue to those potentially similarly situated, likening the approach

to that of a preliminary injunction. Namely, "plaintiffs must show a 'strong likelihood' that those employees [to whom they seek to issue notice] are similarly situated to the plaintiffs themselves."[16] The goal of this "strong likelihood" standard is to ensure notice is sent only to those employees who are in fact similarly situated.[17]

In applying this approach, the court dispensed with the "lenient" or "modest" showing standard widely used by courts, in which courts have determined in absentia whether other employees are similarly situated to the original plaintiffs.[18]

However, the Clark court refused to apply a standard as rigorous as the one that the Fifth Circuit provided in Swales.[19] The Clark court characterized the Swales decision as allowing notice only to those actually similar to the plaintiffs — "meaning, apparently, that the district court must find by a preponderance of the evidence that those employees are similarly situated to the original plaintiffs."[20]

The problem with the Swales "actually similar" approach, according to Clark, is that it excludes those who may be potential plaintiffs that would be entitled to notice under Hoffman-LaRoche, since a conclusive finding of similarity is not required before issuing notice.[21]

Although Clark did not go as far as Swales, the Clark court departed dramatically from the prevailing two-step approach.

In emphasizing that plaintiffs must come forward with sufficient facts to establish that other employees to whom they wish to issue notice have a strong likelihood of being similarly situated, Clark has raised the bar substantially for an FLSA suit to expand to include other would-be party plaintiffs.

**Implications for Employers in Proposed FLSA Collective Actions**

After Clark, employers should consider at least the following.

First, plaintiffs attorneys likely will try to evade Clark's more rigorous Section 216(b) approach by filing suits outside the Sixth Circuit, which includes Michigan, Ohio, Kentucky and Tennessee, and continue to avoid the Fifth Circuit, which includes Texas, Louisiana and Mississippi.

However, the U.S. District Court for the Eastern District of Virginia federal court, which is within the Fourth Circuit, rejected the two-step approach in Mathews v. USA Today Sports Media Group LLC in April.[22]

The Mathews court directed that some discovery be conducted prior to the court's determination of whether to issue notice, criticizing the traditional two-step framework's encouragement "to send notice to a broad group of collective members ... [which] necessitates that notice will be sent to at least some people who are not 'similarly situated' to the named plaintiffs."[23] Thus, forum-shopping may prove a difficult strategy for plaintiffs attorneys.

Second, employers facing such suits in other circuits should consider arguing for the Clark (or Swales) standard to apply in opposing motions for judicial notice — and, if the district court refuses to do so, seek to certify this issue for appeal.

Third, after Clark, employers should have greater leeway to insist on discovery and the

ability to build a record to oppose a plaintiff's notice request. Indeed, the Clark decision instructed that a district court "may promptly initiate discovery relevant" to such a motion by court order under Federal Rule of Civil Procedure 26(d)(1).[24]

Early and aggressive discovery could help to preclude notice — as opposed to only being able to marshal facts to decertify an already conditionally certified collective action under the traditional two-step approach.

**Next Steps**

For the last several decades, the two-step approach to evaluating the ability of those who are similarly situated under FLSA, Section 216(b), to become party plaintiffs has allowed conditional certification to become the decisive event in this type of litigation. Under this approach, the court may never reach the point of deciding whether plaintiffs and those who may join the case are, in fact, similarly situated, or potentially even address the merits of the plaintiff's claims themselves.

With these decisions from the Swales, and now Clark, court — and perhaps other courts to follow — a more appropriate balance may emerge that recognizes how others similar to plaintiffs should be given the opportunity to join such a suit, while not allowing Section 216(b) to become a procedural ploy to prematurely expand a case, increase potential exposure and cudgel employers.

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[1] Clark v. A&L Homecare & Training Ctr. LLC, Nos. 22-3101/3101, 2023 WL 3559657 (6th Cir. May 19, 2023).

[2] Clark, 2023 WL 3559657, at *4.

[3] 29 U.S.C. § 216(b).

[4] Id.

[5] Hoffmann-La Roche v. Sperling, 493 U.S. 165 (1989).

[6] See Clark, 2023 WL 3559657, at *1.

[7] Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

[8] Clark, 2023 WL 3559657, at *1.

[9] Id.

[10] Id.

[11] Id.

[12] Swales v. KLLM Transport Services LLC, 985 F.3d at 434.

[13] Clark, 2023 WL 3559657, at *2.

[14] Id., at *3.

[15] Id., at *3.

[16] Id., at *4.

[17] Id.

[18] Id.

[19] 985 F.3d 430 (5th Cir. 2021).

[20] Id. at *3 (citing Swales, 985 F.3d at 434).

[21] Id. at *3.

[22] Mathews v. USA Today Sports Media Group LLC, No. 22-cv-1407, 2023 WL 3676795 (E.D. Va. Apr. 14, 2023).

[23] Id., at *3.

[24] Id., at *4.