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No More Two-Stepping for Court Certification of FLSA Collective Actions: The Sixth Circuit Leaves the Rodeo

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Courts have been dancing away from the two-step process for certification of collective actions under the Fair Labor Standards Act (FLSA), and the 6th Circuit is the latest to join the trend. In a recent decision that could have significant impact on the future of FLSA collective actions, the 6th Circuit has borrowed a "strong likelihood" standard from the preliminary injunction context, eliminating the first step of conditional certification which made it easier for FLSA plaintiffs to recruit additional members through notice at a very early stage in litigation. Now FLSA plaintiffs in the 6th Circuit must prove that there is a "strong likelihood" that potential plaintiffs are actually similarly situated to them before the Court will facilitate sending out notice.

The Sixth Circuit Decision: *Brooke Clark v. A&L Homecare and Training Center, LLC*

The 6th Circuit adopted stricter standards for plaintiffs seeking to send notices to potential plaintiffs in a May 19, 2023 decision, *Brooke Clark v. A&L Homecare and Training Center, LLC*, that could have significant impact on the future of FLSA collective actions. Rather than requiring only a "modest factual showing" that plaintiffs are similarly situated to one another, the 6th Circuit determined

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that plaintiffs must demonstrate a "strong likelihood" that members of the notice group are similarly situated to the plaintiff(s) for the district court to authorize giving notice of the lawsuit to those individuals. Thus, the 6th Circuit has removed conditional certification entirely from the process for cases within its jurisdiction.

Previously, most courts adopted a two-step approach to determine whether it was appropriate for the court to facilitate notice of FLSA suits to potential plaintiffs. In the first step, a lenient standard known as "conditional certification," courts determined that they may facilitate notice to other potential plaintiffs (e.g. other current or former employees) of the FLSA action upon a "modest factual showing" that they are "similarly situated" to the original plaintiffs. Then, when discovery is complete, the second step allows courts to again consider whether the noticed employees are, in fact, similarly situated to the original plaintiffs.

Strong Likelihood of Similarity

The 6th Circuit has now held that a district court should not facilitate notice upon a mere "modest showing" or other lenient standard of similarity, instead finding that court-approved notice of a FLSA suit should be sent only to employees who *are*, in fact, similarly situated. The 6th Circuit compared the decision to that of a preliminary injunction, recognizing that both decisions have immediate consequences for the parties, and yet the court renders a final decision on the underlying issue (in this case, whether employees are "similarly situated") only *after* the record for that issue is fully developed. The 6th Circuit also noted that the two decisions also share the requirement that the movant demonstrate to a certain degree of probability that they will prevail on the underlying issue when the court renders its final decision. For this reason, the 6th Circuit adopted the preliminary injunction standard requiring a showing of a "strong

likelihood" that the current and/or former employees are similarly situated to the plaintiffs for a district court to facilitate notice of an FLSA suit. The 6th Circuit further reasoned that, to apply this standard, discovery should be expedited to the extent practicable. Thus, defendant-employers facing FLSA collective actions in the 6th Circuit should expect expedited discovery schedules. This change may result in less pressure for employers to settle early. Granting FLSA notice under the two-step approach for collective certification has often put immense pressure on the defendant-employer to settle FLSA claims, especially if sending a notice of the lawsuit could expand the number of plaintiffs exponentially. Now, defendant-employers will be on more equal footing with plaintiffs as the parties aim to determine whether there is a *strong* likelihood potential plaintiffs are actually similarly situated.

The Trend Away From Two-Stepping FLSA Certification

The 6th Circuit is not the first federal appellate court to reject the two-step collective process. In 2021, the 5th Circuit became the first court of appeals to reject that process, holding that district courts have a duty to "consider all of the available evidence" before issuing notices to potential members of a collective action. As a result of that decision, district courts in the 5th Circuit may now move beyond the bare allegations of the pleadings to consider all evidence presented when ruling on a motion to issue notice to potential plaintiffs in a collective action. The 5th Circuit decision also stressed that district courts should rigorously enforce the FLSA's "similarly situated" requirement at the outset of litigation and allow parties sufficient early discovery to permit the court to analyze this requirement.

What's on the Horizon for Employers

Adopting a higher standard for giving FLSA notice to potential plaintiffs may help level the playing field

between employees and employers in collective actions. Federal district courts in the 11th Circuit and 4th Circuit have also followed or applied the 5th Circuit decision, suggesting that courts in other circuits may adopt similarly heightened standards in considering motions to issue notice in collective actions in the near future. Should more federal circuit courts turn their backs on two-step certification of FLSA collectives, and the split widens, the Supreme Court may ultimately weigh in.

For further information or specific guidance regarding collective certification of FLSA claims, contact your Akerman labor and employment attorney.
