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Sixth Circuit Adopts More Stringent Standard for FLSA Collective Actions

In a highly anticipated [decision](#) issued last Friday, the Sixth Circuit Court of Appeals, in *Clark v. A&L Homecare and Training Center, LLC*, adopted a significantly different approach to the question of when claims under the Fair Labor Standards Act (FLSA) may be pursued by “similarly situated” employees as a collective action. Specifically, the court held that employees bringing FLSA collective actions must show a “**strong likelihood**” that they and the employees they seek to add to the case are similarly situated. The approach outlined by *Clark* is a major departure from the two-step “conditional certification” framework that most courts in the Sixth Circuit and elsewhere have historically followed. The Sixth Circuit’s decision covers the states of Ohio, Kentucky, Michigan and Tennessee.

The Historical Two-step ‘Conditional Certification’ Approach

The FLSA allows employees to pursue claims collectively against an employer on their behalf and on behalf of other **similarly situated** employees if they affirmatively consent to being a part of the case. However, neither the FLSA nor the Sixth Circuit have defined what the phrase “similarly situated” means.

Historically, many courts have utilized a two-step process to determine whether employees are similarly situated for purposes of FLSA collective action claims. In step one—“conditional certification”—the court determined whether the proposed collective members were sufficiently similarly situated to receive a court-approved notice of the lawsuit and an opportunity to join the lawsuit. Courts have often held that this requires only a modest factual showing that the plaintiffs were actually similarly situated to the class they sought to represent. This “lenient” standard often resulted in cases where the claims of just one or a few plaintiffs led to notice being sent to hundreds or even thousands of other employees despite minimal evidentiary connection between the

plaintiffs and those employees. As the Sixth Circuit noted in *Clark*, this type of notice process ran the risk of being a solicitation of employees and former employees to sue their employer.

Following “conditional certification,” the parties typically engaged in expansive discovery. At the conclusion of discovery, the employer could then proceed to step two, moving to “decertify” the collective class if it could establish that the conditionally certified class was not, in fact, similarly situated. However, the *Clark* decision noted that as a practical matter, allowing the collective action to expand to potentially include many potential members of the collective at step one often led to overbroad and expensive discovery and put significant pressure on employers to settle expansive claims.

In recent years, especially with the proliferation of FLSA claims, challenges to this “lenient” standard have increased and with the *Clark* decision, two courts of appeal have now rejected the two-step framework.

Fifth Circuit Overturns Two-Step Framework

In the 2021 case of *Swales v. KLLM Transport Services, L.L.C.*, the Fifth Circuit Court of Appeals expressly rejected the two-step “lenient” standard framework, finding it lacked any basis in the FLSA statute. The court specifically found that “a district court must rigorously scrutinize the realm of ‘similarly situated’ workers, and must do so from the outset of the case, not after a lenient, step-one ‘conditional certification.’” By applying a more stringent standard, the Fifth Circuit noted that notice would only go to individuals who were actually similar to the named plaintiffs.

The *Clark* Decision

In *Clark*, the Sixth Circuit not only rejected the two-step “lenient” standard, but it also declined to adopt the Fifth Circuit’s standard in *Swales*. Instead, it found that a court’s “determination to facilitate notice in an FLSA suit is analogous to a court’s decision whether to grant a preliminary injunction.” The Sixth Circuit relied on the fact that both the determination to facilitate notice in an FLSA suit and the decision whether to grant a preliminary injunction are

provisional because the court renders a final decision on the underlying issue only after the record for that issue is fully developed; yet, both decisions have immediate consequences for the parties.

When assessing whether a preliminary injunction is appropriate, courts within the Sixth Circuit typically consider four factors: (1) the likelihood the movant will succeed on the merits, (2) the probability of irreparable harm to the moving party if the injunction is not granted, (3) the balance of hardships and equities, and (4) whether granting the injunction is in the public's interest. In *Clark*, the Sixth Circuit borrows the first element of the preliminary injunction standard, holding that before a notice of an FLSA suit is sent to other employees, the plaintiffs must show a "strong likelihood" that those employees are similarly situated to the plaintiffs themselves. This standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance of the evidence. The court further noted that this new standard "would confine the issuance of court-approved notice, to the extent practicable, to employees who are in fact similarly situated[.]"

What *Clark* Means for Employers

The *Clark* decision will likely lead to significant changes in the way that FLSA collective action claims will be handled in the states located within the Sixth Circuit. First, the days of notifying eligible current and former employees of an FLSA collective action without a thorough analysis of whether those employees have a strong likelihood of being similarly situated to the named plaintiffs are seemingly over. Second, because of *Clark's* "strong likelihood" standard, there will likely be a move by plaintiffs toward the use of expedited discovery over the "similarly situated" issue, which will lead to more intense discovery at the early stages of the case. Third, the question of whether uninvolved employees' statute of limitations should be tolled pending the court's "similarly situated" determination will likely become more of a focus in future FLSA cases.

More globally, *Clark* represents the third different approach to determining “similarly situated” for purposes of the FLSA across the 12 federal circuit courts of appeal. Given that, this issue will likely continue to evolve, and the question may end up ultimately being decided by the U.S. Supreme Court. For more information, please contact the authors of this article or any attorney with Frost Brown Todd’s [Labor & Employment Group](#).

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