Appeals Court Sets New Standard in Federal Wage and Hour Collective Actions: 4 Biggest Takeaways for Employers

Insights
5.24.23

An appeals court just raised the bar for employees seeking to notify other potential plaintiffs about collective wage and hour claims under federal law. Employees may bring such claims under the Fair Labor Standards Act on behalf of themselves and "similarly situated" workers — but they must meet certain criteria before a court will allow additional employees to be notified about the claims and give them an opportunity to opt into the lawsuit. Last week, the 6th Circuit Court of Appeals set a new standard, holding that an employee must show a "strong likelihood" that other employees are similarly situated. It rejected the "fairly lenient" two-step collective process used by many district courts – and also diverged from the 5th Circuit's stricter standard. While the 6th Circuit's ruling will impact employers in Kentucky, Michigan, Ohio, and Tennessee, employers in all locations should pay attention to developments in this area, particularly since SCOTUS may ultimately need to weigh in on the evidentiary standard. What are the four biggest takeaways for employers defending federal wage and hour claims?

1. Appeals Court Rejects 2-Step Process

In this case – *Clark v. A&L Homecare and Training Center, LLC* — a group of home health aides sued their former employer alleging they were paid improper rates for overtime premiums and vehicle expense reimbursement. They sought to bring their federal Fair Labor and Standards Act (FLSA) claims as a collective action on behalf of themselves and similarly situated employees, relying on a standard that required them to show only that they were all subjected to the same policy or practice. The employer, however, challenged this minimal standard and argued for a more stringent showing.

In an FLSA case, the court may facilitate notice to potential plaintiffs who are then given an opportunity to join the lawsuit by affirmatively "opting in" via a consent form. But who exactly is a potential plaintiff and how can the original plaintiffs establish that they are similarly situated to these potential plaintiffs? The evidentiary standard now depends on the jurisdiction.

Many courts have adopted the following two-step process that was first established by a federal appeals court in New Jersey in 1987:

- **Conditional certification.** Under this step, a district court may facilitate notice to other employees about an FLSA lawsuit when the plaintiffs establish a "modest factual showing" that the potential plaintiffs are "similarly situated" to them. The Sixth Circuit noted that this is a "fairly

lenient" standard, which results in the "sending of court-approved written notice to employees," according to SCOTUS precedent.

- **A closer look after discovery.** "Thereafter, when merits discovery is complete — assuming the case has not settled in the meantime, which it usually has — the court takes a closer look at whether those 'other employees' are, in fact, similarly situated to the original plaintiffs," the Sixth Circuit explained. If the court finds that the potential plaintiffs are similarly situated, it will grant "final certification" for the collective action.

The Sixth Circuit, however, thinks a district court should require more than a "modest showing" of similarity before facilitating notice. Why? Under SCOTUS precedent, such notice must not look like "the solicitation of claims." However, employees who receive notice of the claims — but are not ultimately deemed "similarly situated" to the plaintiffs — have essentially been solicited to file their own lawsuits, according to the Sixth Circuit.

"To the extent practicable, therefore, court-approved notice of the suit should be sent only to employees who are in fact similarly situated," the appeals court said.

But determining "the extent practicable" is complicated, as discussed below.

2. Court Also Declines to Adopt Stricter 5th Circuit Standard

Although many courts follow the two-step process, the 5th Circuit set a stricter standard in a 2021 ruling, holding that court-approved notice may be sent only to employees "who are actually similar to the named plaintiffs."

This standard appears to require the original plaintiffs to show that the other employees are more likely than not to ultimately be deemed similarly situated. "But 'potential plaintiffs' can just as easily mean employees who — based on a lesser showing of likelihood — might be similarly situated to the original plaintiffs, and who thus might be eligible to join the suit," the Sixth Circuit noted. Indeed, SCOTUS has previously sided with a district judge who said that "notice to absent class members need not await a conclusive finding of 'similar situations.'"

Furthermore, the Sixth Circuit said, a determination of whether employees are similarly situated is fact intensive, particularly regarding the tasks they performed and the timekeeping and compensation policies that applied to them. So, how can a district court conclusively make "similarly situated" determinations about employees who are not present in the case?

3. New Test Aims for the Middle

Instead of adopting either of the standards established by other circuit courts, the Sixth Circuit held that the plaintiffs must show a "strong likelihood" that other employees are similarly situated before a district court may facilitate notice of an FLSA lawsuit to those employees.

The appeals court said that trial judges are familiar with the "strong-likelihood" standard because it is used in other situations. The new standard would "confine the issuance of court-approved notice, to the extent practicable, to employees who are in fact similarly situated; and it would strike the same balance that courts have long struck in analogous circumstances," the court concluded.

The Sixth Circuit noted that the limitations period for FLSA claims is typically two years. "If the plaintiffs in an FLSA suit move for court-approved notice to other employees, the court should waste no time in adjudicating the motion. To that end, a district court may promptly initiate discovery relevant to the motion, including if necessary by court order."

Ultimately, the Sixth Circuit vacated the district court's decision applying the two-step standard and instructed the court to apply the "strong-likelihood" standard.

4. What This Means for Employers

This issue is important for employers because they often feel pressured to settle a potential FLSA collective action lawsuit after it is filed, since conditional certification has been almost a foregone conclusion.

As the Sixth Circuit said, "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 — because the issuance of notice can easily expand the plaintiffs' ranks a hundredfold." Thus, applying a stricter standard for issuing such notice may help employers in their litigation strategy.

Plaintiffs may no longer be able to request issuance of notice early in litigation and instead may have to go through discovery to satisfy the "strong likelihood" standard. This will give employers an opportunity to develop evidence through written discovery and depositions to show that other employees are not similarly situated. Employers also may be able to move for summary judgment on the merits before the issue of notice is even briefed.

In any event, employers should benefit from a shift away from the lenient two-step process standard — and this could help them negotiate a more reasonable settlement.

Notably, however, it's not entirely clear what a "strong likelihood" of being similarly situated actually requires a plaintiff to show. Does it mean the other employees worked for the same supervisor? Worked in the same job position or geographic location? Performed the same job duties? Although district courts have applied this standard when reviewing requests for preliminary injunctions and in other non-FLSA situations, it will take time for them to flesh it out in this context.

Conclusion

Fisher Phillips will continue to monitor these developments and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date

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