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EMPLOYER LAW BLOG

Federal Court Rejects Plaintiff-Friendly Approach to FLSA Conditional Certification

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At the end of 2021, we discussed in our Labor & Employment podcast some of the significant legal developments from that year. One of those developments involved the Fifth Circuit Court of Appeals - in a case styled *Swales v. KLLM Trans. Servs., LLC* - rejecting the prevailing "two-step" approach to FLSA conditional certification of overtime or minimum wage claims. This "two-step" approach has been repeatedly characterized by courts as "lenient" and widely considered to be favorable to plaintiffs.

As we noted at that time, the "two-step" approach is the framework used by most federal district courts in deciding (usually early on in a lawsuit) whether to authorize a plaintiff to send notice of the lawsuit to others who are allegedly "similarly situated" so as to give those individuals the option of choosing to "opt in" and become a part of the lawsuit. This process of authorizing notice is referred to as "conditional certification." Courts often (but not always) grant conditional certification based on little more than a few declarations or affidavits from the plaintiffs or other individuals alleged to be similarly situated. Once notice is sent out and the time for opting into the lawsuit has expired, the parties then engage in further discovery on all those who have joined the lawsuit to determine whether they are "similarly situated" in fact.

However, the trouble with this approach is that it asks courts to preliminarily determine, based on a very limited record (*e.g.*, a plaintiff's allegations alone and/or little to no evidence or discovery), who is "similarly situated" to the named plaintiff(s). This often results in notice being erroneously sent to individuals who are not similarly situated or have no claim. And often these individuals still join, or try to join, the lawsuit. This approach can result in a case growing significantly in terms of the parties and claims involved before any reliable determination has been made as to whether all such individuals are "similarly situated" or whether the claims have merit at all. These were many of the concerns that led the Fifth Circuit in *Swales* to reject the "two-step" approach.

But all hope is not lost. Cracks (however small) appear to be emerging in the use or viability of this "two-step" approach. On April 14, 2023, the United States District Court for the Eastern District of Virginia issued an Order - in a case styled *Mathews v. USA Today Sports Media Group, LLC, et al*. - wherein the Court explicitly adopted the *Swales* approach and rejected the "two-step" framework.

Like the *Swales* case, the *Mathews* case involves allegations the defendants misclassified workers as independent contractors and thus denied them overtime and/or minimum wage pay. Cases involving claims of misclassification are invariably more fact-intensive than typical unpaid overtime or minimum wage cases, as they often require scrutiny of nearly every aspect of the relationship between the defendant (the supposed employer) and the plaintiff(s) (the supposed employees). As a result, discovery in these cases can be expensive and protracted. Given the stakes of these cases, they tend to highlight well some of the fundamental problems behind the "two-step" approach discussed above.

In *Mathews*, the Court echoed some of these concerns in concluding: "the Fifth Circuit's approach is the better one." Notably, however, the Court also stressed a textual approach to justify its rejection of the "two-step" approach: "FLSA says nothing at all about 'conditional certification.' Rather, FLSA's text makes clear that district courts must ensure that notice goes out to those who are 'similarly situated' to the named plaintiffs." It reasoned that the "two-step" approach is "flawed" because it does not ensure that happens.

Thus, given the text of the FLSA, the *Mathews* Court followed the "correct approach" of the *Swales* Court and authorized "limited discovery" into the issue of whether other individuals are "similarly situated" to the plaintiffs. In other words, the *Mathews* plaintiffs' allegations and declarations in support of their conditional certification request were simply not enough.

It remains to be seen what will come of this *Mathews* case, including whether it will be conditionally certified or whether an appeal of the order may follow. So we will have to wait and see. The case is still pending at the district court level and would need to go through the Fourth Circuit of Appeals before ever being considered by the United States Supreme Court for review. However, given the current composition of the Supreme Court, it would not be surprising to see most of the high court agree with some or all the reasoning of the *Mathews* and *Swales* courts (especially their textual arguments against the "two-step" approach). Given the importance of the issue, we would not be surprised to see the Supreme Court weigh in sooner than later. Stay tuned for further developments.