SANDBERG PHOENIX

EMPLOYER LAW BLOG

The Tide Keeps Turning: Another Federal Appellate Court Rejects "Lenient" Conditional Certification Standard under the FLSA

AUTHOR: JAMES KEANEY

On May 19, 2023, the Sixth Circuit Court of Appeals became the second federal appellate court to address and reject a commonly applied "lenient" standard for plaintiffs to conditionally certify FLSA collective actions.

We have previously covered developments on this front when, for example, the Fifth Circuit Court of Appeals recently rejected the same plaintiff-friendly standard.

However, the Sixth Circuit adopted its own approach in rejecting the standard. The Court analogized a trial court's decision to issue notice to other allegedly "similarly situated" individuals to a trial court's decision to grant or deny preliminary injunctive relief. In other words, the Court concluded a plaintiff must show a "strong likelihood" that other employees are similarly situated to the plaintiff—not just a "modest" showing, as required under the common "lenient" standard applied by courts.

But what does this difference mean? According to the Court, "[t]hat standard [of 'strong likelihood'] 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." And trial courts, according to the Sixth Circuit, "may promptly initiate discovery relevant to" motions seeking to issue notice to others alleged to be similarly situated. So, while distinct from the Fifth Circuit's approach, it is similar in principle

The Sixth Circuit's decision was not unanimous; it came with a couple concurrences and dissent. Nonetheless, the overarching significance of the decision is clear: it is yet another step in a growing split among federal appellate courts on the standard for FLSA conditional certification. Given the emerging views, one can reasonably expect the issue to reach the United States Supreme Court sooner than later. Stay tuned.