# PUBLICATION

## Two's Company, Three's A Crowd: Three-Way Split Sets Stage for Supreme Court Review of FLSA Collective Actions

**Authors: Zachary B. Busey, Dean J. Shauger**
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**On May 19, 2023, the Sixth Circuit Court of Appeals issued a decision creating a three-way split among federal courts on the handling of collective actions filed under the Fair Labor Standards Act (FLSA). In deciding whether and when current and former employees receive notice of a collective action, the Sixth Circuit created a new test, rejecting the test used by a majority of federal courts and a separate test used within the Fifth Circuit Court of Appeals. This three-way split sets the stage for the Supreme Court to address collective actions under the FLSA—an important topic the Supreme Court has substantively avoided and cleverly punted for decades.**

Collective actions are specific to the FLSA and the Age Discrimination in Employment Act, which incorporates by reference sections of the FLSA. Collective actions differ from class actions. In a class action, which is not limited to any particular statute or claim, an individual is included in the class by default but can opt out if they do not want to be included. In a collective action, to be included, an individual (always a current or former employee) must opt into the action. In other words, an individual must affirmatively join a collective action.

Although Congress enacted the FLSA in 1938, collective actions only became popular in the 1990s. There are several reasons for this, but the driving factor was a 1987 decision from a federal court in New Jersey, *Lusardi v. Xerox Corporation*. The *Lusardi* decision created a two-step or two-stage certification process for FLSA collective actions. In the first stage—known as the "notice" stage or "conditional certification" stage—a court will send a notice to current and former employees, advise them of the collective action, and provide instructions for joining it. The second stage, which occurs after employees have opted into and joined the action, examines whether the opt-in employees are actually similarly situated to the plaintiff-employee that filed the lawsuit. The standards applied at the first stage are extremely favorable to the plaintiff-employee and heavily weighted against any defendant-employer. This most often results in conditional certification of a collective action, with hundreds if not thousands of current and former employees joining an action before any meaningful litigation has occurred. For decades, employers have battled to even out this lopsided approach, but courts continued to apply it

In 2021, the Fifth Circuit was the first federal appellate court to flatly reject conditional certification, *Lusardi*, and any lenient standard. In *Swales v. KLLM Transport Services, L.L.C.*, the Fifth Circuit ruled that a court must consider "all available evidence" when deciding whether or when to send notice to any current or former employee, and notice should only be sent when current and former employees are actually (not potentially or theoretically) similarly situated to the plaintiff-employee that file the lawsuit. Now known as the Swales test, it split the Fifth Circuit from other federal courts.

The Sixth Circuit has added to that split. In *Clark v. A&L Home Care and Training Center, LLC*, with respect to *Lusardi* and any lenient standard, the Sixth Circuit rejected that approach. Notably, in doing so, the Sixth Circuit noted how the approach "can easily expand the plaintiffs' ranks a hundredfold," thereby "forcing a defendant to settle." As for the *Swales* test, the Sixth Circuit rejected it, too, believing it to place impractical burdens on a court. The Sixth Circuit then created its own test. In order for notice to be sent, a plaintiff-employee must show a "strong likelihood" that other current and former employees are similarly situated—a

standard, the Sixth Circuit explained, that is analogous to a court's decision whether to grant a preliminary injunction.

It is likely that the *Clark* decision will remain at the Sixth Circuit for the foreseeable future. The plaintiffs—or perhaps the U.S. Department of Labor, an interested party in the case—will ask the full Sixth Circuit to reconsider the decision, known as a rehearing en banc. From there, it is likely a party will appeal the case to the Supreme Court. Will the Supreme Court take the appeal? That remains to be seen, but *Lusardi*, *Swales*, and *Clark*—the three-way split—makes it more likely.

What should employers do in the meantime? As with any litigation, an employer's priority should remain on avoidance. With FLSA collective actions in particular, auditing wage-and-hour practices and utilizing workplace arbitration agreements are two ways employers can work to avoid them. For any pending collective action, employers should discuss the recent decision with their litigation counsel and any argument/defense it might support. This is especially true if the pending collective action is within the Sixth Circuit, which encompasses Kentucky, Michigan, Ohio, and Tennessee.

For any question about a pending collective action or best practices for avoiding them, please contact the authors, Zachary B. Busey or Dean J. Shauger, or any member of the Labor & Employment Group.