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Wage & Hour Developments



In *Mathews v. USA Today Sports Media Group, LLC et al.*, plaintiff Elizabeth Mathews (Mathews) brought a collective action under the FLSA alleging that she was an employee rather than an independent contractor to the defendant. Mathews moved for conditional certification pursuant to the widely followed two-step conditional FLSA certification process adopted in *Lusardi v. Xerox Corp*, 118 F.R.D. 351 (D.N.J. 1987). Under this approach, an initial collective certification determination is made using a lenient standard—that proposed members of a collective are similar enough to receive notice of the lawsuit so the proposed collective member may decide whether to affirmatively join the lawsuit. In the second step, which occurs after collective certification discovery has been completed, the district court makes a second decision when the employer moves

for "decertification" of the collective, using a stricter standard, to determine whether the named plaintiffs and opt-in members are "similarly situated."

The defendant argued that the District Court for the Eastern District of Virginia (the Court) should adopt the U.S. Court of Appeals for the Fifth Circuit's decision in *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Circ. 2021), which rejected this two-step conditional certification process. They asserted in favor of the district court identifying at the case's outset what facts and legal considerations will be material to determining whether a group of employees is "similarly situated" and then authorizing any preliminary discovery before notice of the lawsuit is provided to potential collective members.

In acknowledging that the U.S. Court of Appeals for the Fourth Circuit has provided district courts with discretion to supervise the notice-giving process in collective actions, the Court determined that the Fifth Circuit's approach in *Swales* should be followed. The Court relied on the FLSA's statutory text that makes it clear that district courts must ensure notice goes out to those who are "similarly situated" to the named plaintiffs and provides no mention of "conditional certification." The Court also noted that the *Lusardi* two-step approach allows for notice to be sent to a broad group of potential collective members at step one, which inevitably includes some members who are not "similarly situated" to the named plaintiffs, therefore directly conflicting with the FLSA's statutory language. Accordingly, the Court held the correct approach is for the district courts to determine at the *outset* whether a proposed collective is "similarly situated" to the named plaintiffs and order any limited discovery necessary to make such determination.

This decision highlights the possibility that more courts could adopt the Fifth Circuit's approach to certifying collective actions. This decision also provides district courts with a greater degree of discretion to make immediate decisions regarding whether opt-in plaintiffs are "similarly situated," which will reduce the potential number of individuals who are not "similarly situated" from receiving notice. Employers with questions about the FLSA collective certification process should contact experienced counsel.

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Wage & Hour Developments

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