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FLSA Turns 80: A Closer Look At Conditional Cert. Standard

By **Sari Alamuddin and Allison Powers** (June 19, 2018, 11:47 AM EDT)

Originally signed by President Franklin D. Roosevelt in 1938, the Fair Labor Standards Act turns 80 this year. In this Expert Analysis series, attorneys most familiar with the statute provide different perspectives on the law's impact and development over the course of its history.


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While the adoption of the two-stage standard for collective action certification may have been born of good intention, its current interpretation strains judicial resources and forces settlement regardless of the merits of the litigation.

Under Section 216(b) of the Fair Labor Standards Act, a private cause of action may be brought against an employer "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[1] Section 216(b), however, does not define "similarly situated." In Hoffman-La Roche v. Sperling,[2] the U.S. Supreme Court confirmed that Section 216(b) grants courts the discretion to authorize discovery regarding, and notice to, similarly situated employees,[3] but it stopped short of providing any guidance about when potential opt-ins would be considered similarly situated. In the absence of a statutory definition or guidance from the Supreme Court, lower federal courts have endorsed a variety of approaches, with the majority having converged on a two-stage process first articulated in Lusardi v. Xerox Corp.[4] to determine when plaintiffs and potential opt-ins may proceed to trial collectively.

At the first stage, a court grants "conditional certification" of the collective action and authorizes notice to other potential claimants if the plaintiffs can show they are similarly situated to those potential claimants. In this context, to be "similarly situated" to the potential opt-ins, a plaintiff only needs to make a "modest factual showing sufficient to demonstrate that [he or she] and potential class members were victims of a common policy or plan that violated the law."[5] The second stage — typically initiated by a motion to decertify — does not begin "until potential plaintiffs have been given a chance to 'opt-in' to the collective action and discovery is complete."[6] At the second stage, the court must engage in a more thorough inquiry and reexamine the class "to determine whether there is sufficient similarity between the named and opt-in plaintiffs to allow the matter to proceed to trial on a collective basis."[7] If a class is decertified then each plaintiff and opt-in may file suit individually; the collective action may at that point splinter into potentially

numerous single-plaintiff lawsuits.

A two-stage process seemed to make good sense, in large part because it appealed to notions of fairness to the putative collective. In Lusardi, for example, the court explained, "[D]own the road there will come a time when they're going to have to show that for this case to go forward, that from all these notifications, and all this investigation, and all this discovery, they have got an honest to goodness case ... I think the best way to find out if you have a cart from the horse is to let these people communicate in a meaningful way with that group of people that they say they can prove were wronged."[8] Most courts also recognized that delaying notice could significantly impact the rights of other employees who otherwise would not have knowledge of potential claims, since under the FLSA the statute of limitations is not tolled until a plaintiff opts in to the case.[9]

At first, courts considering motions for conditional certification under the two-stage approach reinforced the proposition that although the first-stage standard may be "lenient" or "not onerous," it also is "not invisible" or toothless.[10] This was reflected in the parties' respective submissions, which often contained dueling, well-supported declarations and affidavits, detailed arguments for and against plaintiffs' theory of what made putative class members similarly situated, some (limited) discussion of the merits, and spirited oral arguments. And while there was always an understanding that the odds favored certification, there were enough examples of courts denying conditional certification, for a variety of reasons, to convey a sense of a proper balance between ensuring that putative class members received timely notice of their claims and weeding out meritless suits.[11]

Over time, however, courts have taken increasingly more lenient views of the first stage standard. Now, unless significant discovery has taken place and the defendant can argue for a higher standard as a result,[12] courts are not likely to even consider, much less analyze, the defendant's evidence and argument, even where they contradict the plaintiffs' statements or highlight flaws in the evidence in support of certification.[13] Indeed, courts have granted conditional certification even if "[t]he majority of defendants' arguments may ... support eventual decertification at the second stage."[14] As a result, denial of conditional certification has become virtually unheard of, except in circumstances such as where a plaintiff seeks conditional certification relying solely on allegations unique to his or her employment experience.[15]

With the plaintiffs bar now well aware that conditional certification is almost certain, there is little incentive for a plaintiffs attorney to be selective about which cases to file. And once notice is issued, the plaintiffs are assured of having a larger population of opt-ins join the suit. As a result, employers are between a rock and a hard place: settle early to avoid business disruption and expensive discovery and litigation, or push to decertification recognizing that even a "win" on that point will leave them dealing with dozens of single-plaintiff matters, often filed in a variety of jurisdictions. All but the most fearless, well-resourced employers come under intense pressure to settle FLSA collective actions before or immediately after conditional certification, regardless of the merits of the underlying claims.

It should come as no surprise, therefore, that the filing of wage and hour actions has skyrocketed over the last 15 or so years. Federal Judicial Caseload Statistics, released annually, confirm that the number of FLSA lawsuits continues to grow and set new records each year. In 2001, just 1,961 such cases were filed.[16] By 2007, that figure had ballooned by more than 325 percent to 6,387.[17] In 2016, the count reached an all-time high of 9,073.[18] Few, if any, of these matters are being subject to appellate review, let alone being litigated to the merits, depriving both plaintiffs and employers of guiding authority and only fueling more settlements because of the resulting uncertainty. Morgan v. Family Dollar Stores Inc. is the rare FLSA collective action that has resulted in a jury trial and judgment in recent

memory, and perhaps as another cautionary tale against pushing to litigate these types of cases, it ended poorly for the defendant.[19]

Whether the recent Supreme Court decision clearing the path to waivers of class and collective actions, including those brought under the FLSA, as a condition of employment[20] will curtail the explosion in wage and hour cases remains to be seen. Regardless, it is time to restore the balance and put some teeth into the first-stage determination. Requiring more from plaintiffs at the first stage would (a) weed out meritless claims, (b) allow employers to make litigation decisions on the merits, and (c) result in more substantive decisions that would provide guidance on the law to plaintiffs and defendants alike.

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[1] 29 U.S.C. §216(b).

[2] 493 U.S. 165, 170-74 (1989).

[3] See 493 U.S. at 170 ("Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure.")

[4] 118 F.R.D. 351, 353-54 (D.N.J. 1987).

[5] Berger v. Perry's Steakhouse of Ill. LLC, No. 14 C 8543, 2018 WL 1252106, at *5 (N.D. Ill. March 12, 2018); see also Jirak v. Abbott Labs. Inc., 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008) (requiring only a "minimal showing.").

[6] Persin v. Career Builder LLC, 2005 WL 3159684, at *1 (N.D.Ill. Nov. 23, 2005).

[7] Kenton Smallwood v. Illinois Bell, 710 F. Supp. 2d 746, 753 (N.D. Ill. 2010) (citing Carnegie v. Household International, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

[8] 118 F.R.D. at 354.

[9] See Carroll v. City of Birmingham, No. 2:10-CV-2244-KOB, 2011 WL 13232588, at *8 (N.D. Ala. Nov. 14, 2011) ("Delaying consideration of certification of the class for notice purposes prejudices the claims of the absent class members, for every day of delay reduces the value of each member's claim and moves them all closer to a complete time bar. That prejudice far outweighs the interest of the City in trying to address the merits of the claim first."). For similar reasons, significant delays can lead to a grant of equitable tolling of the claims. See, e.g., Struck v. PNC Bank N.A., 931 F. Supp. 2d 842, 847 (S.D. Ohio 2013) ("[W]hile the FLSA's opt-in mechanism necessarily involves some lapse of time between the date a collective action is commenced and the date that each opt-in plaintiff files his or her consent form, the extreme delay in receipt of actual notice in this case — through no fault of the potential plaintiffs—will prove highly prejudicial.").

[10] Parker v. Rowland Express Inc., 492 F. Supp. 2d 1159, 1164 (D. Minn. 2007).

[11] See, e.g., Basco v. Wal-Mart Stores Inc., No. CIV.A. 00-3184, 2004 WL 1497709, at *7-8 (E.D. La. July 2, 2004); Mike v. Safeco Ins. Co. of Am., 274 F. Supp. 2d 216, 220 (D. Conn. 2003); Austin v. CUNA Mut. Ins. Soc'y, 232 F.R.D. 601, 605-06 (W.D. Wis. 2006); Trinh v. JPMorgan Chase & Co., No. 07-CV-1666 W(WMC), 2008 WL 1860161, at *4 (S.D. Cal. April 22, 2008).

[12] See Jungkunz v. Schaeffer's Inv. Research Inc., No. 1:11-CV-00691, 2014 WL 1302553, at *7 (S.D. Ohio March 31, 2014); Kress v. PricewaterhouseCoopers LLP, 263 F.R.D. 623, 628 (E.D. Cal. 2009) (discussing cases).

[13] See, e.g., Black v. P.F. Chang's China Bistro, No. 1:16-cv-03958, 2017 WL 2080408, at *3 (N.D. Ill. May 15, 2017) ("The first stage involves conditionally certifying a class for notice purposes. There is a low standard of proof. The court does not make merits determinations, weigh evidence, determine credibility, or specifically consider opposing evidence presented by a defendant." (quoting Bergman v. Kindred Healthcare, Inc., 949 F. Supp. 2d 852, 855-56 (N.D. Ill. 2013))).

[14] Bastian v. Apartment Inv. & Mgmt. Co., 2007 WL 5234235, at *1 (N.D. Ill. Sept. 17, 2007).

[15] See, e.g., Brown v. Citicorp Credit Servs. Inc., No. 1:12-CV-00062-BLW, 2013 WL 4648546, at *1 (D. Idaho Aug. 29, 2013); Guess v. U.S. Bancorp., 2008 WL 544475, at *4 (N.D. Cal. Feb. 26, 2008) (same); Colson v. Avnet Inc., 687 F. Supp. 2d 914, 930 (D. Ariz. 2010) (same).

[16] http://www.uscourts.gov/sites/default/files/statistics_import_dir/c02mar02.pdf.

[17] http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Mar07.pdf.

[18] http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2016.pdf. Statistics for 2017 have not yet been released.

[19] In January 2001, Janice Morgan and one other store manager filed a Section 216(b) putative collective action in the United States District Court for the Northern District of Alabama against Family Dollar Stores Inc. seeking unpaid overtime wages for alleged violations of the FLSA. After initial discovery, the district court granted certification. At the close of discovery in May 2004, Family Dollar filed a motion to decertify the collective action, which at the time consisted of 1,424 employees. The district court denied the motion eight months later. Following an eight-day trial in 2006, the jury returned a verdict for the plaintiffs resulting in a final judgment of more than $35.5 million. In 2008, the case reached the Eleventh Circuit, which affirmed the judgments of the district court. Finally, on Oct. 5, 2009, the U.S. Supreme Court denied Family Dollar's Petition for a Writ of Certiorari. See Morgan v. Family Dollar Stores Inc., 551 F.3d 1233, 1241 (11th Cir. 2008); Family Dollar Stores Inc. v. Morgan, 130 S. Ct. 59 (2009) (denying certiorari)).

[20] In Epic Systems Corp. v. Lewis, 584 U.S. ---, 2018 WL 2292444 (May 21, 2018), the court ruled in a 5-4 decision that arbitration agreements with class and collective action waivers required as a condition of employment are enforceable under the Federal Arbitration Act, and nothing in the National Labor Relations Act (NLRA) overrides that result. The decision resolves a circuit court split and addresses a key concern for employers that has lingered since the National Labor Relations Board decided in 2012 that the NLRA prohibited such waivers. It also clears a potential obstacle to enforcement of arbitration agreements with class and collective action waivers and provides employers with another opportunity to consider whether an arbitration program is right for their organization.