CLASS ACTION TRENDS REPORT

Employers at the crossroad: The DEI data dilemma

The social movements occurring across our country have some companies and organizations renewing their focus and commitment to making long-term changes and fostering a more inclusive workforce through Diversity, Equity and Inclusion (DEI) initiatives. Many companies have been moved to publicly commit to address historical disparities experienced by underrepresented groups and provide information and data to acknowledge the problem and be part of the solution.

But organizations are discovering that instituting a DEI initiative is a complex and dynamic endeavor that requires a strategic, comprehensive plan and an effective monitoring process. Employers must consider carefully the compliance challenges, the cause of any DEI gaps, and the best way to move their organization toward their goals while proactively avoiding or mitigating potential legal and reputational damages resulting from a class and collective action alleging systemic discrimination.

In this issue of the Class Action Trends Report*, Stephanie L. Adler-Paindiris, a principal in the Orlando office of Jackson Lewis and co-leader of the firm's General Employment Litigation Practice Group, and Michael D. Thomas, a principal in the firm's Los Angeles office, discuss the complex intersection between an employer's legitimate desire to be part of the solution and the possible risks of remedial efforts.*

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The quandary

"Statements and supporting data acknowledging race-based disparities can be powerful tools for employers seeking to advance meaningful change and equity in the workplace," Michael Thomas notes. A business or organization also may face mounting pressure from politicians, employees, advocacy groups, and activist shareholder groups to produce such information. For example, on March 18, 2021, House Committee on Financial Services Chairwoman Rep. Maxine Waters and Chair of the Subcommittee on Diversity and Inclusion Rep. Joyce Beatty sent a letter to the nation's 31 largest investment firms requesting DEI-related data, including:

- Workforce and board diversity;
- Spending with diverse suppliers, including the use of diverse asset management firms; and
- Challenges implementing diversity and inclusion policies and practices.

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A WORD FROM MIA, DAVID AND ERIC

MIA FARBER

DAVID GOLDER

ERIC MAGNUS

There is light at the end of the tunnel.

As this issue of the *Class Action Trends Report* goes to press, a growing number of Americans have been fully or partially vaccinated against COVID-19, and the vaccinations appear to be winning the race against virus mutations. The optimistic forecast is that the nation and its workplaces will return to relative normalcy by mid-summer.

What remains to be seen is what the "new normal" will look like, however — and what it will mean for employers navigating the challenges of a safe return-to-work and the prospects of a sharply expanded remote workforce. In this issue, we look at the implications of these developments for class-wide wage and hour liability.

But first, we turn to another pressing issue employers are facing in the wake of 2020's widespread protests against racial injustice and the underlying concerns that sparked it. As the streets swelled with protesters, many corporations acted quickly, publicly pledging support for the movement and taking a hard look at how their own organizations measure up on diversity, equity and inclusion (DEI). Such a reckoning is important; however, employers seeking to further their own DEI initiatives in the urgency of this historic moment must proceed with care. In this *Report*, we discuss how employers can undertake DEI efforts without risking class action discrimination suits.

Finally, we discuss a new cause for optimism for employers. Federal courts continue to chip away at the common practice of rubber-stamping motions for conditional certification of Fair Labor Standards Act (FLSA) collective actions — most notably, in a landmark Fifth Circuit decision that will come as considerable relief to employers within the jurisdiction.

Enjoy your spring, and the promise of a post-pandemic summer.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Many employers are thinking about how they are addressing the issues and whether they should discuss publicly what they are doing about them. "However, if made without engaging in a strategic process with the assistance of counsel and under privilege, these disclosures and actions can derail the company's DEI efforts and create class exposure for the employer," Stephanie Adler-Paindiris warns. This area of law is full of landmines that must be navigated carefully to advance important DEI goals while protecting the organization. The decision of whether a company should disclose information depends on a variety of factors, including legal requirements, internal pressure, and public relations.

Employers that release DEI data without the assistance of counsel risk inviting adverse consequences, such as increased scrutiny by government agencies regarding alleged systemic discriminatory practices. Similarly, shareholder derivative lawsuits may seek to hold directors and officers of major companies accountable for alleged failures to uphold their commitment to diversity, equity, and inclusion. Unfortunately, many of the lawsuits sometimes originate with data released by an employer in an effort to support its DEI programs.

The conundrum: Acknowledge pay, promotion, and other historical disparities based on race, gender, and other protected characteristics, but face costly, protracted, and unfounded litigation. How can employers be transparent about creating an equitable workplace without inviting a potential class action lawsuit?

Proactive steps

Employers must be thoughtful when developing a comprehensive DEI strategy. This is especially so when considering aggregating or releasing DEI-related data, and it is imperative for employers to anticipate the potential business and legal impact of releasing data. The risks include, but are not limited to, monetary exposure, injunctive relief, and reputational damage. Based on their public statements and strategic plans, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) have placed greater emphasis and scrutiny on potential discriminatory systemic practices and pay equity — a trend that will undoubtedly increase under the Biden administration.

With these considerations in mind, Adler-Paindiris and Thomas suggest employers work closely with counsel to implement the following steps when pursuing a DEI initiative or in aggregating or releasing DEI-related data:

1. Conduct a DEI assessment. Making public statements or releasing DEI-related data without first analyzing the figures and identifying targets and goals can be harmful to an organization, its workplace culture, and its employees. Moreover, it may invite a lawsuit. Therefore, a pre-disclosure assessment will be most advantageous. However, even if the employer has already made public statements or commitments, it is not too late to work with legal counsel to assess current DEI initiatives to determine where performance is not meeting objectives and to identify steps to adjust or enhance efforts.

Understandably, many corporations postpone or avoid completely their DEI assessments out of fear such assessments will uncover major diversity deficiencies and ultimately result in significant legal, financial, and reputational damage. However, these are reasons to be proactive and conduct the assessment with the guidance of counsel. Adler-Paindiris and Thomas encourage organizations to meet the moment, assess their DEI initiatives, and work with counsel to safely address any shortcomings.

2. Implement "race/gender-neutral" DEI efforts. DEI measures and initiatives that are designed and implemented in a race- and gender-neutral fashion are significantly less likely to raise legitimate legal issues. These include reviewing policies and practices for biases

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or revising job descriptions and announcements for requirements that could limit the pool of job applicants.

Importantly, where neutral measures have failed, the U.S. Supreme Court and the EEOC have authorized race/gender-conscious programs and employment selection decisions as exceptions to the prohibition under Title VII of the Civil Rights Act against taking race and gender into account in employment decisions — provided such actions are taken pursuant to a compliant Voluntary Affirmative Action Plan (VAAP) covering all the necessary requirements. Consistent with the rationale and requirements of the leading cases on this issue, the EEOC also has established VAAP guidelines.

3. Focus on pay equity; monitoring and benchmarking. Consider proactive pay equity analyses by gender, race and ethnicity, age, and other factors to remediate inequities. Use advanced regression analyses for pay equity and adverse impact analyses of various job categories and workplace functions to facilitate prompt corrective actions. Also, consider ongoing monitoring of workplace DEI performance to proactively prevent patterns of workplace inequities — or the appearance of such inequities — from emerging. There is an array of tools that can be employed to better assess corporate performance in the workplace, including:

- Regular statistical benchmarking (including creation of industry/geographic-specific databases) of workforce demographics to determine "gaps/underutilizations" and address them on an ongoing basis;
- Dramatically increased use of "big data" to identify status, trends, and problems to assist in addressing them; and
- Industrial/organizational psychologists and other experts to create and validate pre- and post-employment tests.

4. Adopt enhanced EEO policies and related training. Ensure that all company workplace fairness policies are

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Jackson Lewis earns national recognition for DEI efforts

Since its founding, Jackson Lewis has been committed to be a trailblazer in diversity, equity and inclusion (DEI) both internally and externally. These efforts were recognized when the firm received a 100 percent score on the Human Rights Campaign Foundation's 2021 Corporate Equality Index (CEI), the nation's premier benchmarking survey and report measuring corporate policies and practices related to LGBTQ+ workplace equality. The firm also received the Tipping the Scales Award as part of the Diversity & Flexibility Alliance's 2020 New Partner Report, among other accolades.

"Our commitment to diversity, equity and inclusion has been a touchstone of the firm since its founding," said Firm Chair Kevin Lauri. Jackson Lewis has also renewed its membership in CEO Action for Diversity and Inclusion and was the first law firm to sign the CEO Action Pledge, which more than 1,600 American CEOs have signed in support of diversity in corporate America.

Other recent actions to renew the firm's commitment to DEI include:

- Offering legal assistance to local and national civil rights organizations in support of the Black Lives Matter movement, joining the Law Firm Antiracism Alliance, and participating in the National Bar Association – Commercial Law Section (NBA-CLS) Black Lawyers Matter Internship Program;
- Creating a special DEI Core Committee from its Board of Directors to work alongside its full-time director of DEI to implement numerous DEI initiatives including recruiting, onboarding, developing, retaining, and promoting diverse attorneys, in addition to other broader external attorney-led DEI commitments;
- Launching its DEI REACH program, aimed at significantly enhancing representation of underrepresented groups in Jackson Lewis' attorney headcount; and
- Partnering with clients to make sure attorneys from underrepresented racial groups are handling their matters and spending time forming relationships with their legal teams.

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recognized as a senior management priority, and that they are regularly updated, accurate, and available to all employees. It is also important to provide comprehensive training of affected personnel to ensure that practices effectively implement company policies.

Similarly, ensure the organization's internal complaint systems, processes, and outcomes enhance credibility with employees. This will help prevent employees from seeking an alternative "external source" (such as private counsel) and can serve as a high-functioning "early warning system" to aid both the company and its employees.

5. Develop an authentic DEI narrative. Finally, it can be helpful to develop a narrative around DEI data that authentically represents the voices and experiences of the organization's workforce. Both internal and external stakeholders are asking for DEI-related data and greater transparency. If an employer decides to release data, it should underscore DEI goals: know the intended goals for collecting data, understand the data, and be specific in what it does with that data.

Once an employer is confident with its data, even if the numbers are not as anticipated, it should work with legal counsel on a narrative that resonates with diverse employees, allies, and other stakeholders in order to build "buy in." Only if the narrative is authentic to the organization and its employees will leaders be able to build credibility and trust and minimize the likelihood employees will seek an alternative avenue to address workplace concerns. ■

Wage and hour issues persist a year into the pandemic


ALISON CRANE

The COVID-19 crisis has complicated every facet of operating an enterprise, and wage and hour compliance is no exception. Because wage and hour disputes are so frequently brought as high-stakes class or collective actions, it is critical to get these issues right. Jackson Lewis attorney Alison Crane, a principal in the firm's Chicago office, discusses pandemic-related wage and hour compliance issues that employers should be prepared to address as businesses and organizations continue to wade through these unprecedented times.

Employees working remotely

Generally, exempt employees are paid a full salary that covers any work they have performed for the organization, regardless of whether they are working onsite or remotely. "However, compensating non-exempt employees who work remotely can create a trickier situation," Crane warns. Because they must be paid for all the time they actually work, as well as overtime premiums, employers must act proactively to ensure these employees are accurately recording their compensable work time.

Particularly in light of non-work distractions that can arise throughout the day while employees are working at home, employers should consider implementing and clearly communicating a scheduling and work-time policy. It is also perhaps more critical than ever to incorporate a mechanism to accurately track when non-exempt employees start their shift, take breaks, and end all work-related tasks for the day.

The employer's expectations related to the permissible amount of overtime work that may be performed and how to report it should be clear. Managers also should have a clear understanding of the overtime boundaries and expectations. In addition, employers may want to consider implementing a policy prohibiting their non-exempt workforce from working overtime hours without advanced written authorization from their supervisors.

Off-the-clock pitfalls. The increase of telework has led to a heightened risk of non-exempt employees performing

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"off-the-clock" work without their employer's knowledge or approval. "Such an infraction is often committed by the most conscientious of employees, such as those who may log into their computer a bit early to get a jump on a big project or work late on a Friday to finish up before the weekend," Crane explains. To prevent the thorny compliance issues that may arise, employers should work with counsel to audit their policies to ensure non-exempt employees know they are required to record all of their time worked, even if it is performed outside of their normal work hours.

Crane also suggests that employers not turn a blind eye to potential violations of the work-time policy and proactively address and remedy non-compliance. This may include training supervisors to discipline any non-exempt employee found to be violating the policy by, for example, sending emails before or after their scheduled shift. But keep in mind that the employer still has an obligation to pay for all compensable work, even if it did not direct it. Employers may also consider configuring remote access capabilities to limit when non-exempt employees can work online to prevent the temptation to log in early, log off late, or access work email outside of working hours.

A business that had its workforce located all in one state pre-pandemic may face very different compliance requirements if it allows teleworking employees to scatter to many states.

Multi-state relocations. Even pre-pandemic, many employers — particularly in the technology industry — had begun allowing their employees to work remotely from any location as opposed to requiring them to remain in the state where a regional or corporate office is located. In choosing to make such allowances, Crane suggests employers be mindful of the legal implications of what may be deemed a multi-state workforce, especially if compliance issues might lead to class action vulnerabilities. For example, the employer may be required to comply with the state laws in an employee's new location, as well as any applicable municipal or county ordinances.

In some of the more employee-friendly jurisdictions, employee relocations can create a major compliance challenge for employers in the wage and hour context by imposing additional administrative and recordkeeping burdens. A business that had its workforce located all in one state pre-pandemic may face very different compliance requirements if it allows teleworking employees to scatter to many states. Additionally, as states and localities have rushed to enact new laws and ordinances to address the unprecedented workplace challenges of the COVID-19 crisis, there may be additional legal requirements that did not exist pre-pandemic.

The commissioned sales employee. The challenges of meeting in person with customers during the pandemic have resulted in sales employees increasingly reaching out to customers remotely, from their home offices. As a result, while these types of workers may have previously been classified as exempt pursuant to the FLSA's outside sales exemption, employers should proactively consider whether these employees' duties have changed in a manner that would require reclassification.

For example, one element of the exemption is that the employee is regularly and customarily away from the employer's place of business. If that employee is working remotely (as has been the case for many during the pandemic), their home may now be considered the employer's place of business. Consequently, the employer may need to reclassify the employee, either on a temporary or permanent basis. Employers that are considering keeping the new remote arrangement even after vaccinations are readily available, infection rates are down, and the country fully reopens should keep these issues in mind and consult with counsel to determine if any action should be taken.

Expense reimbursement. A potentially problematic compensation issue has arisen in states (*e.g.,* California and Illinois) that have enacted laws requiring that employees be reimbursed for necessary work-related

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expenses. These requirements can create a myriad of questions for the employer not easily answerable without legal guidance. In addition to whether a specific expense is fully reimbursable (*e.g.,* an industrial-sized scanner, a printer and ink cartridges, and the cost of increased internet or cellphone usage), questions may arise as to whether an employee who is telecommuting as a matter of convenience is entitled to reimbursement or should be required to utilize equipment and supplies that are available at the office.

Exacerbating the difficulty in Illinois is that, unlike California, the state's statutory reimbursement requirements are vague. However, the statute provides some criteria as to what work-from-home expenses are reimbursable, including:

- The expense is incurred within the scope of employment;
- It is directly related to services performed by the employer;
- It is required of the employee in the discharge of their work;
- The expense is reasonable; and
- The expense inures to the primary benefit of the employer, not the employee.

"These guidelines can be useful to employers, even outside Illinois, in creating a reimbursement policy that puts clear limitations in place and reasonable expectations as to what will be reimbursed," Crane suggests. ■

Compensation issues surrounding COVID-19 vaccinations

Whether employees are entitled to compensation for time spent receiving a COVID-19 vaccine likely will depend on the type of vaccination program an employer has in place, at least under federal law. If a business or organization adopts a mandatory vaccination program that requires immunization as a condition of employment, the time a non-exempt employee spends obtaining the vaccine likely is compensable, regardless of whether the employee finds a vaccination appointment during their normal shift or outside of their scheduled work hours. An employer also may be required to provide compensation for travel time to and from the vaccination site.

Evolving issue. If the vaccination is not mandated but only "encouraged," it is probably not compensable time, especially if received during the employee's personal time. However, this is an evolving issue under the FLSA, and state and local laws may come into play and must be regularly monitored. Indeed, some states have enacted or are in the process of enacting legislation that covers the cost of employee vaccinations, if any, or mandates paid leave.

Because of these issues, even if vaccinations are "voluntary," Crane suggests that it may be advisable to provide compensation for an employee's time and costs spent in receiving the vaccination. This may include providing sick time or other paid leave time (for both exempt and non-exempt workers), or other flexible scheduling alternatives that allow the employee to avoid taking unpaid time outside the office.

There are other wage and hour issues that must be considered if an employer offers financial incentives, like a cash bonus, to encourage employee vaccinations. For instance, if such payments are considered "nondiscretionary bonuses" under the FLSA, the employer may be required to include that amount when calculating overtime premiums for their non-exempt workers. Failing to do so may create class action exposure since an employer that chooses to "encourage" vaccinations through financial incentives is likely to do so uniformly across its workforce.

A rejection of the rubber-stamped FLSA collective

In an important decision for employers defending collective actions under the FLSA, the U.S. Court of Appeals for the Fifth Circuit has declined to follow the two-step conditional certification-followed-by-decertification approach that is commonly followed by district courts across the country. The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

Under this so-called *Lusardi* approach that the Fifth Circuit declined to follow, courts would often "conditionally certify" a collective (thus triggering notice to potential opt-in plaintiffs) without any true examination into whether those individuals were actually "similarly situated." Due to an exceedingly low standard being applied at this first stage, plaintiffs' counsel were almost guaranteed to win FLSA conditional certification even when the alleged violations required highly individualized analyses.

However, in *Swales v. KLLM Transport Services, LLC,* issued on January 12, 2021, the Fifth Circuit declined to follow the decades-old standard for conditionally certifying a FLSA collective. A three-member panel announced, "[A] district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.'"

In so ruling, the appeals court made clear that district courts must review the factual record developed by the parties to determine whether plaintiffs meet the "similarly situated" standard before notice goes out to potential opt-in plaintiffs. Significantly, this holding rejects the commonplace doctrine that courts should avoid considering discovery at the conditional certification stage and assume the allegations in the plaintiffs' complaint are valid.

Emergence of the two-step approach

Section 16(b) of the FLSA allows employees to proceed collectively when they are "similarly situated." The statute, however, neither defines that term nor provides guidance as to how such actions may be brought. In 1989, the U.S. Supreme Court issued its landmark decision in *Hoffmann-La Roche Inc. v. Sperling*, in which the high court established the framework for collective actions and gave district courts discretion to send "accurate and timely notice" of pending actions to potential opt-in plaintiffs. While *Hoffmann-La Roche* involved Age Discrimination in Employment Act allegations, the collective action notice framework from the decision is cited most often today in FLSA cases.

Acknowledging the concerns expressed by Justice Antonin Scalia in his dissent, the Court majority made careful efforts to limit a district court's authority to facilitate "accurate and timely notice" to "potential plaintiffs" who could opt-in and actually participate as plaintiffs in the collective action. The Court also made clear that federal courts maintain discretion to limit issuance of notice or decide not to issue any notice at all even if the plaintiffs demonstrated the putative collective was similarly situated.

The Court, however, did not provide clear guidance as to when it is proper to send notice of a case to opt-in plaintiffs. As a result, district courts across the country have grappled with this consequential issue, with many following a two-step process for "certification" set forth by a New Jersey district court in *Lusardi v. Xerox Corporation* in 1987. Significantly, neither *Hoffmann-La Roche* nor the FLSA itself makes any mention of a "certification" process.

Low bar for conditional certification. The first step of the two-step certification process, referred to as "conditional certification" of a putative class, involves a district court's determination of whether prospective opt-in plaintiffs are similar enough to receive notice of the pending lawsuit. During this initial step, courts have generally looked only to the pleadings and affidavits of the parties to decide — under a lenient standard — whether the plaintiffs are "similarly situated" to the employees they seek to represent and do not inquire into the actual merits of the allegations. Though some courts have conducted a more rigorous analysis and ruled that consideration of some discovery is appropriate, FLSA conditional certification is often granted with nothing more than boilerplate allegations

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that the putative class members have similar claims under the FLSA.

Post-discovery decertification. It is only *after* the notices are sent to the potential opt-in plaintiffs and the parties have engaged in full discovery that an employer can move for "decertification" of the conditionally certified collective. At this second stage, a district court will utilize a stricter standard to determine whether the named plaintiffs and opt-ins are indeed sufficiently "similarly situated" to proceed to trial as a collective. Unfortunately for the employer, it has already been drawn into costly class-wide litigation and extensive discovery and may have been pressured into settling the matter regardless of the merits to end the dispute.

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The lack of consistency in conditional certification decisions

The low standard employed by courts in the conditional certification process is not the only problem with FLSA collective actions. Because the U.S. Supreme Court initially envisioned the collective action as a case management tool the district court may or may not use, it provided federal courts wide discretion on whether to grant conditional certification. This wide discretion has led to significant inconsistency in conditional certification decisions in many ways. The following are merely a few examples:

- **Impact of discovery.** Courts disagree whether discovery can impact the standard employed at conditional certification. While some courts have applied a "heightened standard" during the first stage of conditional certification, most have held it is not appropriate to do so.
- **Counter-affidavits.** Courts have reached inconsistent opinions regarding whether they will consider affidavits of putative class members presented by a defending employer at the conditional certification stage.
- **Interest of opt-in plaintiffs.** Courts disagree on whether the plaintiff bringing suit must demonstrate an interest of others who wish to join the collective action. The Eleventh Circuit, which has been flooded with FLSA collective actions and has jurisdiction over Alabama, Florida, and Georgia, requires such a showing. This has helped lower the number of cases where conditional certification is granted in the circuit. However, in circuits that do not have such a requirement, it is far easier for a single plaintiff to make allegations that can put in motion a massive, national collective action.
- **Waivers in arbitration agreements.** Should FLSA notice issue to putative collective members with arbitration agreements containing class and collective action waivers? Some courts (most recently, the Fifth and Seventh Circuits) find that putative collective members with arbitration agreements should not receive FLSA notice, while others have reached the opposite conclusion.
- **Out-of-state opt-in plaintiffs.** In *Bristol-Myers Squibb v. Superior Court,* decided on June 19, 2017, the U.S. Supreme Court further muddied the already inconsistent collective action jurisprudence by concluding that courts lacked personal jurisdiction over claims brought by out-of-state plaintiffs against an out-of-state defendant, since neither the conduct nor injuries alleged had occurred in California, where the case was brought. Courts that have subsequently addressed this jurisdictional issue in the context of national FLSA claims for out-of-state opt-in plaintiffs have reached varying conclusions.

The inconsistency in the federal case law leads to bizarre results. Indeed, on similar fact patterns in a national FLSA collective action involving the alleged misclassification of assistant managers, three different federal courts can reach three very different conclusions. One might deny FLSA conditional certification altogether, a second might grant national FLSA conditional certification, and the third could take a middle-road approach and deny national conditional certification but grant certification as to the locals where the named plaintiff worked. This lack of consistency among district courts and circuits courts has led to unclear guidance to companies and encourages plaintiffs to forum-shop their cases.

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Fifth Circuit adopts more stringent framework

The *Swales* lawsuit was brought by truck drivers who claimed they were misclassified as independent contractors rather than as "employees" under the FLSA and unlawfully denied overtime compensation. After the parties engaged in substantial court-authorized discovery on "certification" issues, the plaintiffs moved for conditional certification. Following the two-step *Lusardi* approach, the district court granted the motion and conditionally certified a collective of "potentially thousands" of drivers, but also took the unique move of instantly certifying its decision for interlocutory appeal based on the "open questions regarding the applicable standards [of conditional certification], especially when some discovery has occurred."

In granting conditional certification, the district court declined the employer's bid to consider evidence allegedly showing the application of the economic-realities test to the plaintiffs and potential opt-ins would require a highly individualized inquiry. According to the Fifth Circuit, the lower court "believed it could not consider anything related to the economic-realities test at the pre-notice stage because the test was a 'merits issue' to be dealt with after discovery was complete." However, the district court acknowledged the company "'may ultimately have a point' that, because each plaintiff would have to present different facts under the economic-realities test, they might not be 'similarly situated.'"

"Gatekeeping" approach. In deciding for the first time "the legal standard that district courts should use when deciding whether to send notice in an FLSA collective action," the three-member panel of the Fifth Circuit addressed head-on the extent to which a district court may examine the factual circumstances of whether potential opt-in plaintiffs are "similarly situated" *before* conditionally certifying a collective action. The appeals court adopted a "definitive legal standard," setting what it called a "gatekeeping" framework: assessing whether putative opt-in plaintiffs are similarly situated "*before* notice is sent to potential opt-ins … not abstractly but actually."

The Fifth Circuit observed that in hearing motions for conditional certification, district courts in the circuit have used "ad hoc tests of assorted rigor" in deciding whether employees are similarly situated. It described the standard the district court used in the case at hand as "a Goldilocks version of *Lusardi*, something in between lenient and strict." But the appeals court wanted to adopt a more precise approach while expressly rejecting *Lusardi* — which it emphasized that it had "carefully avoided adopting" in the past. The problems the two-step certification standard creates "occur not at decertification, but from the beginning of the case," the panel stressed. The panel stated, "The leniency of the stage-one standard, while not so toothless as to render conditional certification automatic, exerts formidable settlement pressure." Two-stage certification "may be common practice," the court noted. "But practice is not necessarily precedent."

"Preliminary" discovery. In order to determine whether it is appropriate to send notice to potential opt-in plaintiffs, the Fifth Circuit instructed district courts to "identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated,'" and then "authorize preliminary discovery accordingly." The amount of discovery necessary to make this determination will vary case by case and may in certain circumstances include issues that go to the merits of the case. "The fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out," the appeals court explained. "When a district court ignores that it can decide merits issues when considering the scope of a collective, it ignores the 'similarly situated' analysis and is likely to send notice to employees who are not potential plaintiffs. In that circumstance, the district court risks crossing the line from using notice as a case-management tool to using notice as a claims-solicitation tool."

Applying this new standard to the instant case, the Fifth Circuit explained the district court should have considered the evidence relating to how much control the employer had over the truck drivers "in order to determine whether the economic-realities test could be applied on a collective basis." If it had done so, the district court may have concluded the opt-ins were "too diverse a group to be 'similarly situated' for purposes of answering whether they are in fact employees, or at least that Plaintiffs have not met their burden of establishing similarity." Alternatively, the district court may have determined that only certain

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subcategories of drivers should receive notice as opposed to the entire group of drivers the plaintiff sought to represent.

What now?

The immediate effect of the *Swales* decision on FLSA collective actions is that (at least for litigation brought in the Fifth Circuit) plaintiffs no longer will be able to issue notice to potential opt-in plaintiffs based merely on the allegations raised in the complaint. Instead, the district court must decide what discovery is warranted to make the threshold determination as to whether plaintiffs are actually "similarly situated" to the collective they purport to represent. As a result, employers will be able to gain more information about the extent of a potential class early in the case, thereby allowing it to make important strategic decisions at an earlier stage of litigation, rather than having to wait until it can move to decertify a class.

Moreover, district courts outside the Fifth Circuit may be persuaded to adopt the new framework, or something more like it. At the very least, district courts will be asked to address the question of whether to adopt the new alternative approach, and those who explicitly choose not to do so will eventually create a conflict between the circuits ripe for Supreme Court review. In the meantime, at least within the Fifth Circuit, courts should apply a fairer, more workable framework for evaluating whether potential opt-in plaintiffs are similarly situated *before* conditional certification is granted.

Open questions. *Swales* leaves many questions unanswered that district courts both within and outside the Fifth Circuit are sure to grapple with for years to come. Perhaps most significantly, the decision begs the issue of whether decertification motions will continue to play a role in FLSA collective cases (at least in the Fifth Circuit), or if they will take a different form with a different level of scrutiny. If courts are to determine whether plaintiffs satisfy the "similarly situated" standard in order for notice to be issued using a standard akin to that for traditional class actions under Federal Rule of Civil Procedure 23, with its "well-established procedural safeguards to ensure that the named plaintiffs are appropriate class representatives," FLSA Sec. 216(b) certification may become a single-step, definitive determination.

The predicament: statute of limitations

The new requirement in the Fifth Circuit of preliminary discovery also raises an important issue that is not present in the Rule 23 class action context: the pre-certification running of the statute of limitations pending discovery. Unlike Rule 23 class litigation, where the statute of limitations is tolled at the time the original complaint is filed, for FLSA collective actions the statute of limitations is not tolled until an opt-in plaintiff files the requisite consent form. As a result, when faced with a FLSA collective action, an employer is incentivized to oppose conditional certification much earlier in the case, in hopes of running out the clock before a collective is certified. For the same reasons, plaintiffs are disincentivized to permit any delay of their certification efforts to allow for any type of discovery, to prevent the claims of any potential opt-in plaintiffs from being time-barred.

Now that district courts in the Fifth Circuit have been instructed to conduct preliminary discovery at the notice stage, plaintiffs are at much higher risk of having the statute of limitations run for the potential opt-in plaintiffs. Consequently, they likely will seek a tolling agreement. However, even if such an agreement cannot be mutually agreed upon between the parties, a district court may also exercise its discretion to toll the statute of limitations to allow the parties to engage in the now-required discovery.

Tolling agreements. Since the statute of limitations does not stop running for a particular member of the collective until that employee files an opt-in notice, a direct correlation exists between early class notice and higher litigation costs and ultimate verdicts. As a result, even in courts outside the Fifth Circuit, employers should discuss with counsel the advantages of consenting to a tolling agreement with plaintiffs' counsel in exchange for pre-certification discovery. A tolling agreement in exchange for preliminary discovery will allow an employer to potentially save money and resources by limiting the size of the collective, or fending off certification altogether, while plaintiffs' counsel will benefit by knowing that if the court is persuaded to issue notices to potential opt-ins, their claims will not be time-barred. ■

Other class action developments

No *en banc* rehearing on rejection of national statistics. A deeply divided U.S. Court of Appeals for the Second Circuit denied a petition for *en banc* rehearing of a 2-1 panel decision affirming the dismissal of the Title VII disparate impact claims asserted by two African-American job applicants against a company that withdrew their job offers upon learning of their felony convictions. While the applicants relied on national statistics showing that, on average, African Americans are more likely to be arrested and incarcerated than whites, the panel majority explained, "[T]he fact that such a disparity exists among the general population does not automatically mean that it exists among the pool of applicants qualified for the jobs in question — what is true of the whole is not necessarily true of its parts."

Rounding up meal periods found unlawful. The California Supreme Court has ruled unanimously that an employer's practice of rounding up time punches for meal periods was inconsistent with the provisions of the state's wage and hour law. Limiting its ruling in this class action to the application of the California law to the rounding up of meal periods, the court opined that "the practical advantages of rounding polices may diminish further" as "technology continues to evolve" and "help employers to track time more precisely." The state's high court adopted a rebuttable presumption of meal period violations if time records show noncompliant meal periods, explaining, "[I]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."

Deficient time records fatal to defense. The U.S. Court of Appeals for the Fifth Circuit affirmed a district court's backpay award to 53 current and former employees of a sprinkler installation company who performed pre- and post-shift work without compensation. Because of the

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Supreme Court denies initial bid to review FAA transportation worker exemption

On February 22, 2021, the U.S. Supreme Court denied the first of two petitions for certiorari filed by an online retailer asking the Justices to weigh in on the hotly contested issue of whether "gig" drivers can be forced to arbitrate independent contractor misclassification claims. The e-commerce employer urged the Supreme Court to decide whether an exemption in the Federal Arbitration Act (FAA) for classes of workers engaged in foreign or interstate commerce applies to "last mile" delivery drivers who do not cross state lines in the course of making deliveries of out-of-state goods.

The denied petition sought review of a divided decision by the U.S. Court of Appeals for the Ninth Circuit that had affirmed a district court's denial of a motion to compel arbitration of the drivers' misclassification claims. The Ninth Circuit held that the drivers, who used their personal vehicles to make local deliveries in a single state, were interstate workers exempt from the FAA's enforcement provisions because the online retailer sold goods that traveled in interstate commerce *before* the drivers pick them up for delivery.

The online retailer's second petition for *certiorari* is still pending. That petition seeks review of a decision by the U.S. Court of Appeals for the First Circuit that similarly held that the FAA exemption applied to drivers who performed the last leg in the intrastate transport of goods purchased online by customers. If the Supreme Court also denies that petition, a circuit split will remain since a divided panel of the U.S. Court of Appeals for the Seventh Circuit has rejected the notion that local drivers for a restaurant delivery app fell under the FAA exemption. In an opinion authored by now-Supreme Court Justice Amy Coney Barrett, the appeals court interpreted the FAA exemption more narrowly, finding it applied solely to individuals who are themselves directly "engaged in the channels of foreign or interstate commerce."

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employer's lack of time records, the district court allowed the U.S. Department of Labor (DOL) to use employee testimony to establish liability and calculate damages pursuant to the Supreme Court's *Mt. Clemens* burden-shifting framework. The only evidence the employer put forth to rebut this testimony was a chart based on the company president's memory, which the appeals court deemed insufficient to negate any raised inferences of unpaid work.

Putative 37-member class lacked numerosity. In a lawsuit alleging an employer's travel time practices resulted in the miscalculation of overtime wages in violation of Wisconsin wage and hour laws, the U.S. Court of Appeals for the Seventh Circuit affirmed the denial of certification of a proposed 37-member class due to the plaintiff's failure to meet the numerosity requirement. In assessing class certification, the district court did not abuse its discretion in considering the overall size and geographic dispersion of the proposed class (all but two members lived within 50 miles of the courthouse), the small dollar amounts involved with each individual claim, and the named plaintiff's ability to easily contact the class members to determine the employee failed to show it would be impracticable to join the other proposed class members in a single action. While 37 potential class members "comes close to crossing the benchmark numerosity threshold, a closer look at the circumstances of the potential class members and the nature of the claim at issue" persuaded the appeals court that Rule 23(a)(1) was not satisfied.

Misclassification suit settles for $2.95M. A federal district court in Pennsylvania has approved a total settlement fund of $2.95 million in a FLSA collective action brought against a national chain of truck stops and convenience stores. Operations managers employed at various locations alleged they were misclassified as exempt managerial employees and denied overtime. The court allowed plaintiffs' counsel to collect expenses plus attorneys' fees of up to over $1.3 million from the total settlement. While the fee award was at the high end of amounts approved in other FLSA cases, it was reasonable under both the percentage of recovery method preferred by the Third Circuit and the lodestar multiplier cross check given the several unique factors that "took this lawsuit beyond the garden variety of FLSA claims into a much more complex realm."

Jail workers' suit improperly certified. A federal district court in Illinois abused its discretion by certifying a class of about 2,000 women who worked at the Cook County jail or its adjoining courthouse and, due to the inaction by the county and sheriff's office, were purportedly subjected to a "horrible 'epidemic'" of sexual harassment by male inmates. On interlocutory appeal, the Seventh Circuit ruled that the lower court erred by using the "peripheral and overbroad concept of 'ambient harassment'" (*i.e.,* indirect or secondhand harassment) to certify a class of employees who had endured a wide range of direct and indirect harassment. Even without this error, certification was improper since the class was comprised of members with materially different working environments whose claims required separate, individualized analyses.

Drivers' claims partially advance as a class. A federal judge in California has certified a Rule 23 class of app-based drivers on their claim that they were misclassified as independent contractors under California law, but ruled their related minimum wage, overtime, and paid sick leave claims must be pursued on an individual basis. As a result of the ruling, a trier of fact will determine on a class-wide basis whether the class satisfied the first two prongs (A and B) of the ABC test under state law for distinguishing between employees and independent contractors, as well as the expense reimbursement and itemized wage statement claims. However, individual consideration will be necessary for the third prong of the ABC test, as well as class members' minimum wage, overtime, and sick leave claims. The drivers refused to limit their minimum wage and overtime claims to the time they spent *actually* driving for the defendant, which prevented class resolution of those substantive claims.

Donning and doffing suit ends for $5.3M. Production workers at two food processing plants were granted final approval of a $5.3 million settlement of claims against their employer for failing to compensate them for time spent donning and doffing protective equipment and for denying them meal and rest breaks. A federal district court in California found that the gross settlement amount was fair, noting that it permitted class members to receive awards much sooner than they would have if litigation were to continue through trial. Additionally, a proposal to award plaintiffs' counsel 35 percent of the gross settlement amount ($1.855 million) and incentive awards of $7,500 to the five named plaintiffs was also deemed reasonable. After the deductions, about $3.1 million would be left to distribute to the class members.

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Suit challenging bi-weekly wage payments advances. Employees of a national retailer who alleged the employer violated New York law by failing to pay class members their wages within seven calendar days after the end of the week in which the wages were earned, but instead paid them on a bi-weekly basis, defeated a motion to dismiss their putative class action claim. A federal district court opted to allow the action to proceed in order to hear the parties' arguments as to whether New York courts recognize a private right of action for frequency of pay violations when all wages have been paid. However, the court dismissed the employees' claim for failure to provide accurate wage statements since the state law did not require the employer to furnish wage statements on a weekly basis or to provide a breakdown of how many hours an employee worked per week.

Pilot wins certification of military leave suit. A California federal district court has granted a pilot's motion for class certification of his lawsuit asserting his employer, a major airline, refused to pay employees for short-term military leave even though it provided paid leave for jury duty, bereavement, and sickness. The numerosity requirement was met since there were at least 1,999 potential class members based on a previously settled class suit involving pilots only, and the plaintiff contended there would be over 6,700 members of this class, which was comprised of other work groups. The court also ruled that common issues could be resolved on a class-wide basis, including whether paid leave was a "right and benefit" protected by the Uniformed Services Employment and Reemployment Rights Act and whether short-term military leave was comparable to other forms of paid leave.

Drugstore chain ends wage suit for $4.5M. A federal district court granted final approval of a $4.5 million agreement to settle a class action case brought by a drugstore chain's distribution center employees alleging improper payment of wages due to the employer's quarter-hour rounding policy and mandatory off-the-clock security checks. Claiming they were denied the applicable minimum wage or overtime rate, the lawsuit alleged violations of the California Labor Code, the California Business and Professions Code, and the California Private Attorneys General Act. The court concluded that the settlement agreement was fair, reasonable, and adequate. ■

DOL thwarts implementation of Trump-era FLSA regs

Now led under the Biden administration, the DOL not only delayed the effective date of its recently finalized rule on independent contractors under the FLSA until May 7, 2021, it has officially proposed to withdraw the Trump-era final rule entirely. Depending on the Biden administration's actions, it may become more difficult for employers to retain independent contractors without fear of misclassification claims. Additionally, the DOL has officially proposed rescinding the Trump-era final rule on joint-employment status, which took effect on March 16, 2020.

In a similar vein, after having delayed the effective date for the Trump-era tip rule to April 30, 2021, the DOL recently issued proposals seeking to: (1) withdraw and re-propose portions of the final rule that narrow the circumstances in which the agency can assess civil money penalties for violations; (2) obtain comments on whether to revise the portion of the final rule that addresses "managers or supervisors"; and (3) further delay the effective date of three portions of the final rule to December 31, 2021, including a section on the application of the FLSA tip credit to workers who perform both tipped and non-tipped duties. However, the DOL will allow several portions of the new tip rule to go into effect, including the prohibition on employers keeping tips received by workers and the ability of an employer that does not take a tip credit to include non-tipped workers in nontraditional tip-sharing agreements.

The federal agency's move came as no surprise after President Joe Biden, on his first day in office, issued an executive order freezing any Trump-era regulations that had not yet gone into effect. The DOL has also withdrawn several FLSA opinion letters authored during the Trump administration and ended the DOL's Payroll Audit Independent Determination (PAID) program. PAID was launched in 2018 and permitted employers to self-report wage violations without facing litigation, penalties, or additional damages, provided that they paid back all wages due and proactively worked with the agency to fix any compensation practices at issue.

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

May 18, 2021	Returning to Work: Safety Accommodations, Policies, Vaccines and More
May 19, 2021	Planning for Pandemic Protocol: Understanding Federal and Virginia Workplace Safety Standards
May 25, 2021	Accessibility Litigation and Compliance in the Healthcare Industry
May 26, 2021	Using Diversity Analytics to Improve the Bottom Line: A Webinar Series for the Financial Services Industry
June 9, 2021	Using Diversity Analytics to Improve the Bottom Line: A Webinar Series for the Financial Services Industry
August 5,2021	Settling Into the New Workplace Normal
November 4, 2021	2021 Workplace Safety Review