Cutting Class: *Swales v. KLLM Transportation Services, LLC*

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A recent case out of the United States Court of Appeals for the Fifth Circuit has provided a major win for motor carriers involved in independent contractor Fair Labor Standards Act ("FLSA") misclassification suits. This case is *Swales v. KLLM Transportation Services, LLC*, 2021 U.S. App. LEXIS 827 (5th Cir. 2021). Specifically, this case involves class action certification of multiple drivers suing the motor carrier under the FLSA for misclassification. To understand the opinion and the implications that it has on certifying class action suits under FLSA classification, it is important to understand the previous framework courts used to certify classes.

At the outset, challenges to a motor carrier's independent contractor program provide serious consequences of liability. This can include back-pay, minimum wage requirements, and attorneys' fees for a successful plaintiff bringing a misclassification action. Depending on the type of action and jurisdiction of the court, two different tests can be used to determine whether a driver is, in fact, an employee or independent contractor. The two tests are the ABC test, which provides a difficult standard for motor carriers to classify their drivers as independent contractors due to the second requirement, and the economic realities test which provides a multi-factor test that is less stringent on the motor carrier to prove that the driver is an independent contractor. The Fifth Circuit in the *Swales* case utilized the economic realities test. However, under previous class certification tests used by District Courts in FLSA actions, even under the economic realities test, litigation could be stirred up due to the notice process given to potential plaintiffs.

Under FLSA, plaintiffs are allowed to proceed as a collective for a class action for employee misclassification actions. Unfortunately, the standard under FLSA to determine whether plaintiffs can form a class action is merely if plaintiffs are "similarly situated." Potential plaintiffs are allowed to opt-in to the FLSA suit via written consent, as opposed to a traditional class action under Rule 23 of the Federal Rules of Civil Procedure where members are bound by the judgment or settlement unless they opt out. Potential plaintiffs cannot benefit from a collective action unless there is timely notice. Therefore, the court will help facilitate notice of the collective action to potential plaintiffs. Courts are advised that while their role is to facilitate notice, the process cannot devolve into a solicitation of claims to potential plaintiffs, and courts must take a neutral position during this process avoiding the appearance of endorsing the merits of the case. However, no guidance was given to courts on how they should facilitate this process without endorsing the merits of the case.

With no guidance on the administration and facilitation of notice to potential plaintiffs, courts utilized the two-step approach of *Lusardi v. Xerox Corporation*, with varying approaches. The first step in this process is the conditional certification of a class. Analysis of whether the proposed members of the class are similar enough to receive notice of the pending action relies on the pleadings and affidavits of the parties. After the first step, notices are sent out to opt-in to the suit. The next step occurs after discovery, where ordinarily the defendant files a motion to decertify the class. If the court finds that the opt-in plaintiffs are not similarly situated to the named plaintiffs, then the opt-in plaintiffs will be dismissed. Another test, the *Shushan v. University of Colorado* test, requires FLSA collective actions to follow the standards under Rule 23 of the Federal Civil Rules of Civil Procedure. Both tests provide their own difficulties in application, such as in the *Shushan* test Rule 23 plaintiffs are opt-out plaintiffs and under FLSA they are opt-in plaintiffs.

The practical hardships of the *Lusardi* analysis arise when a court must determine that the opt-in plaintiffs are similarly situated as under the economic realities test. The economic realities test is a highly individualized test, which considers: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's

opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation. As motor carriers will tell you, this test greatly depends on the individual independent contractor running under the motor carrier's authority, with some independent contractors choosing to lease a truck from the motor carrier and some independent contractors choosing to run loads for only one client. Under the application of *Lusardi*, the consideration of the economic realities test was analyzed at the second step after notices had been sent to potential opt-in plaintiffs. With notice already sent, this certainly would cause an increase in litigation and high bargaining power on the plaintiff's side.

The *Swales* case explicitly rejected the application of *Lusardi*. The *Swales* case states that the court should decide at the outset whether the misclassification case can be decided on a collective action basis. This means that the court should review the economic realities test and all evidence available to the court to decide whether a collective action can proceed. The court may decide to allow further discovery to make this determination or decide at the outset that the plaintiffs are not similarly situated enough to proceed under a collective basis. This decision seemingly erodes the two-step analysis and provides for one step. Additionally, due to the individualized nature of the economic realities test, this creates a difficult standard for plaintiffs to certify a class action for a misclassification action under FLSA in the transportation industry, in particular due to the varying circumstances in which independent contractors drive under a certain motor carrier's authority. This case is undoubtedly a win for the trucking industry and hopefully other courts will follow suit using the Fifth Circuit's analysis.