LEGAL UPDATES

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Seventh Circuit Raises the Bar for Collective Actions, Gives Employers New Tools at the Notice Stage

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JOSEF S. GLYNIAS
ST. LOUIS:
314.345.6208
JOE.GLYNIAS@
HUSCHBLACKWELL.COM

KEVIN KORONKA
AUSTIN:
512.479.1162
KEVIN.KORONKA@
HUSCHBLACKWELL.COM

ANNE M. MAYETTE
CHICAGO:
312.341.9844
ANNE.MAYETTE@
HUSCHBLACKWELL.COM

SAMUEL M. MITCHELL
CHICAGO:
312.526.1582
SAMUEL.MITCHELL@
HUSCHBLACKWELL.COM

The Seventh Circuit's decision in *Richards v. Eli Lilly & Co.* represents the most significant shift in collective action procedure in the circuit in decades. For many years, district courts in the circuit have utilized the plaintiff-friendly *Lusardi* "modest factual showing" standard when deciding whether to approve notice of a collective action to potential opt-ins. In *Richards*, the court rejected *Lusardi* and announced a requirement that plaintiffs produce evidence sufficient to create a material factual dispute over whether the proposed opt-in group is "similarly situated."

This is more than a technical adjustment. By allowing—and requiring—district courts to consider both sides' evidence before issuing notice under the Fair Labor Standards Act (FLSA) or the Age Discrimination in Employment Act (ADEA), the decision fundamentally changes the economics and strategy of bringing and defending collective actions in Illinois, Indiana, and Wisconsin.

The new standard

Under *Richards*, a plaintiff must come forward with actual evidence, not mere allegations, suggesting that the proposed group was subjected to a common unlawful policy or practice. The defendant is entitled to submit rebuttal evidence, and the court must evaluate both sides' submissions in determining whether a "material factual dispute" exists.

Importantly, the court did not adopt the Fifth Circuit's "preponderance of the evidence" test (*Swales*) or the Sixth Circuit's "strong likelihood" threshold (*Clark)*. Instead, it charted what it described as a middle course, emphasizing "flexibility" and judicial discretion. District courts may still use a two-step process when key evidence is in the hands of potential opt-ins, but they can

also resolve similarity disputes at the outset, narrow the scope of notice, or deny certification entirely.

Why it matters

For years in many courts, conditional certification under the two-step *Lusardi* conditional certification approach was largely a procedural formality—a low bar that plaintiffs could clear with generic declarations, while courts ignored employer evidence until after hundreds of court-approved notices had gone out. That dynamic drove early settlements by inflating opt-in counts and increasing litigation pressure before the merits were tested.

Richards changes the equation. The notice stage now requires a more meaningful examination, giving employers real opportunity to challenge, narrow, or in some cases defeat motions to send notice to a putative group of litigants. By requiring judicial engagement with both parties' evidence, the decision brings neutrality to the process and disrupts the "certify now, fight later" model that had tilted the playing field toward plaintiffs.

Strategic implications for employers

The most immediate effect of *Richards* is to move more of the fight over similarity to the front of the case. Employers that act quickly to marshal evidence of meaningful differences among employees (e.g., differences in job duties, pay practices, supervision, or policy applications) will be positioned to challenge certification before notice ever issues. This can reduce exposure, contain discovery costs, and prevent the leverage that comes from an artificially large opt-in pool.

The decision also elevates the value of pre-litigation readiness. Employers should consider reviewing job descriptions, documenting location- or role-specific policies, and preserving testimony from supervisors that highlight operational differences. When a case is filed, counsel can then move swiftly to prepare rebuttal declarations, produce policy documents, and push for early rulings or targeted pre-notice discovery.

For multistate employers, the opinion underscores the importance of jurisdictional strategy. With a widening circuit split, plaintiffs may seek out more lenient venues that still allow for the *Lusardi* approach. Defendants with operations in multiple states should be prepared to assert transfer or dismissal arguments where appropriate and to coordinate defenses across jurisdictions to prevent inconsistent outcomes.

Unanswered questions

While *Richards* provides a clearer framework, it also leaves important questions unanswered. How much weight must courts give to rebuttal evidence? When will judges authorize pre-notice discovery, and how narrowly will it be cabined? At final certification, will plaintiffs have to prove similarity by a

preponderance of the evidence, as the majority suggests, or will the more flexible, case-management approach urged in Judge Hamilton's concurrence prevail? The answers will shape the contours of collective action practice in the circuit for years to come.

The bottom line

The Seventh Circuit has transformed the notice stage from a procedural speed bump into a substantive checkpoint. Employers now have the tools and the opportunity to halt or narrow collective actions before they gather momentum. But this advantage will favor those who are ready: organizations that invest in documenting distinctions among employees, preserving evidence of policy variations, and acting decisively when a complaint is filed will be best positioned to leverage the new standard.

The opportunity for automatic conditional certification in the Seventh Circuit is over. Employers should prepare to meet plaintiffs' evidence with a well-developed factual record of their own and do so at the very outset of the case.

Contact us

If you have questions concerning the implications of *Richards*, please contact a member of Husch Blackwell's Labor & Employment team or your Husch Blackwell attorney.