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Insights

Recent Seventh Circuit Court of Appeals Opinion a Win for Employers in Fair Labor Standards Act Collective Actions

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Collective actions under the Fair Labor Standards Act ("FLSA") brought by hourly, non-exempt employees against their employers have been a thorn in the side of employers in recent years. However, the Seventh Circuit Court of Appeals issued an opinion last week, *Richards v. Eli Lilly & Co*., No. 24-2574, 2025 WL 2218500, at *6 (7th Cir. Aug. 5, 2025), which increases the burden to issue notice of a collective action lawsuit to all potential plaintiffs. *Richards* has the potential to stop many of these actions in their tracks at an early stage to the benefit of employers.

To join a collective action lawsuit under the FLSA, an employee must affirmatively "opt-in" to the lawsuit. At the conditional certification stage of an FLSA collective action lawsuit, a court decides whether notice should be sent to other employees/potential plaintiffs to notify them of the lawsuit and give them the opportunity to opt-in to the lawsuit and become plaintiffs themselves. Historically, district courts have had discretion without much guidance over the process for notifying employees/potential plaintiffs of a FLSA collective action lawsuit.

FLSA Notice Process Prior to *Richards*

Prior to *Richards*, the burden Plaintiff must meet before sending notice of the FLSA collective action lawsuit to other employees/potential plaintiffs has been minimal, requiring only that Plaintiff make a modest factual showing demonstrating that the named Plaintiff and any potential opt-in plaintiffs were victims of a common policy or plan that violated the law. If Plaintiff made this modest factual showing, the Court would issue notice of the lawsuit to the other employees/prospective opt-in plaintiffs and give them an opportunity to opt-in to the lawsuit and become plaintiffs themselves.

FLSA Notice Process Post-*Richards*

Under *Richards*, Plaintiffs must now meet a higher burden before notice of the lawsuit will be sent to other employees/potential collective members. Instead of the modest factual showing previously required, a Plaintiff must now show that there is "a material factual dispute as to whether the proposed collective is similarly situated." This means that a Plaintiff "must produce *some evidence* suggesting that they and the members of the proposed collective are victims of a common unlawful employment practice or policy" and Defendants must be allowed to submit rebuttal evidence. Because minimal discovery has likely occurred at this stage of the lawsuit, *Richards* found that affidavit evidence is sufficient for this stage, which can be less costly for an employer to obtain than other forms of evidence. *Richards* also held that a Court may allow limited pre-notice discovery which is narrowly tailored to whether common issues of law or fact between the named Plaintiff and potential collective members make it more efficient to resolve the claims together, which has the benefit of potentially resolving these cases at an early stage before engaging in extensive and expensive discovery.

The Benefit of *Richards* for Employers

The modest standard for sending out notice of an FLSA collective action lawsuit prior to *Richards* has driven employers to settle cases early to avoid the costs of extensive discovery involving payroll and timekeeping records for potentially thousands of employees and costly motion practice. For employers, *Richards* provides a path to favorably resolve FLSA collective actions at an early stage before spending significant litigation costs or entering an early settlement simply to stop increasing litigation fees.
