



finding them overly inflexible. As a result, the court sought a middle-ground approach lying somewhere between these standards and *Lusardi*.

The new standard adopted in *Richards* requires named plaintiffs to demonstrate a material factual dispute as to whether they and the proposed opt-ins are “similarly situated.” This showing must be supported by evidence, and courts must consider rebuttal evidence introduced by defendants. This burden is heavier than *Lusardi*’s “modest showing” requirement, but it stops short of the relatively conclusive proof demanded by the Fifth and Sixth Circuit Courts. Under *Richards*, once the evidentiary threshold is met, the district court has discretion regarding how to proceed. If the question of similarity cannot be resolved without evidence from yet-unnoticed employees, the court may use a two-step process, issuing notice now and deferring final similarity determinations until after opt-in and discovery. If the dispute can be resolved upfront, the court may authorize targeted pre-notice discovery to pare down notice to an appropriate group of putative collective members. The court also endorsed partial notice, denials without prejudice, equitable tolling to prevent prejudice from delay, and narrowly tailored pre-notice discovery focused strictly on similarity rather than premature merits adjudication.

The court’s approach places the Seventh Circuit firmly in the middle of the existing circuit split. While most Circuits still apply *Lusardi*’s “modest showing” framework, the Fifth and Sixth Circuits have imposed much higher burdens at the outset. Rejecting either end of this scale, the Seventh Circuit has adopted a “material factual dispute” standard, with the stated goal of protecting the remedial purposes of the FLSA and ADEA without sacrificing judicial neutrality or efficiency. The decision vacates the district court’s order and remands for reconsideration under this new framework, meaning *Richards*’s motion for conditional certification must now survive a more rigorous review.

With *Richards*, the Seventh Circuit has formally retired *Lusardi*’s “modest showing” standard in favor of a more rigorous, evidence-based burden of proof. While employers will likely celebrate this decision as consistent with Supreme Court precedent and the intent of the FLSA’s collective enforcement provision, it will likely increase the number of eligible employees who are denied notice and the opportunity to opt in. Additionally, the new burden of proof may transform the relatively perfunctory step of conditional certification into a long and costly dispute at the outset of collective actions.

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