

## SEVENTH CIRCUIT ADOPTS STRICTER CERTIFICATION STANDARD IN FLSA AND ADEA COLLECTIVE ACTIONS

On August 5, 2025, the U.S. Court of Appeals for the Seventh Circuit issued a decision in *Richards v*. *Eli Lilly & Co*. In this case, the Seventh Circuit considered the appropriate standard for analyzing motions for conditional certification in collective actions – cases filed on behalf of groups of similarly-situated employees – brought under both the Fair Labor Standards Act ("FLSA") and the Age Discrimination in Employment Act ("ADEA").

The Seventh Circuit had previously applied the "modest showing" standard for conditional certification established in 1983 in *Lusardi v. Xerox Corp*. This standard requires only a minimal factual showing at the outset of litigation, while rigorous scrutiny of the collective is postponed until the putative collective members have been afforded an opportunity to opt in and the parties have conducted discovery. Although the Seventh Circuit stopped short of discarding the two-step certification process altogether in *Richards*, it held that a steeper standard of proof applied at the conditional certification stage.

Plaintiff Monica Richard filed suit against her employer, Eli Lilly, for age discrimination under the ADEA. She brought her lawsuit as a collective action, seeking to represent all similarly-situated Eli Lilly employees aged 40 and older who had been denied promotions. Applying the longstanding two-step certification procedure under *Lusardi*, the district court required only a modest showing of similarity when analyzing Richards' motion for conditional certification, and it declined to consider the employer's rebuttal evidence at this stage. Based on this analysis, the court granted conditional certification and authorized notice to the putative collective members. However, in light of mounting disagreement among circuit courts around the country as to the appropriate standard of proof at this stage, the trial court certified the issue for interlocutory appeal.

On appeal, the Seventh Circuit concluded that *Lusardi's* lenient first-step standard cannot be squared with the Supreme Court's instructions in *Hoffmann-La Roche Inc. v. Sperling*, an ADEA collective action decided six years after *Lusardi*. In *Hoffman-La Roche*, the Court emphasized that collective actions were intended to increase judicial neutrality and efficiency. Under *Lusardi*, courts typically ignore defense evidence at the conditional certification stage, arguably increasing the risk that notice will be sent to individuals who are clearly ineligible to join the suit. The court argued that allowing plaintiffs to notify an inflated number of putative collective members could put undue settlement pressure on defendants and function as impermissible solicitation. Furthermore, the court emphasized that allowing patently unnecessary notices inflates legal costs and causes "futile attempts at joinder."

In contemplating a new burden of proof for conditional certification, the Seventh Circuit considered steeper standards recently adopted by the Fifth Circuit (in *Swales v. KLLM Transp. Servs., L.L.C.*) and the Sixth Circuit (in *Clark v. A&L Homecare & Training Ctr., LLC*). However, the Seventh Circuit rejected these as well,

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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