

New Statutory Framework Mandated for Employers Seeking to Limit Notice to Putative Class Members in an Enforceable Arbitration Agreement

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The United States Court of Appeals for the Seventh Circuit recently articulated a new statutory framework for determining whether notice to a putative plaintiff should be issued under the Fair Labor Standards Act (FLSA). At issue was whether a district court may authorize notice to potential plaintiffs who had entered into arbitration agreements waiving the right to participate in a collective action; or in the alternative, whether these employees are “similarly situated” to a plaintiff that has not waived their right to participate in a collective action.

In *Bigger v. Facebook, Inc.*, an employee sued Facebook for overtime pay violations, challenging Facebook’s claim that she, and other similarly situated employees, were exempt from FLSA overtime requirements. The district court authorized notice to a putative class of plaintiffs despite Facebook’s objection that many of the class employees had entered into arbitration agreements waiving their right to participate in a collective action.



The Seventh Circuit observed that, while collective actions enable employees to pool their resources and promote efficiency by resolving multiple claims in a single action, they can also be used to force larger settlements of claims that may

lack merit. Moreover, giving notice to an employee who cannot participate in the underlying action by virtue of an arbitration agreement may “prompt futile attempts at joinder” or the assertion of claims outside of the present litigation. In these scenarios, the district court arguably oversteps its obligations to maintain neutrality and shield against the abuse of collective claims.

The Seventh Circuit held that, prior to authorizing notice to a putative plaintiff who has entered into an arbitration agreement, the district court must conduct the following analysis. First, the court must determine whether a putative plaintiff contests the existence of a valid arbitration agreement. If not, the court cannot authorize notice to that person. Next, if a plaintiff contests the validity of the agreement, the court must permit the parties to submit additional evidence on the existence and validity of the arbitration agreement. It is the employer's burden to show by the preponderance of the evidence that a valid arbitration agreement exists for every putative plaintiff it seeks to exclude from a collective action. The Seventh Circuit remanded the case to the district court to conduct the analysis based on this framework.

Going forward, this framework will become the blueprint for employers seeking to limit notice to putative class members who have entered into enforceable arbitration agreements.

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