RECENT CASES

COLLECTIVE ACTIONS — FAIR LABOR STANDARDS ACT — SEVENTH CIRCUIT HOLDS THAT ARBITRATION-BOUND EMPLOYEES CANNOT BE GIVEN NOTICE OF COLLECTIVE ACTION PROCEEDING UNDER THE FAIR LABOR STANDARDS ACT. — *Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020).

Over the past decade, the Supreme Court has steadily weakened the ability of parties bound by arbitration agreements to band together and sue.[1] Given the rise of arbitration clauses in employment contracts, this trend has harmed workers[2]: since it is rarely economically feasible for workers to individually sue for, say, fifteen minutes of unpaid overtime a day,[3] violations of statutes protecting laborers — like the Fair Labor Standards Act[4] (FLSA) — have become harder to redress.[5] Recently, in *Bigger v. Facebook, Inc.*,[6] the Seventh Circuit dealt another blow to workers' ability to enforce their rights by holding that collective action plaintiffs cannot use the FLSA notice process to provide notice of their suit to employees who the defendant has proven have signed arbitration clauses. In doing so, the court assumed a defendant-friendly baseline that is inconsistent with the remedial and enforcement goals of the FLSA.

Susie Bigger was a Client Solution Manager (CSM) at Facebook in Chicago, Illinois.[7] Although Bigger worked an average of sixty hours a

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[1] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (holding that arbitration agreements waiving collective action procedures are enforceable notwithstanding the National Labor Relations Act); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 470–71 (2015) (holding that the Federal Arbitration Act preempts an invalid state law); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempts a state rule allowing any party to a consumer contract to demand classwide arbitration ex post).

[2] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://nyti.ms/1KMvBJg [https://perma.cc/25XD-LXDN] ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.").

[3] Because of the small economic value of individual claims, suits of this nature tend to proceed as class or collective actions. *See, e.g.*, Austin v. Amazon.com, Inc., No. C09-1679, 2010 WL 1875811, at *1 (W.D. Wash. May 10, 2010) (denying Amazon's motion to strike collective action allegations that it failed to pay workers overtime wages for all hours they worked); *see also* Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 453 (2012).

[4] 29 U.S.C. §§ 201–219 (2018).

[5] *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., BRIEFING PAPER: THE ARBITRATION EPIDEMIC 26 (2015).

[6] 947 F.3d 1043 (7th Cir. 2020).

[7] *See* Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007, 1012 (N.D. Ill. 2019).

week,[8] Facebook refused to pay her overtime because it classified certain CSMs like her as "overtime-exempt" employees under both the FLSA and the Illinois Minimum Wage Law[9] (IMWL).[10] Bigger filed suit against Facebook in the United States District Court for the Northern District of Illinois. She brought two claims: (1) a putative *collective* action under the FLSA for violating its overtime provisions, and (2) a putative *class* action under Rule 23 of the Federal Rules of Civil Procedure for violating the IMWL.[11] Both the district court and appellate court opinions primarily dealt with Bigger's collective action.

As the district court emphasized, class actions and collective actions, though similar in spirit, are analytically distinct: class actions require class members to *opt out* to avoid being bound by a proceeding, while collective actions require plaintiffs to *opt in* to the case.[12] Collective actions "do not proceed as traditional Rule 23 class actions."[13] Thus, the district court evaluated Bigger's collective action claim using a widely adopted,[14] court-created two-step process.[15] First, in the "conditional certification" stage, the "plaintiff must make a 'modest factual showing' that she and similarly situated employees were 'victims of a common policy' that violated the FLSA."[16] In the second stage, the court "imposes more demanding requirements on plaintiffs" to determine whether they are similarly situated.[17]

Bigger's case involved the first, "conditional certification" step. She sought conditional certification of a broad collective including "[a]ll individuals . . . employed by Facebook as Client Solutions Managers . . . in the United States during the period from three years prior to the entry of the conditional certification order."[18] Facebook opposed this definition, claiming that it should be "narrowed to exclude all individuals who had arbitration clauses and class action waivers in their employment contracts."[19] By

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[8] *Id.*

[9] 820 ILL. COMP. STAT. ANN. 105 (West 2018).

[10] *Bigger*, 375 F. Supp. 3d at 1012.

[11] *Id.*

[12] *See id.* at 1021.

[13] *Id.*; *see also* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 530–39 (2012) (overviewing the differences).

[14] *See* 7 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 23:37 (5th ed. 2019).

[15] *Bigger*, 375 F. Supp. 3d at 1021.

[16] *Id.* (quoting Pfefferkorn v. PrimeSource Health Grp., LLC, No. 17-CV-1223, 2019 WL 354968, at *2 (N.D. Ill. Jan. 29, 2019)).

[17] *Id.*; *see also* 7 RUBENSTEIN, *supra* note 14, § 23:39.

[18] *Bigger*, 375 F. Supp. 3d at 1021.

[19] *Id.* Simultaneously, Facebook moved for summary judgment on Bigger's collective action, arguing that Bigger was exempt from the overtime provisions of FLSA either as a "highly compensated employee" or because she worked in a "bona fide administrative capacity." *Id.* at 1014. On the same grounds, Facebook also moved for summary judgment on Bigger's IMWL claim. *Id.* at 1020.

Facebook's estimate, more than half of the CSMs in Bigger's proposed collective were bound by arbitration agreements or class action waivers.[20] Because these CSMs were "barred from litigating the claims at issue in [Bigger's] case," it argued, "they [were] not 'potential plaintiffs'" who should have been given notice.[21]

The district court agreed with Bigger. The court found that she had sufficiently[22] shown "that she and similarly situated employees were victims of a common policy" violating the FLSA, and it conditionally certified her collective action.[23] Explaining that "district courts are divided over whether notice of a collective action may be sent to employees with arbitration agreements" and that only one circuit had reached the issue,[24] the district court held that notice to arbitration-bound employees was permissible for three reasons.[25] First, it noted that Bigger herself was *not* bound by an arbitration agreement; because the arbitration agreements Facebook sought to enforce were between Facebook and third parties not before the court, Facebook's argument that these agreements were enforceable was premature.[26] Next, the court explained that because the enforceability of arbitration agreements is a merits determination not made at the conditional certification stage, blocking notice based on arbitration agreements would be inappropriate.[27] Finally, it highlighted that because the arbitration agreements' enforceability is governed by state law — and because neither side had briefed the court on which state's law would govern the contracts — the court had "insufficient information" to block notice at the conditional certification stage.[28] If any opt-in plaintiffs did have valid arbitration agreements with Facebook, Facebook could "move to decertify the case or divide the class into subclasses" during the decertification stage of the collective action.[29]

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[20] *Id.* at 1021–22.

[21] *Id.* at 1022.

[22] The burden on the plaintiff is not particularly onerous, as she "needs only to clear a 'low bar' to meet her burden." *Id.* at 1021.

[23] *Id.* at 1024. The court also denied Facebook's motion for summary judgment on the FLSA claim, explaining that there remained genuine issues of material fact as to whether Bigger was exempt from the FLSA. *Id.* at 1019–20. Separately, the court noted that Facebook "did not address the relevant IMWL standards in its motion" and therefore denied summary judgment on that claim. *Id.* at 1020.

[24] *Id.* at 1022 (citing *In re* JPMorgan Chase & Co., 916 F.3d 494, 499 n.6 (5th Cir. 2019)).

[25] *Id.*

[26] *Id.* at 1022–23.

[27] *Id.* at 1023.

[28] *Id.*

[29] *Id.*

Facebook appealed.[30] Writing for the unanimous panel, Judge Kanne[31] held that the district court abused its discretion by authorizing notice to arbitration-bound plaintiffs.[32] His opinion laid out a new test for determining when notice is appropriate.[33] Because the novelty of this test meant that the district court "could not — and did not — apply the correct standard," the Seventh Circuit vacated and remanded.[34]

The Seventh Circuit's new framework applies when a defendant asserts that "proposed notice recipients entered mutual arbitration agreements" with the defendant.[35] Under this framework, a court must first determine if the existence of a valid arbitration agreement is contested; if not, then notice to employees with arbitration agreements is improper.[36] If any plaintiff does contest the existence of valid arbitration agreements, the court "must permit the parties to submit additional evidence on the agreements' existence and validity," and the burden is on the employer to show, by a preponderance of the evidence, that a valid arbitration agreement exists "for each employee it seeks to exclude from receiving notice."[37]

In arriving at its new test, the court first highlighted the "twin goals of collective actions": enforcement of the FLSA and efficiency in case management.[38] But beyond these goals, it also explained that collective actions can present dangers: plaintiffs may seek settlement leverage by threatening a collective action, and broad notice may be "indistinguishable from the solicitation of claims."[39] To temper these concerns, trial courts serve as gatekeepers with "discretion to monitor the preparation and distribution of notice to 'potential plaintiffs.'"[40]

The court concluded that the "efficiency" goal of collective actions "neither favors nor disfavors" its framework.[41] While sending notice to a large group and culling potential plaintiffs later in the process may be efficient, the court explained that it may also be efficient to perform the

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30 *See Bigger*, 947 F.3d at 1048. After the district court conditionally certified the collective action, Facebook sought and was granted an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* Facebook did not appeal the denial of summary judgment on Bigger's IMWL claim. *Id.* at 1047 n.2.

31 Judge Kanne was joined by Chief Judge Wood and Judge Barrett.

32 *Bigger*, 947 F.3d at 1051.

33 *Id.* at 1050–51.

34 *Id.* at 1051. The Seventh Circuit also affirmed the district court's denial of Facebook's motion for summary judgment, agreeing that "factual issues remain concerning the extent to which [Bigger] engaged in exempt duties." *Id.* at 1052.

35 *Id.* at 1050. The Seventh Circuit's framework is similar to the one adopted by the Fifth Circuit last year. *See In re* JPMorgan Chase & Co., 916 F.3d 494, 503 (5th Cir. 2019).

36 *Bigger*, 947 F.3d at 1050.

37 *Id.*

38 *Id.* at 1049.

39 *Id.*

40 *Id.* (quoting Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989)).

41 *Id.* at 1050.

culling process before notice is ever sent, particularly if a party has shown that certain notice recipients would be unable to join the action.[42]

Because its efficiency analysis was inconclusive, the Seventh Circuit rooted its test in a district court's "obligations to maintain neutrality and to shield against abuse of the collective-action device."[43] Instead of "inform[ing] employees of an action in which they can resolve common issues," allowing notice to employees with arbitration agreements would serve mainly to "inflate settlement pressure."[44] Similarly, the court explained that there is a high risk that sending notice to arbitration-bound employees will "place a judicial thumb on the plaintiff's side of the case."[45] The court remanded the case to the district court to apply this new framework.[46]

With *Bigger*, the Seventh Circuit has created a defendant-friendly regime that undercuts the FLSA's enforcement goals in three ways. First, it raises the bar to notice in a way that resembles Rule 23 class actions by limiting district courts' ability to gather information and shifting part of the "similarly situated" analysis in FLSA collective actions from the decertification stage to the conditional certification stage. Next, it adopts a narrow view of the purpose of FLSA notice that helps defendants scuttle non–collective action FLSA claims by limiting the number of employees with potentially valid claims who receive notice. Finally, it entrenches defendants' favorable litigation position by allowing them to litigate the existence of valid arbitration agreements without the knowledge or participation of employees subject to the agreements.

First, the Seventh Circuit's holding makes the conditional certification stage of collective actions more similar to Rule 23 class actions in a way that benefits defendants. The "settlement pressure" argument it makes comes from the Rule 23 context,[47] where it has faced criticism for being unjustifiably defendant-friendly.[48] Introducing this "settlement pressure" justification into the collective action context exacerbates the argument's

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1051.

[47] The argument has justified increased judicial gatekeeping in the class certification process, *see, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995), though the argument has not escaped judicial critique, *see* 2 RUBENSTEIN, *supra* note 14, § 4:82 n.15 (collecting cases); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344–45 (1979). For an academic critique, see Nicholas Almendares, *The False Allure of Settlement Pressure*, 50 LOY. U. CHI. L.J. 271, 275–76 (2018).

[48] *See, e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1359–60 (2003) ("Even accepting the proposition that class actions generate enormous pressure to settle, one must still ask whether the pressure is too great. To show that it is, proponents of the blackmail charge must offer a normative account of settlement pressure, that is, a standard to which pressure in class actions can be compared.").

defendant-friendly nature by ignoring the doctrinal differences between class and collective actions. Traditionally, the conditional certification step in the FLSA's collective action process has involved significantly less judicial gatekeeping than has Rule 23 class certification,[49] in part because of the FLSA's protracted two-step process. The purpose of the conditional certification step is to gather information.[50] The FLSA's second step, the decertification stage, is where courts actually decide whether collective action plaintiffs are similarly situated.[51] By applying the already defendant-friendly "settlement pressure" argument to push the "similarly situated" analysis to the FLSA's conditional certification analysis, the Seventh Circuit elided the doctrinal differences between class and collective actions and began from a defendant-friendly starting point.

Next, by adopting a narrow view of the purpose of FLSA notice, the court's decision is defendant-friendly and undermines the FLSA's remedial purpose because it will likely reduce the number of valid FLSA claims employees pursue. Congress enacted the FLSA to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,"[52] and the Act's stated purpose is "to correct and as rapidly as practicable to eliminate" detrimental working conditions.[53] By analyzing the FLSA's legislative history, multiple scholars have confirmed this purpose and urged an expansive interpretation of the FLSA to better protect workers.[54]

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[49] *See, e.g.*, O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584–86 (6th Cir. 2009) (holding Rule 23 analysis of collective action certification was improper); *see also* 7 RUBENSTEIN, *supra note* 14, § 23:38 ("[T]he modest factual showing that the plaintiffs must make is *not* that they meet the class certification requirements of Rule 23. As FLSA actions do not proceed under Rule 23, the standard class certification requirements are irrelevant." (footnote omitted)).

[50] *See, e.g.*, Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) ("[T]he purpose of this first stage is merely to determine *whether* 'similarly situated' plaintiffs do in fact exist.").

[51] *See, e.g.*, Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001) ("At [the decertification] stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question."); *see also* 7 RUBENSTEIN, *supra* note 14, § 23:39.

[52] 29 U.S.C. § 202(a) (2018); *see also* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 11 (2011) (explaining that the FLSA "relies for enforcement of these standards . . . upon 'information and complaints received from employees seeking to vindicate rights claimed to have been denied'" (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960))).

[53] 29 U.S.C. § 202(b) (2018).

[54] *See, e.g.*, Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 569–80 (2019) ("[T]he legislative history overwhelmingly communicates that one of Congress' purposes was for those interpreting the FLSA to have some leeway to adapt as businesses restructured in response to economic circumstances, or to evade liability under the Act." *Id.* at 572.); William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. POVERTY L. & POL'Y 233, 254–56 & n.139 (2016) (collecting sources on the FLSA's remedial nature); Scott A. Moss & Nantiya Ruan, *No Longer a Second-Class Class Action? Finding Common Ground in the Debate over Wage Collective Actions*

Collective action notice could serve a narrow or broad purpose. Under the narrow view adopted by the Seventh Circuit, it exists only to notify employees eligible to join the collective action of their ability to do so.[55] Arbitration-bound employees, then, should not receive notice. This view is not novel; the Fifth Circuit has adopted a similarly narrow understanding of the purpose of collective action notice.[56] Alternatively, one could imagine a much broader view of the purpose of FLSA notice: that it exists both to inform employees that one of their colleagues is bringing an FLSA claim against their employer and to tell some employees that they may be eligible to join their colleague's collective action or bring their own claim. While the narrow view of notice is concerned with violations of the FLSA that can be vindicated through the collective action device, the broad view is concerned with FLSA violations writ large; it is agnostic with respect to the means by which employees enforce their rights under the FLSA. The broad view, then, increases the likelihood that workers will bring or join lawsuits — regardless of whether they choose to do so using the FLSA's collective

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with Best Practices for Litigation and Adjudication, 11 FED. CTS. L. REV. 27, 57 (2019) (citing legislative history supporting the broad remedial purpose of § 216(b)); James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 99 (2004) ("Congress enacted the FLSA in 1938 to eliminate substandard working conditions by regulating wages and hours."). Although Congress later amended the FLSA by creating the "opt-in" collective action device, *see* De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 306 (3d Cir. 2003), this change was driven in part by 1940s political hostility toward Rule 23(b)(3)–style class actions (which weren't statutorily sanctioned until 1966), *see* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 172–74 (1991). The change was meant to "strike a balance to maintain employees' rights but curb the number of lawsuits." *De Asencio*, 342 F.3d at 306.

[55] *See Bigger*, 947 F.3d at 1050 (suggesting that the purpose of notice is to "inform employees of an action in which they can resolve common issues").

[56] *See In re* JPMorgan Chase & Co., 916 F.3d 494, 503 (5th Cir. 2019). Although a circuit split has yet to emerge, there is significant disagreement on the issue among lower courts. *Compare, e.g.*, Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 534 (D. Mass. 2019) (granting notice to arbitration-bound employees), *and* Monplaisir v. Integrated Tech Grp., LLC, No. C 19-01484, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) (same), *with* McGuire v. Intelident Sols., LLC, 385 F. Supp. 3d 1261, 1265–66 (M.D. Fla. 2019) (denying notice), *and* Lea Graham v. Word Enters. Perry, LLC, No. 18-cv-10167, 2019 WL 2959169, at *5 (E.D. Mich. June 18, 2019) (same). In particular, some district courts have argued that the Fifth Circuit's characterization of *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), a Supreme Court case holding that "district courts have discretion, in appropriate cases, to implement [the FLSA] . . . by facilitating notice to potential plaintiffs," *id.* at 169, was flawed. In *In re JPMorgan Chase*, 916 F.3d 494 (5th Cir. 2019), the Fifth Circuit explained that authorizing notice to arbitration-bound employees — who, if bound by arbitration, cannot proceed in the collective action — "'merely stirs up litigation,' which is what *Hoffmann-La Roche* flatly proscribes." 916 F.3d at 502. But the concern about "[s]tirring up litigation" appears in *Hoffman-La Roche*'s dissent, not the majority opinion. 493 U.S. at 181 (Scalia, J., dissenting); *accord* Barone v. LAZ Parking Ltd., LLC, No. 17-CV-01545, 2019 WL 5328832, at *2 (D. Conn. Oct. 20, 2019) ("[I]t should be noted that the majority opinion in *Hoffmann-La Roche* did not actually raise the concern about stirring up litigation."); *Romero*, 404 F. Supp. 3d at 533 ("[T]he concern about stirring up litigation was expressed by the *Hoffmann-La Roche* dissent, not the majority opinion.").

action device — and thus better promotes the FLSA's remedial and enforcement goals. In other words, even arbitration-bound employees who cannot join the collective action benefit from notice: learning of a colleague's collective action (and their employer's potential FLSA violation) may spur them to bring their own individual arbitrations against their employer.

A broad view of FLSA notice could also promote transparency and reduce confusion among employees better than the narrow view. For example, if an employer has ten employees with identical job functions and titles but only five are not subject to an arbitration clause and receive notice under the Seventh Circuit's narrow approach, the employees who do not receive notice might mistakenly believe — because of, say, employee gossip — that they have no enforceable rights under the FLSA.[57] A broad notice regime results in less confusion: employees who are eligible to join the FLSA collective action learn that they can, and employees who bargained away their ability to do so are reminded of this fact but also learn that they can still enforce their FLSA rights via individual arbitrations.

Of course, the Seventh Circuit was right to imply that this broad notice regime is plaintiff-friendly in that it would likely increase litigation, arbitration, and liability costs for defendants. The court relied on this fact in its justification for the narrow view, arguing that allowing notice to arbitration-bound plaintiffs would unduly "inflate settlement pressure."[58] Although the court did not detail how a broad view of FLSA notice could increase settlement pressure, it could happen in at least two ways. First, if FLSA collective action plaintiffs could notify arbitration-bound employees of their suit, this would encourage defendants in FLSA cases to settle collective actions before notice is given so that they could avoid alerting past and current employees that their employers may have violated the FLSA. Second, FLSA notice could encourage defendants to settle after notice is given by creating a multiplicity of court cases and arbitrations as potential victims attempted to enforce the FLSA. Multiple simultaneous actions could drive up litigation costs and force a global settlement.

The court's use of the word "inflate" suggests that there would be something artificial or unfair in a plaintiff-friendly notice regime. However, inflation is relative to a baseline; the court's language assumes a narrow view of the purpose of notice, but its baseline could just as easily have been the broad view detailed above. Under the broad view, the Seventh Circuit's decision *deflates* settlement pressure. Indeed,

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[57] *Cf. Hoffmann-La Roche*, 493 U.S. at 172 (explaining how a trial court might use notice to counteract "gossip that might have been misleading").

[58] *Bigger*, 947 F.3d at 1050.

given that the Supreme Court has opined that the "broad remedial goal of the statute should be enforced to the full extent of its terms,"[59] and that a plaintiff-friendly notice regime would presumably increase enforcement of FLSA violations, a broad view of notice seems more consistent with the FLSA's purpose.

Finally, the court's decision entrenches defendants' already favorable position in collective action litigation. In part because of low opt-in rates, defendants face lower risk in FLSA collective actions than in opt-out class actions.[60] Even if arbitration-bound plaintiffs are sent notice of a pending FLSA action, the FLSA's opt-in nature limits its impact on the case: plaintiffs might never actually get notice, might ignore it, or might not want to risk suing their current employer.[61] Next, by allowing the defendant to prevent notice by showing "the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice,"[62] the court's framework pits the defendant — who in almost all cases will have also drafted the employment contract — against plaintiffs who never saw the contract, were not parties to it, and do not have the same incentives to litigate the issue as the defendant does. The scale of the battle also helps defendants. For example, in *Bigger*, Facebook claimed that at least 336 employees were covered by valid arbitration agreements.[63] To send these employees notice under the *Bigger* framework, plaintiffs would have to sift through all 336 of these agreements and argue that each is invalid. As district courts have noted, this approach also benefits defendants in that it "incentivize[s] [them] to raise any number of individualized defenses at the notice stage . . . [t]hat would inevitably delay the litigation . . . and run counter to the majority's warning in *Hoffmann-La Roche* that courts should steer clear of merits issues in facilitating FLSA notice."[64] Shifting a merits-like determination — the enforceability of arbitration agreements — that the

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[59] *Hoffmann-La Roche*, 493 U.S. at 173; *see also* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016) (citing *Hoffmann-La Roche*'s "broad remedial goal" language); Powell v. U.S. Cartridge Co., 339 U.S. 497, 509–10 (1950) ("[T]he primary purpose of Congress [in passing the FLSA] . . . was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power."); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946) (noting the "remedial nature of [the FLSA] and the great public policy which it embodies").

[60] *See* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313–14 (2005).

[61] *See* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1326–28 (2008).

[62] *Bigger*, 947 F.3d at 1050.

[63] *Id.* at 1048 n.3.

[64] Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 533–34 (D. Mass. 2019); *see also* Barone v. LAZ Parking Ltd., LLC, No. 17-CV-01545, 2019 WL 5328832, at *4 (D. Conn. Oct. 20, 2019) (collecting cases).

defendant is better equipped to win to the conditional certification stage puts a thumb on the scale on the defendant's side of the case and undermines the FLSA's remedial and enforcement goals.[65]

Despite the Seventh Circuit's adoption of a narrow, defendant-friendly view of notice, the framework it announced in *Bigger* isn't a total loss for collective action plaintiffs. Most notably, because a defendant bears the burden of proving that a valid arbitration clause exists and must produce the agreements,[66] the plaintiff or her attorneys could encourage employees bound by arbitration agreements — whose identities they learned through discovery — to bring claims against the defendant. Indeed, the Seventh Circuit seemed to acknowledge this possibility.[67] However, as other circuit courts begin to address whether arbitration-bound employees can receive notice under the FLSA, they should consider a broad approach in light of the FLSA's remedial and enforcement goals before following the Seventh Circuit's lead.

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[65] *Cf. Barone*, 2019 WL 5328832, at *4 (explaining that district courts disagreeing with *In re JPMorgan* "generally conclude that the enforceability of the arbitration agreements should not be determined at stage one of the conditional certification process").

[66] *Bigger*, 947 F.3d at 1050.

[67] *Id.* at 1050 n.6 ("Even without notice, employees who entered valid arbitration agreements may try opting in. If they do, the employer may move to compel arbitration to exclude those employees from the action.").