NOTE

Will You "Notice" Me Already? Providing Notice of FLSA Collective Actions to Individuals Governed by Arbitration Agreements

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ABSTRACT

Collective actions provide employees with an important opportunity to challenge their employers' alleged violations of workplace wage and hour laws under the Fair Labor Standards Act ("FLSA"). Unfortunately, unlike Rule 23 Class Actions, collective actions lack formal guidelines. Therefore, parties disagree on many of the important procedural hurdles that must be resolved before a court examines a claim on its merits. The addition of arbitration agreements has further complicated FLSA procedures, particularly at the notice stage, where plaintiffs and defendants often disagree about whether arbitration-bound employees should receive notice of a pending action.

Although several circuit and district courts have attempted to address the provision of notice to arbitration-bound individuals, these judicial efforts have come up short. This Note argues that the Supreme Court, pursuant to the Rules Enabling Act, should adopt a new Federal Rule of Civil Procedure to address this notice issue. The Proposed Rule would balance plaintiff and defendant's interests by allowing courts to authorize notice to all "similarly situated" individuals, while still leaving room for defendants to present a defense that individuals with valid arbitration agreements cannot be joined to the action.

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Ultimately, this Proposed Rule will bring collective action notice procedures back into alignment with the purpose of the FLSA and the Supreme Court's pronotice decision in Hoffmann-La Roche v. Sperling.

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Introduction

Workplace rights have a storied place in American history. The United States has seen many workplace tragedies such as manufacturing disasters,[1] child labor,[2] and poverty due to unfair wages and inhumane working hours.[3] During the twentieth century, there was a proliferation of legislation designed to protect workers such as the implementation of

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1 *See, e.g.*, Jim Frederick, *How the Triangle Fire Transformed Workplace Safety*, DOL Blog (Mar. 25, 2021), https://blog.dol.gov/2021/03/25/how-the-triangle-fire-transformed-workplace-safety [https://perma.cc/EF2U-K8EX].

2 *See, e.g.*, Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. Bureau of Lab. Stat. Monthly Lab. Rev. (Jan. 2017), https://doi.org/10.21916/mlr.2017.1 [https://perma.cc/3GMZ-TVPS].

3 *See, e.g.*, Josh Robin, *How We Got Here: A History of Minimum Wage Laws in America*, Spectrum News 1 (Apr. 15, 2021, 8:00 AM), https://spectrumlocalnews.com/nc/charlotte/national-politics/2021/04/14/how-we-got-here--a-history-of-minimum-wage-laws-in-america- [https://perma.cc/R58S-XAAH].

occupational health and safety provisions,[4] child labor laws,[5] and wage and hour restrictions.[6] One such workplace protection, the Fair Labor Standards Act ("FLSA")[7] currently protects over 143 million employees in the United States[8] by establishing a federal minimum wage,[9] requiring overtime pay,[10] and preventing "oppressive child labor."[11]

The federal government and some state legislatures have adopted labor laws to correct workplace imbalances that favor employers over their employees.[12] Although an employer generally has the ability to fire employees at-will, determine wages, and set workplace policies and procedures,[13] an employee standing alone is often deterred from legally challenging wrongful employment practices for fear of losing their job or suffering from retaliation.[14] In order to gain some leverage over their employers, individuals in the early 1900s pushed for legislation that allowed workers to band together with other employees within their workplace or industry to challenge unfair employer practices through a process known as "collective bargaining."[15] By bargaining collectively, many employees were able to lobby for positive workplace changes, resulting in the enactment of many of the workplace protections discussed above.[16]

Such concerted workplace actions still exist today in many forms. In addition to "collective bargaining," which is most commonly associated with union activity,[17] employees also have the ability to challenge employer actions by filing lawsuits. These lawsuits may be filed by an

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4 *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678.

5 *See* 29 U.S.C. § 212.

6 *See id.* §§ 206–207.

7 *Id.* §§ 201–219.

8 Wage & Hour Div., DOL, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA) (2009), https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage#:~:text=More%20than%20143%20million%20American,%22%20and%20%22individual%20coverage.%22 [https://perma.cc/Z736-RCFG].

9 29 U.S.C. § 206(a)(1).

10 *Id.* § 207.

11 *Id.* § 212(c).

12 *See, e.g.*, *id.* § 207(a) (overtime compensation laws favor employees by establishing provisions requiring employers to pay individuals for hours worked over the standard forty-hour work week); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945).

13 *See* Radha Thiagarajan, *Employer Rights in the Workplace*, KPPB Law (July 27, 2020), https://www.kppblaw.com/employer-rights-in-the-workplace/#:~:text=Employers%20have%20the%20right%20to,work%20hours%20and%20after%20hours [https://perma.cc/6E5M-E9EY].

14 *See* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1119–20.

15 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1634–35 (2018) (Ginsburg, J., dissenting); *see also Collective Bargaining*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining [https://perma.cc/5275-4LPK].

16 *See Epic Sys. Corp.*, 138 S. Ct. at 1634–35.

17 *See Collective Bargaining*, *supra* note 15.

individual employee alone, or by a group of employees together in what is called a collective action.[18] Collective action lawsuits are fundamental to guaranteeing workplace protections because they serve an important role in ensuring employers comply with statutes such as the FLSA.[19] Since the Department of Labor ("DOL") has limited enforcement resources, private collective action lawsuits play a key role in challenging unlawful employment practices and incentivizing corporate compliance with state and federal employment laws.[20]

However, before joining a collective action challenging alleged employer misconduct, an employee must be made aware of the potential rights violation and their ability to join a pending lawsuit to seek recovery.[21] Although employees may be made aware of the pendency of such a lawsuit informally from colleagues or news reports, courts may also authorize formal notice to employees[22] describing the existing allegations, the nature of the lawsuit, and who is eligible to join the action as a plaintiff.[23] Therefore, notice has become an essential element of workplace collective action lawsuits. The provision of notice both informs employees that their workplace rights may have been violated and that they can seek recovery and encourages employers to change unfair labor practices when faced with a multiplaintiff lawsuit.[24]

In recent years, the country has also seen a proliferation of mandatory arbitration agreements,[25] many of which require employees to waive their right to bring an action in a court of law when attempting to individually or collectively resolve workplace disputes.[26] The Supreme Court has generally viewed such arbitration agreements favorably[27] and

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18 Valte v. United States, 155 Fed. Cl. 561, 566 (2021).

19 *See* Ruan, *supra* note 14, at 1118–19.

20 *Id.* at 1112–15 (explaining that employees may file an FLSA claim with the DOL, but that limited resources, low "political will," and DOL's failure to seek full damages have resulted in a low number of cases and a "diminish[ed]" deterrent effect against companies).

21 *Id.* at 1121–22.

22 *Valte*, 155 Fed. Cl. at 567.

23 Prac. Law Lab. & Emp., Notice of an FLSA Collective Action: Key Considerations and Best Practices, Practical Law Practice Note 9-616-7758 (2023).

24 *See* Ruan, *supra* note 14, at 1121–22.

25 Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst., 1–2 (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/JRD9-6T96] ("Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. . . . [T]his means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.").

26 *Id.* at 2 ("Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures . . . .").

27 Jonathan M. Crotty, *U.S. Supreme Court Says Federal Arbitration Act Does Not Apply to Independent Contractor Drivers*, Parker Poe (Jan. 22, 2019), https://www.parkerpoe.com/news/2019/01/us-supreme-court-says-federal-arbitration-act-does [https://perma.cc/LD7E-KKSS].

has repeatedly upheld arbitration even when it may undermine other workplace rights.[28] Unfortunately, these mandatory arbitration agreements tend to disproportionately impact low-wage workers.[29] In fact, in 2019, such class waivers and mandatory arbitration provisions resulted in over $9.27 billion in losses for employees making less than $13.00 per hour; these employees were prevented from recovering under the FLSA.[30] In addition to preventing employees from filing lawsuits or joining lawsuits filed by others, arbitration provisions generally discourage employees from bringing their claims at all.[31]

The prevalence of arbitration has complicated the adjudication of claims under statutes such as the FLSA. Although the FLSA allows individuals to bring a suit against their employer for unfair wage and hour classification practices, the process for bringing such a claim is governed by a morass of complex and contradictory common law precedent.[32] Nestled within this mess of unsettled procedure lies the issue of providing notice to putative plaintiffs, especially those governed by arbitration agreements who may or may not be able to join a pending suit. This Note addresses the emerging discord amongst federal courts regarding the facilitation of notice to similarly situated employees with arbitration agreements in FLSA collective actions by proposing a new Federal Rule of Civil Procedure, which the Supreme Court can adopt pursuant to the Rules Enabling Act.[33] This Proposed Rule will help clarify and codify notice procedures for all employees regardless of their arbitration status. The Proposed Rule will also balance employee litigation interests with the interests of employers. While the Proposed

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28 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) ("The Court today subordinates employee-protective labor legislation to the Arbitration Act.").

29 *See* Colvin, *supra* note 25, at 9 tbl.4 (indicating that 64.5% of employees who make under $13.00 an hour are subject to mandatory arbitration agreements).

30 Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low Paid Jobs*, Nat'l Emp. L. Project 1 (June 7, 2021), https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019/ [https://perma.cc/UH67-59E7].

31 *Id.* at 3 (posits that "the vast majority (98%) of workers simply abandon their claims rather than proceed in arbitration"); *see also* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/X5QL-TM9G] (explaining that "between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less" when barred from bringing a class action lawsuit).

32 *See, e.g.*, Valte v. United States, 155 Fed. Cl. 561, 567–69 (2021) (explaining that several different methods for managing the joinder of additional parties to collective action lawsuits have emerged because of the lack of statutory or other guidance on a process for managing such lawsuits).

33 The Supreme Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals." 28 U.S.C. § 2072(a).

Rule initially establishes a lenient standard for court-authorized notice in order to bring collective actions back into alignment with the FLSA's goal of protecting worker's rights, the Rule simultaneously offers employers ample opportunities to sever opt-in plaintiffs who should not be authorized to continue with the action.

In Part I, this Note provides a brief introduction to FLSA collective-action proceedings and addresses the importance of notice as a procedural step for both plaintiffs and defendants. Part I also discusses how the rise in employer-mandated arbitration over the past few decades has complicated already inconsistent collective action notice procedures across the country. Part II then analyzes the inconsistent approaches advanced by district and circuit courts on sending notice in collective action proceedings to individuals who have agreed to arbitration. Part III argues that existing ad-hoc approaches to notice are inadequate, and that leaving the decision to district and circuit courts will result in inconsistent solutions. Part III also argues that the authorization of broad notice to all impacted individuals of pending FLSA claims is consistent with the purpose of the FLSA and the court's holding in the preeminent Supreme Court case on providing notice in collective action proceedings: *Hoffmann-La Roche Inc. v. Sperling*.[34] Finally, Part IV proposes a new Federal Rule of Civil Procedure, which specifies when district courts should authorize notice to "similarly situated" individuals, specifically addressing how courts should proceed in evaluating whether individuals with arbitration agreements should be included in the notice process. This Proposed Rule will balance the interests of both plaintiffs and defendants, ensure alignment with the underlying enforcement rationale of the FLSA, and begin to untangle the web of inconsistent collective action precedent currently tying-up district and circuit courts.

I. The FLSA and "Collective Action" Proceedings

The FLSA was passed in 1938 in response to Congressional findings of detrimental working conditions for individuals employed by commercial and manufacturing industries.[35] Prior to the adoption of the FLSA, workers were subjected to brutal hours, deplorable conditions like sweatshops, and extremely low wages.[36] In response to these conditions, the FLSA promulgated rules that established a minimum wage for employees, overtime pay for individuals working more than

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34 493 U.S. §§ 165, 169–70 (1989).

35 29 U.S.C. § 202.

36 Nathaniel Ruby & Ross Eisenbrey, *Celebrating 75 Years of the Fair Labor Standards Act*, Econ. Pol'y Inst. (June 25, 2013, 12:51 PM), https://www.epi.org/blog/celebrating-75-years-fair-labor-standards/ [https://perma.cc/JU2M-TNQV].

forty hours per week, and guidance for employing minors.[37] In advancing these worker protections, Congress sought to recognize and correct the power imbalance between employees and employers, which left employees with little ability to contest unfair or inhumane working conditions.[38]

In addition to establishing these minimum wage and hour requirements, the FLSA also instituted penalties for employers who violate its provisions.[39] For example, employers who contravene the Act's minimum wage and maximum hours provisions are liable for backpay of unpaid wages to workers under § 216(b).[40] Actions to recover damages may be brought "in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and *other employees similarly situated*."[41] These actions have been termed "collective action[s]"[42] and are distinguishable from "class actions," which are governed by Rule 23 of the Federal Rules of Civil Procedure.[43] Unlike class actions, which are binding on individuals regardless of their opt-in status,[44] collective actions are not binding on an individual "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[45]

Courts vary in their approaches to adding individual plaintiffs to a pending collective action.[46] The most common way to join individuals

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37 U.S. Dep't of Lab., Wages and the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/flsa [https://perma.cc/HS76-4UDY].

38 Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) ("The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency . . . .").

39 29 U.S.C. § 216.

40 *Id.* § 216(b).

41 *Id.* (emphasis added).

42 Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 69 (2013) (under the FLSA, "[a] suit brought on behalf of other employees is known as a 'collective action'").

43 *See* Fed. R. Civ. P. 23. Many courts fail to distinguish the terminology difference between class and collective actions and therefore sometimes refer to joined plaintiffs as a "class" even when suits have been brought as a collective under § 216(b). To avoid confusion throughout, all instances where a court has referred to a "class action" in place of a "collective action" have been appropriately corrected.

44 *Id.*

45 29 U.S.C. § 216(b).

46 *See, e.g.*, Valte v. United States, 155 Fed. Cl. 561, 567–69 (2021) (describing that district courts have a duty to manage the joinder of parties in collective action proceedings and, in the absence of any guidance by the FLSA, courts have developed three main approaches to manage collective action joinder with the "two-step approach" being most common). The two additional approaches to collective action management, mentioned in *Valte*, are not as widely adopted. *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 441–43 (5th Cir. 2021) (describing a new approach adopted by the Fifth Circuit which does not require "certification" but instead requires

as a "collective" in a suit is known as the "two-step approach."[47] Under this approach, plaintiffs seek "conditional certification" at step one.[48] To achieve conditional certification, the existing plaintiff must demonstrate that all proposed "collective"[49] members are "similarly situated."[50] If conditional certification is granted, the court may authorize notice to other individuals who may then opt-in to the action.[51] At step two, usually "just before the end of discovery, or at its close," the defendant may move for "decertification" by demonstrating that the joined plaintiffs are not "similarly situated," that the defendant needs to present individualized defenses in order to effectively dispute the claims, or that fairness weighs in favor of litigating the claims individually.[52] In most cases, a court-authorized notice sent to employees will explain that a suit has been filed, and include information on an individual's ability to join the lawsuit as an additional party.[53] Because individuals are not bound by a judgment without opting-in to a collective action[54]—and therefore cannot recover damages from the pending lawsuit—notice to potential parties of the pendency of an action is a key procedural step advanced by plaintiffs; defendants

district courts to evaluate whether parties are similarly situated at the beginning of a case and then to proceed with joinder of parties and discovery after making that determination); Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 268 (D. Colo. 1990) (describing that FLSA collective actions should proceed in the same manner as Rule 23 class action lawsuits). In May 2023, the Sixth Circuit presented yet another approach to collective action "certification." *See* Clark v. A&L Homecare & Training Ctr., 68 F.4th 1003, 1010–11 (6th Cir. 2023) (rejecting the *Swales* test and holding that to "facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves").

47 *Valte*, 155 Fed. Cl. at 567–68.

48 Morgan v. Fam. Dollar Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008).

49 Joined plaintiffs who proceed in a collective action as a group are sometimes called a "collective" although other courts still refer to such groups as a "class." *See, e.g.*, Monplaisir v. Integrated Tech Grp., LLC, No. C 19-01484, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) (referring to "the proposed FLSA class"); Smith v. United States, 163 Fed. Cl. 155, 165 (2022) (referring to a "conditionally certified collective").

50 Courts consider many factors in determining whether an individual is "similarly situated" for purposes of the FLSA. *See, e.g.*, Williams v. Omainsky, No. 15-0123, 2016 WL 297718, at *4 (S.D. Ala. Jan. 21, 2016) (quoting Pena v. Handy Wash, Inc., 28 F. Supp. 3d 1289, 1296 (S.D. Fla. 2014)) (explaining that factors considered in a similarly situated analysis include "(1) whether plaintiffs held the same job title; (2) whether they worked in the same geographic location; (3) whether the alleged violations occurred during the same time period; (4) whether plaintiffs were subjected to the same policies and practices . . . established in the same manner and by the same decision maker; and (5) the degree to which the actions constituting the claimed violations are similar").

51 *See Morgan*, 551 F.3d at 1261 n.40.

52 *See id.* at 1261 (citing Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007)).

53 *See, e.g.*, *Notice of Opportunity to Join Collective Action to Determine Your Right to Overtime Compensation Under the Fair Labor Standards Act*, Stagnaro, Saba & Patterson (2016), https://www.sspfirm.com/documents/krogerovertimelawsuit/notice-of-collective-action.pdf [https://perma.cc/8UQ9-K6X3].

54 *See* 29 U.S.C. § 216(b).

often dispute providing notice to a wider range of potential parties because joining additional plaintiffs to a lawsuit could result in both settlement pressure and higher litigation costs.[55]

A. Why Notice Matters: Arguments for and Against Collective Action Notice

Plaintiffs advocate for sending notice to individuals who may opt-in to the pending lawsuit because the addition of similar claims may both assist a plaintiff in finding suitable counsel or serve to strengthen the plaintiffs' bargaining position.[56] Generally, individuals bringing wage and hour claims on their own only seek to recover low dollar amounts.[57] However, if the claims are similar enough in nature, individuals may be able to aggregate their claims into one lawsuit.[58] Aggregating multiple claims into one lawsuit aids plaintiffs in finding suitable representation.[59] Because many attorneys litigating wage and hour claims are paid through contingency fee arrangements, and because the total recovery amount increases as more plaintiffs are added to a lawsuit, the chances of plaintiffs finding representation improve when claims are aggregated.[60] Without a mechanism which allows attorneys to inform other potential plaintiffs of their right to join a lawsuit, thereby increasing the potential recovery amount, plaintiffs may struggle to find suitable representation for certain low-recovery claims. Therefore, sending notice to potential plaintiffs of their right to opt-in to a collective action is crucial, because such notice not only alerts the potential plaintiff that her rights may have been violated, but also directs her to an attorney who is familiar with the matter and who is already willing to litigate the issue on her behalf.[61]

Plaintiffs may also benefit from increased bargaining strength when they aggregate their claims because as the number of plaintiffs in the lawsuit grows, corporations may feel pressure to settle.[62] Corporations feel this settlement pressure because they fear a judgment forcing them

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55 *See, e.g.*, Bigger v. Facebook, Inc., 947 F.3d 1043, 1048 (7th Cir. 2020) (plaintiffs moved for collective action certification and for notice to be sent to others to opt-in to the collective action, and defendants opposed notice, arguing that "most proposed recipients had entered mutual arbitration agreements making them ineligible to join the action"); Ruan, *supra* note 14, at 1124.

56 *See* Ruan, *supra* note 14, at 1118–19.

57 *See id.* ("Most claims of low-wage workers involve relatively small per-person damages, . . . [and] they fail to capture the attention of a plaintiff's attorney who, although entitled to statutory fees under the FLSA, can only justify the resources it takes to successfully prosecute wage claims if they involve multiple plaintiffs.").

58 *See* 29 U.S.C. § 216(b).

59 *See* Ruan, *supra* note 14, at 1118–19.

60 *Id.*

61 *See id.* at 1122.

62 *Id.* at 1124.

to pay large damages.[63] The possibility of providing notice to putative collective members may discourage employers from committing FLSA violations in the first place because they risk paying settlements or damages to large classes of employees again in the future.[64] Therefore, plaintiffs often seek court authorization to send notice to other potential parties early in a lawsuit to encourage additional plaintiffs to join the pending action.[65]

On the other hand, defendants' attorneys frequently oppose notice.[66] Most frequently, opponents of notice will cite Justice Scalia's dissenting opinion in *Hoffmann-La Roche*,[67] which argues that allowing plaintiffs to send notice to individuals who have not yet joined a lawsuit is merely soliciting claims.[68] Others assert that collective action proceedings place extreme settlement pressure on employers because they are often faced with large aggregate actions that may result in significant damage awards.[69] In particular, defendants worry that sending notice to potential putative plaintiffs early in a suit may force them to settle before claims can be litigated on the merits, even if the plaintiffs' claims are tenuous.[70]

Despite the fact that notice is often hotly contested by parties, the Supreme Court has only addressed the question of whether courts can authorize notice to potential opt-in plaintiffs once in its decision in *Hoffmann-La Roche v. Sperling*.[71] In *Hoffmann-La Roche*, the Court evaluated whether a district court reviewing claims by multiple plaintiffs of age-based discrimination under the Age Discrimination in Employment Act ("ADEA") could authorize notice of the pending action to other potential claimants.[72] In its decision, the Supreme Court extolled

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63 *See id.*

64 *Id.* at 1122 ("The sheer magnitude and scope of class litigation enhances the likelihood that a targeted employer will comply with the law.").

65 *See, e.g.*, Valte v. United States, 155 Fed. Cl. 561, 566 (2021) (plaintiffs were seeking "conditional certification" of a FLSA collective action and asking the court to issue notice to other potential opt-in plaintiffs).

66 *See, e.g.*, Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 165 (1989) (noting that district court approved plaintiff's request for notice and that decision was appealed by the defendant); Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021) (explaining that parties disputed district court's decision to send notice).

67 *See, e.g.*, *In re* JPMorgan Chase & Co., 916 F.3d 494, 504 (5th Cir. 2019).

68 *Hoffmann-La Roche*, 493 U.S. at 181 (Scalia, J., dissenting).

69 Ruan, *supra* note 14, at 1124.

70 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

71 493 U.S. 165 (1989).

72 *Id.* at 165, 167–68. Although the plaintiffs in *Hoffmann La-Roche* brought suit under the ADEA, the ADEA incorporates the enforcement provisions laid out in § 216(b) of the FLSA by reference and therefore suits brought under the ADEA are "collective actions" similar to FLSA suits. *Id.* at 165, 167–68.

the benefits of notice, which include lowering litigation costs for plaintiffs and the efficient resolution of multiple claims in one suit.[73] The Court held that "[s]ection 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties" and therefore that district courts may authorize notice as long as they are "scrupulous" and "respect judicial neutrality."[74]

In establishing that district courts may authorize notice to putative collective action members, the Supreme Court's opinion in *Hoffmann La-Roche* identified two key rationales for approving notice.[75] First, the Supreme Court noted that allowing individuals to litigate claims collectively is efficient, and therefore "[c]ourt authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action."[76] Second, the Supreme Court stated that allowing such actions to proceed helps to enforce the underlying goals of the statute at issue.[77] These rationales have been classified as "efficiency" and "enforcement" by subsequent courts.[78] The efficiency and enforcement rationales have consequently informed much of the commentary regarding whether notice should be sent to arbitration-bound individuals in collective actions today.[79]

B. Arbitration Nation: Adding an Additional Hurdle to the Collective Action Notice Process

Despite this broad and general grant of authority by the Supreme Court to district courts to authorize notice to similarly situated individuals in collective action proceedings, many courts still disagree on when notice is appropriate and what factors plaintiffs are required to meet before a court deems them "similarly situated."[80] Meanwhile, the rise of mandatory arbitration agreements in the employment context has added another layer of confusion to the already messy collective action notice process.[81]

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73 *Id.* at 170.

74 *Id.* at 170, 174.

75 *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020) (citing *Hoffmann La-Roche*, 493 U.S. at 170–71).

76 *Hoffmann-La Roche*, 493 U.S. at 172.

77 *Id.* at 173 (explaining that "[t]he broad remedial goal of the statute [preventing age discrimination in employment] should be enforced to the full extent of its terms").

78 *See Bigger*, 947 F.3d at 1049.

79 *See, e.g.*, *id.*; *In re* JPMorgan Chase & Co., 916 F.3d 494, 502 n.16 (5th Cir. 2019).

80 *See* Valte v. United States, 155 Fed. Cl. 561, 567, 569–72 (2021).

81 *See* Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, Bloomberg L. Daily Lab. Rep. (Oct. 28, 2021, 1:01 PM), https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it [https://perma.cc/A39B-A6BW].

Arbitration agreements are contracts, or clauses within a contract, that require individuals to resolve disputes outside of court.[82] Congress endorsed arbitration as a form of dispute resolution in the Federal Arbitration Act of 1925.[83] Since then, courts have generally upheld the validity of arbitration agreements as a way of settling disputes, and mandatory arbitration clauses have become prevalent in many different industries, from consumer credit card contracts[84] to standard employment agreements.[85] Employers generally favor arbitration of employment disputes because arbitration eliminates standard court proceedings, therefore minimizing the likelihood that a sympathetic jury will side with plaintiffs and award significant damages.[86] As a result, over fifty percent of private-sector employees who are not in a union are governed by mandatory arbitration clauses.[87] The Supreme Court has also shown a preference for upholding mandatory arbitration clauses in employment agreements, even when such agreements require employees to waive workplace protections, such as the right to collectively litigate claims under the FLSA.[88]

Arbitration agreements in the employment context are generally opposed by plaintiffs' attorneys, who argue that such agreements significantly damage an employee's bargaining power, therefore undermining the purpose of employee-friendly statutes like the FLSA.[89] Although proponents of arbitration agreements argue that such agreements are simply two-party contracts, critics often point out that the negotiation of arbitration clauses is generally one-sided.[90] Many employees are presented with arbitration clauses in employment documents that they have no say in drafting and may fear negotiating or objecting to.[91]

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82 Katie Shonk, *What Is an Arbitration Agreement?*, Harvard L. Sch. Program on Negot. Daily Blog (Aug. 7, 2023), https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement/ [https://perma.cc/KJT7-SJVB].

83 *See* 9 U.S.C. §§ 1–16.

84 *See* Silver-Greenberg & Gebeloff, *supra* note 31.

85 *See* Mulvaney, *supra* note 81.

86 Stephen Joyce, *Arbitration Use by Employers Up as High Court Affirms Validity*, Bloomberg L. Daily Lab. Rep. (Aug. 24, 2022, 5:43 AM), https://news.bloomberglaw.com/daily-labor-report/arbitration-use-by-employers-up-as-high-court-affirms-validity [https://perma.cc/R4TU-V34Q].

87 *See* Colvin, *supra* note 25, at 2,

88 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

89 *See* Ruan, *supra* note 14, at 1129–30 (discussing opposition by plaintiffs' bar to class-wide arbitration prohibitions); *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, 447–48 (2012) (explaining the enactment of the FLSA as a response to the societal bargaining imbalance which favors employers).

90 Getman & Getman, *supra* note 89, at 459.

91 *See id.* at 459. (When discussing *AT&T v. Concepcion*, authors Julius Getman and Dan Getman note that "Justice Scalia reads the Arbitration Act as a sanctification of adhesion contracts which he regularly attributes to 'the parties' even though one party had no voice in its framing.").

Furthermore, Supreme Court justices continue to show a preference for upholding arbitration agreements as written.[92]

By enforcing arbitration agreements as written, and because such agreements are written almost exclusively by employers, the Supreme Court has "suggest[ed] that any employer-imposed procedures will be enforced as expressing the will of 'the parties.'"[93] Therefore, employers have broad power to require confidentiality provisions, class or collective action waivers, or otherwise "structure the [arbitration] process to [their] liking."[94]

Approximately thirty percent of employers who require employees to agree to arbitration also require employees to waive their rights to join or bring their claims as a class or collective.[95] However, because of low recovery amounts, and the high litigation costs associated with bringing a lawsuit, aggregating wage and hour claims under the FLSA is one of the few mechanisms available for plaintiffs seeking to enforce their statutory wage rights.[96] Absent this ability to aggregate their claims, plaintiffs may determine that their limited recovery amount does not justify the time and effort it would take to bring a claim alone.[97] Employees' inability to bring suits collectively, coupled with the DOL's limited resources to enforce the FLSA,[98] diminishes the effectiveness of workplace protection laws because the aggregation of claims in class and collective actions are "critical to FLSA enforcement" of wage and hour protections.[99]

Arbitration has further complicated the already messy collective action process for both individuals governed by arbitration agreements and those who are not. When an individual without an arbitration agreement brings a collective action and seeks court authorization to send notice to potential opt-in plaintiffs, the court must then engage in a lengthy back and forth regarding whether arbitration-bound employees should receive that notice.[100] On the one hand, the individual may have been subject to a workplace rights violation and notice to them would allow them to either join the pending action and contest the validity of their arbitration agreement or bring their own claim through arbitration.[101] On the other hand, if the arbitration-bound individual joins the

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92 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 355 (2011) (Thomas, J., concurring).

93 Getman & Getman, *supra* note 89, at 459.

94 *Id.*

95 Colvin, *supra* note 25, at 2.

96 *See* Ruan, *supra* note 14, at 1106.

97 *See* Silver-Greenberg & Gebeloff, *supra* note 31.

98 *See* Ruan, *supra* note 14, at 1112–15.

99 Getman & Getman, *supra* note 89, at 454.

100 *See* Recent Case, Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020)*, 133 Harv. L. Rev. 2601, 2609 (2020).

101 *See id.* at 2608.

action and the court determines that the arbitration agreement is valid, the individual will be severed from the lawsuit, and both parties will have spent time and resources adjudicating an issue for a plaintiff ineligible to join the current suit.[102] Therefore, whether arbitration-bound employees should receive notice of a pending claim is another unresolved procedural question courts face when attempting to manage collective actions.[103]

II. Emergence of the Problem

Although the Supreme Court has indicated a strong preference for upholding mandatory collective action waivers in favor of enforcing arbitration agreements,[104] federal district and circuit courts have been unable to agree on whether, in the early stages of a lawsuit before the validity of an arbitration agreement has been determined, courts should allow plaintiffs to include arbitration-bound employees as notice recipients of a pending claim.[105] Opponents of notice argue that individuals with arbitration agreements will not be able to join the collective action if their arbitration agreements are valid; therefore, providing notice to such individuals fails to advance the lawsuit.[106] Proponents of notice argue that excluding individuals with arbitration agreements at the notice stage is premature, because these individual's arbitration agreements may be invalid and therefore arbitration-bound individuals may actually be able to join the pending suit.[107]

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102 *See In re* JPMorgan Chase & Co., 916 F.3d 494, 502 (5th Cir. 2019).

103 *See infra* Part II.

104 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018). In *Epic Systems*, employees entered into arbitration agreements with their company which barred them from filing a class or collective action for recovery on their misclassification claims under the National Labor Relations Act. The employees attempted to bring a collective action, arguing that the "Savings Clause" of the Federal Arbitration Act of 1925 invalidated the provision within their individual arbitration agreements that prevented them from proceeding collectively. Justice Gorsuch, writing for the majority, held that the provision barring class and collective actions in these arbitration agreements was lawful and that said provisions could only be invalidated by generally accepted contract principles such as fraud or duress.

105 *Compare In re* JPMorgan Chase & Co., 916 F.3d at 498 (holding that district court erred in sending notice to individuals who had signed arbitration agreements), *with* Bruno v. Wells Fargo Bank N.A., No. 2:19-cv-00587, 2021 WL 964938, at *6 (W.D. Pa. Mar. 15, 2021) (granting plaintiff's motion to send notice and consent forms to putative collective members, including individuals who signed arbitration agreements).

106 *See* discussion *infra* Section III.A. Although arbitration agreements present many issues, this Note only addresses arbitration at the notice stage of a collective action. This note does not discuss what steps individuals who have signed a valid arbitration agreement will need to follow to arbitrate their claims against their employer if their arbitration agreement is determined to be valid and they are therefore barred from proceeding as a participant in the collective action.

107 *See* discussion *infra* Section III.B.

This tension has caused confusion amongst district courts deciding "certification" motions or requests by plaintiffs to send notice to "similarly situated" individuals.[108] The Fifth, Sixth, and Seventh Circuits have addressed the issue directly, while another case before the Third Circuit, *Bruno v. Wells Fargo Bank*,[109] has been stayed pending approval of a settlement.[110]

A. The "Antinotice" Cohort

In 2019, the Fifth Circuit became the first appellate court to rule on the issue of sending notice to individuals in FLSA cases when some affected employees had signed arbitration agreements.[111] In *In re JPMorgan Chase & Co.*,[112] call-center employees at the bank filed a collective action alleging that the company failed to compensate them for work they had completed "off-the-clock."[113] In the district court proceedings, the Judge granted the plaintiff's motion to conditionally certify a collective action and authorized plaintiffs to send notice to approximately 42,000 other "similarly situated" JPMorgan Chase call-center employees.[114] JPMorgan Chase opposed notice, alleging that approximately 35,000 of the employees slated to receive notice had signed arbitration agreements containing class and collective action waivers and therefore that these employees were not eligible to join a collective action.[115] The bank argued that, "giving [individuals who had signed arbitration agreements] notice of [the pending action] 'would be inconsistent' with the agreements and the Federal Arbitration Act ('FAA')" and filed a mandamus petition appealing the decision to the Fifth Circuit.[116]

As a matter of first impression, the Fifth Circuit held that "district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action."[117]

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108 *See* Robert Iafolla, *Wells Fargo Wage Suit Sets Up Clash Between Arbitration, Notices*, Bloomberg L. (June 22, 2022, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/wells-fargo-wage-suit-sets-up-clash-between-arbitration-notices [https://perma.cc/VW9G-DKPK].

109 No. 2:19-cv-00587, 2021 WL 964938, at *6 (W.D. Pa. Mar. 15, 2021).

110 *See* Iafolla, *supra* note 108. As of August 28, 2023, the parties proposed a $16.6 million dollar settlement. The settlement has not yet been approved by the court. *See* Caleb Drickey, *Wells Fargo Inks $16.6M Deal in Overtime Suit*, Law360 (Aug. 28, 2023, 8:13 PM), https://www.fslawfirm.com/blog/wp-content/uploads/2023/08/Wells-Fargo-clean.pdf [https://perma.cc/8PND-3G78].

111 *In re* JPMorgan Chase & Co., 916 F.3d 494, 494 (5th Cir. 2019); Iafolla, *supra* note 108.

112 916 F.3d 494 (5th Cir. 2019).

113 *Id.* at 498.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 501.

The Fifth Circuit primarily relied on Justice Scalia's dissenting opinion in *Hoffmann-La Roche*, concluding that sending notice to individuals with arbitration agreements only serves to "stir[] up litigation."[118] The court further concluded that the party alleging the existence of a valid arbitration agreement should submit evidence of such an agreement, and the agreement's validity should be determined before notice has been sent to any putative collective action members.[119] In doing so, the court dismissed the Plaintiff's argument that "all putative collective members—including Arbitration Employees—have a right to be given notice of any FLSA claims that they might have, even if they cannot join the current collective action."[120]

In 2020, the Seventh Circuit became the second appellate court to decide that arbitration-bound individuals should be excluded from receiving notice in FLSA collective action proceedings.[121] In *Bigger v. Facebook, Inc.*,[122] the plaintiff was an "exempt" Client Solutions Manager ("CSM") in Facebook's advertising department and therefore unable to collect overtime for hours worked in excess of a standard forty-hour workweek.[123] She brought a suit claiming Facebook violated the FLSA by denying her, and other CSMs at her level, overtime pay.[124] The Plaintiff sought certification of her proposed collective and requested that the court authorize notice.[125] Facebook argued that notice was improper because approximately seventy-eight percent of CSMs at the plaintiff's level had signed arbitration agreements and therefore were ineligible to join the lawsuit.[126]

Like the Fifth Circuit, the Seventh Circuit held that notice to employees with valid arbitration agreements was improper; additionally, the Seventh Circuit proposed a new framework for approaching notice when these cases arise.[127] Under the Seventh Circuit's approach, when a defendant claims that potential notice recipients have signed arbitration agreements, "[f]irst, the court must determine whether a plaintiff contests the defendant's assertions about the existence of valid arbitration agreements entered by proposed notice recipients."[128] If the plaintiff disputes the defendant's arbitration agreement claims,

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118 *Id.* at 502 (quoting Hoffmann-La Roche v. Sperling, 493 U.S. 165, 181 (1989) (Scalia, J., dissenting)).

119 *Id.* at 503.

120 *Id.*

121 Bigger v. Facebook, Inc., 947 F.3d 1043, 1047 (7th Cir. 2020).

122 947 F.3d 1043 (7th Cir. 2020).

123 *Id.* at 1047.

124 *Id.*

125 *Id.* at 1048.

126 *Id.* at 1048 & n.3.

127 *See id.* at 1047, 1050.

128 *Id.* at 1050.

"the court must permit the parties to submit additional evidence on the agreements' existence and validity[]," and in such instances, the production burden falls on the defendant "to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice."[129] After litigating the validity of the arbitration agreement, the court may only then authorize notice to putative plaintiffs, excluding all individuals with valid arbitration agreements "unless the record reveals that nothing in the agreement would prohibit that employee from participating in the action."[130]

Like the court in *In re JP Morgan Chase*, the court in *Bigger* also relied on the *Hoffmann-La Roche* decision.[131] However, instead of solely focusing on Justice Scalia's dissent, the court in *Bigger* concentrated its analysis on *Hoffmnan La-Roche*'s efficiency rationale.[132] The efficiency rationale focuses on the ability of employees to work collectively to obtain relief for unfair workplace practices by litigating similar issues in one lawsuit.[133] When it comes to providing notice to individuals bound by arbitration agreements, the court found that the efficiency rationale cuts both ways.[134] On the one hand, the court asserts, it may be more efficient to send notice to everyone impacted and, after more discovery has occurred, sever any opt-in plaintiffs who are not able to join the action.[135] On the other hand, the court recognizes that by sending notice to individuals who may not be able to join the lawsuit, the court will have to supervise the addition of parties who may be severed as soon as the validity of the arbitration agreement is litigated.[136] Therefore, the court determined that providing notice to arbitration-bound individuals could be regarded as both efficient or inefficient and that *Hoffmann La-Roche*'s efficiency rationale "neither favors nor disfavors" the court's outcome.[137] Ultimately, the *Bigger* court underscored that "the risk is high that the notice will appear to facilitate abuse of the collective-action device and thus place a judicial thumb on the plaintiff's side of the case."[138] Given this risk, the court held that notice should only be sent to putative plaintiffs after the parties have litigated the validity of

129 *Id.*
130 *Id.*
131 *See id.* at 1049–50.
132 *See id.*
133 *Id.* at 1049.
134 *Id.* at 1050.
135 *Id.*
136 *See id.*
137 *Id.*
138 *Id.*

any arbitration agreement, and that any individuals subject to a valid agreement should not receive notice.[139]

In May 2023, the Sixth Circuit also weighed in on the issue in its decision in *Clark v. A&L Homecare and Training Center, LLC*.[140] In *Clark*, a group of home-health aids brought suit against their employer, A&L Homecare, alleging that the company failed to pay them the correct overtime rate under the FLSA and hadn't properly reimbursed them for their out-of-pocket vehicle expenses.[141] After filing the suit, the plaintiffs asked the district court to facilitate notice to other employees who had worked for the company.[142] After applying the two-step test for "certification," the district court authorized notice to former employees.[143] However, the district court did not authorize notice to employees who had valid arbitration agreements with A&L.[144]

Similar to the Fifth and Seventh Circuits, the Sixth Circuit rejected plaintiffs' request to provide notice to other employees early in the lawsuit.[145] However, instead of adopting an existing approach to collective action notice, the Sixth Circuit established yet another standard: putative Plaintiffs must show a "strong likelihood" that employees are similarly situated before the court will authorize notice.[146] This standard, which is comparable to the standard required for preliminary injunctions, "requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance."[147] When applying this standard to the facial validity of an arbitration agreement in the notice context, the court held that the validity of arbitration agreements should be litigated at the outset of the lawsuit, prior to sending notice to other potential plaintiffs.[148] In making this determination, however, the Sixth Circuit is careful to distinguish its decision from *JP Morgan Chase* and *Bigger v. Facebook*.[149] The Court also rejects Plaintiffs' arguments that litigating the validity of arbitration agreements is a "merits" question, an argument advanced by "pronotice" courts below.[150]

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139 *Id.*

140 68 F.4th 1003 (6th Cir. 2023).

141 *Id.* at 1008.

142 *Id.*

143 *Id.*

144 *Id.*

145 *See id.* at 1011–12.

146 *Id.* at 1011.

147 *Id.*

148 *Id.* at 1012.

149 *Id.* at 1011–12 ("We therefore respectfully disagree that district courts can or should determine, 'by a preponderance of the evidence,' whether absent employees have agreed to arbitrate their claims.") (citing *In re* JPMorgan Chase & Co., 916 F.3d 494, 503 (5th Cir. 2019) and Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020)).

150 *Id.* at 1012. *See generally infra* Section II.B.

B. On the Right Track: Pronotice Approaches

Despite the Fifth and Seventh Circuit decisions denying notice to arbitration-bound employees, some district courts maintain that all employees, regardless of their arbitration status, should receive notice of a pending claim.[151] For example, the district court in *Bruno v. Wells Fargo Bank* determined that arbitration-bound employees should receive notice of a pending collective action.[152] In *Bruno*, the plaintiff sought collective action certification and notice to other "similarly situated" Wells Fargo Home Mortgage Consultants, arguing that Wells Fargo violated the FLSA by requiring employees to work off the clock and by engaging in other business practices that resulted in employees making less than minimum wage.[153] Wells Fargo opposed notice, arguing that all Home Mortgage Consultants hired after 2015 had signed arbitration agreements, which the bank claimed covered any employment disputes, including FLSA claims.[154]

The district court approved notice to potential collective members, even those who had signed arbitration agreements, stating that Wells Fargo's argument about arbitration was "premature" because the court "ha[s] no ability to determine whether certain arbitration agreements are enforceable against potential opt-in plaintiffs, and to hold otherwise would cause further delays in the FLSA notice process."[155]

Other district courts have also addressed this issue and have directly disputed the Fifth Circuit's reasoning in *In re JPMorgan Chase*.[156] In *Romero v. Clean Harbors Surface Rentals USA, Inc.*,[157] a district court in the First Circuit criticized the Fifth Circuit's reliance on Justice Scalia's dissenting opinion in *Hoffmann-La Roche* and found that *Hoffmann-La Roche*'s broad grant of authority to district courts in facilitating notice was proper, even when individuals had signed arbitration agreements.[158] In making this determination, the court noted that "[n]owhere in the majority's opinion did it suggest that trial courts were required to make sure that the only workers receiving notice of an FLSA collective action were those actually capable of joining the action."[159] The court further explained that excluding employees who had signed arbitration.

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151 *See, e.g.*, Bruno v. Wells Fargo Bank N.A., No. 2:19-cv-00587, 2021 WL 964938, at *6 (W.D. Pa. Mar. 15, 2021) (this decision was stayed pending a Third Circuit appeal).

152 *Id.* at *5–6.

153 *Id.* at *1.

154 *Id.* at *6.

155 *Id.*

156 *See, e.g.*, Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 533–34 (D. Mass. 2019).

157 *Id.*

158 *Id.* at 533.

159 *Id.*

agreements from the notice process would require a plaintiff who has brought an action to contest the validity of an arbitration agreement to which he is not a party, an issue that employees without arbitration agreements may not have standing to address.[160]

Given these issues, the *Romero* court determined that it lacked the authority to assess the existing arbitration agreements and that therefore, "[t]he more sensible approach is for Plaintiff to send notice to the Arbitration Workers" at the outset of the lawsuit.[161] Under this approach, all affected individuals would receive notice of the action and "[a]ny that wish to join [the] action may challenge the validity and/or enforceability of their Arbitration Agreements . . . [and] [i]f their agreements are found to be either invalid or unenforceable, they may then join the collective action."[162] District courts in the Fourth, Ninth, and Eleventh Circuits have authorized notice to individuals who have signed arbitration agreements along similar lines.[163]

Proponents of notice have raised a number of arguments in favor of providing notice to individuals governed by arbitration agreements. Chief amongst these arguments is the observation that at step one of the "Two-Step" approach, plaintiffs must only meet a limited evidentiary bar to show that they are "similarly situated," and therefore, at this stage, courts do not have enough evidence to determine the validity of arbitration agreements.[164] Pronotice advocates have also argued that the purpose of the FLSA is to protect workers who may have been subject to unfair labor practices, and failure to alert potentially impacted workers of the pendency of a claim runs contrary to the overall statutory

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160 *Id.* at 534.

161 *Id.* at 534–35.

162 *Id.* at 535.

163 *See* Monplaisir v. Integrated Tech Grp., LLC, No. C 19-01484, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) (holding that the validity of arbitration agreements covering 1,400 individuals out of a proposed class of 2,680 was best left to step two of the collective action "certification" process and therefore that all potential collective members should receive notice at stage one); Williams v. Omainsky, No. 15-0123, 2016 WL 297718, at *8 (S.D. Ala. Jan. 21, 2016) ("By signing the [Arbitration] Agreement, putative opt-in plaintiffs did not forfeit the right to receive notice of this litigation or to pursue FLSA claims . . . they merely agreed to a different forum and procedure for resolving such disputes. Therefore, these individuals are properly afforded notice just like all other prospective class members."); Gordon v. TBC Retail Grp., Inc., 134 F. Supp. 3d 1027, 1039 n.9 (D.S.C. 2015) (finding that conditional certification of a class, and therefore notice to similarly situated employees, was proper even though many employees had signed arbitration agreements, because declining to include arbitration-bound employees "prematurely assumes that such arbitration agreements are enforceable"); Amrhein v. Regency Mgmt. Servs., LLC, No. 13-1114, 2014 WL 1155356, at *10 (D. Md. Mar. 20, 2014) (finding that plaintiffs with arbitration agreements could be included in the "conditional certification" stage of a collective action and therefore receive notice).

164 *See, e.g.*, Weckesser v. Knight Enters. S.E., LLC, No. 2:16-CV-02053, 2018 WL 4087931, at *2–3 (D.S.C. Aug. 27, 2018).

purpose of the FLSA.[165] Others have posited that individuals have a "right to receive notice,"[166] especially because wage theft is particularly detrimental to low wage workers who may otherwise be unaware of their rights to challenge an employer's unfair wage practices.[167]

III. A Better Way Forward

Although the approaches advanced by circuit courts have served as an interim stop-gap measure in dealing with the intersection of collective action and arbitration notice issues, these measures alone are not sufficient to address such a complex procedural hurdle in the long-term. Instead, the Supreme Court, pursuant to the Rules Enabling Act, should adopt a new Federal Rule of Civil Procedure ("FRCP") to instruct district courts on when notice is appropriate for all individuals, including individuals who have signed arbitration agreements. Such a rule should be lenient in its initial authorization of notice to bring courts back in line with the FLSA's primary purpose, protecting workers and their workplace rights, while also including interim steps where defendants may request that a court sever opt-in plaintiffs who cannot proceed with the action. This rule should be similar in form and substance to FRCP 23(c)(2), which governs notice requirements for class actions[168]—with specific modifications that address the challenges of notice in collective action proceedings with arbitration-bound individuals. Promulgation of such a rule is necessary to ensure that individual employees have recourse for workplace violations and that courts have a set procedure for uniformly handling collective actions to prevent forum shopping and unequal enforcement of the FLSA.

A. Why Current Approaches Are Not Enough

Although district courts in some circuits have authorized notice to arbitration-bound putative plaintiffs, allowing district courts—and even circuit courts—to establish notice standards on an ad-hoc basis may result in inconsistent precedent, unclear legal standards, and forum shopping, making future enforcement of the FLSA difficult for both employers and employees. Because disputes over sending notice to arbitration-bound employees arise early in a lawsuit, the issue rarely

165 *See* Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 533 (D. Mass. 2019); Getman & Getman, *supra* note 89, at 452–54.

166 *See Williams*, 2016 WL 297718, at *8.

167 *See* Ruan, *supra* note 14, at 1121–22.

168 *See* Fed. R. Civ. P. 23.

makes it to appellate courts.[169] This is primarily because such early procedural decisions are not considered "final" and consequently are not ripe for review.[170] Therefore, approaching this issue on a case-by-case or circuit-by-circuit basis could result in a circuit split, which may lead to inconsistent application of the FLSA for different employees depending on where they live.[171] This may unfairly disadvantage individuals in jurisdictions where notice to arbitration-bound employees is prohibited, by preventing them from joining a lawsuit that plaintiffs in another jurisdiction would have been permitted to join.[172] Such differences in the law could also result in employees forum shopping for better jurisdictions to file their lawsuit.[173]

Additionally, the approaches adopted by current circuit and district courts do not fully address all of the issues surrounding notice to arbitration-bound individuals and are often contradictory. For example, individuals who argue that class or collective litigation disadvantages defendants by requiring them to incur large litigation costs have failed to consider the increased burden placed on defendants by requiring them to respond to hundreds of individual claims.[174] In fact, responding to multiple arbitration claims at once can be more expensive and burdensome than proceeding with a traditional aggregate lawsuit.[175] Therefore, an approach that considers both the purpose of the FLSA and the intent of Congress is required going forward.

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169 *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 436 (5th Cir. 2021) ("FLSA collective actions rarely (if ever) reach the courts of appeals at the notice stage because 'conditional certification' is not a final judgment.").

170 *See id.*

171 *See* Iafolla, *supra* note 108.

172 *Compare* Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020) (holding that arbitration-bound employees were not permitted to receive notice of a pending collective action until after the court had determined the validity of any arbitration agreements), *with* Bruno v. Wells Fargo Bank N.A., No. 2:19-cv-00587, 2021 WL 964938, at *6–7 (W.D. Pa. Mar. 15, 2021) (allowing arbitration-bound individuals to receive notice of a pending collective action prior to a review of a disputed arbitration agreement).

173 Forum shopping is of general concern to FLSA litigators. *See* Frank C. Morris, Jr., *Can Employers Now Thwart Forum Shopping by Plaintiffs in FLSA Class & Collective Actions?*, Nat'l L. Rev. (Mar. 11, 2019), https://www.natlawreview.com/article/can-employers-now-thwart-forum-shopping-plantiffs-flsa-class-collective-actions_[https://perma.cc/3BDF-PNLE]. The effect of the recent Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 582 U.S. 256 (2017), which addresses personal jurisdiction and forum in FLSA collective actions, is outside of the scope of this Note. *See also* Recent Case, Waters v. Day & Zimmermann NPS, Inc., *23 F.4th 84 (1st Cir.)*, cert. denied, *142 S. Ct. 2777 (2022)*, 136 Harv. L. Rev. 990, 996 (2023) (an example of how a circuit split concerning the FSLA created a difference in the law that encourages forum shopping in FLSA claims). This procedural issue is also beyond the scope of this Note.

174 *See* Mulvaney, *supra* note 81 ("The AAJ report found that companies, including Amazon.com Inc., American Express Co., and AT&T, at times faced more than 10, and sometimes over 100, arbitration filings in a single day.").

175 *Id.*

B. Returning to the Roots of the FLSA: Why Notice Should be Sent to Arbitration-Bound Individuals Despite Arguments to the Contrary

As the Supreme Court noted in *Hoffmann-La Roche*, there are two key justifications for allowing notice to putative plaintiffs in a collective action—enforcement and efficiency.[176] Both of these goals tend to favor notice to all individuals impacted by an unfair labor practice under the FLSA regardless of their arbitration status.

The FLSA's enforcement goal weighs in favor of sending notice to individuals who are governed by arbitration agreements because allowing employees to proceed collectively both deters employer wrongdoing and aligns with Congress's intent for enacting the FLSA. As noted previously, collective action proceedings may act as a deterrent for employers engaging in unlawful wage and hour practices because by doing so, they open themselves up to aggregated lawsuits that may result in large judgments or settlements.[177] Sending notice to all individuals whose rights may have been violated is a key step to making such aggregate lawsuits effective.[178] Without notice, affected individuals may know that their rights have been violated, but they may not be aware that there is recourse for such violations.[179] Providing individuals with notice that their rights may have been violated and with information telling them how they may seek compensation for those violations will encourage employees to seek enforcement of their rights and put pressure on employers to stop committing widespread wage and hour violations.[180]

Additionally, allowing arbitration-bound individuals to receive notice of a collective action aligns with Congress's intent to prevent employers from circumventing FLSA requirements through other measures.[181] Tools such as requiring arbitration or banning collective actions act as a new "intermediar[y]" that defendants may use to side-step enforcement of the FLSA through costly litigation.[182] Sending notice to employees that their workplace rights may have been violated helps to

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176 Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170–71 (1989).

177 Ruan, *supra* note 14, at 1122.

178 *Id.*

179 *See id.*; *see also* Recent Case, *supra* note 100, at 2608.

180 *See* Ruan, *supra* note 14, at 1122.

181 Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 Cornell L. Rev. 557, 571 (2019) ("The FLSA's legislative history illustrates that the FLSA's framers intended to reduce incentives for businesses to use intermediaries, or to change form, in order to gain exclusion from the Act's coverage.").

182 *Id*. at 571. Griffith argues that the framers of the FLSA were concerned about "intermediar[y]" measures like misclassification as a tool for employers to avoid the FLSA's requirements. *Id.* Although tools like collective action bans and arbitration agreements were not in widespread use at the time of the FLSA's enactment, it follows that these new mechanisms—which

rebuild the effectiveness of a collective action lawsuit.[183] Because collective actions require affected employees to opt-in, such suits demand an affirmative step by employees which can only occur once an employee is aware of the potential rights violation.[184]

Although taking such a pronotice approach to arbitration-bound employees is criticized by opponents as a "solicitation of claims,"[185] it reflects a concern for FLSA enforcement on a broader scale.[186] Providing notice to all employees impacted by a potential FLSA violation may result in the filing of more claims, because "learning of a colleague's collective action (and their employer's potential FLSA violation) may spur [an employee] to bring their own individual arbitrations against their employer."[187] However, including arbitration-bound employees in the FLSA notice process can "promote transparency[,] . . . reduce confusion among employees," and emphasize that all employees have enforceable FLSA rights.[188] So although antinotice cohorts may be correct in their assumption that notice may result in additional FLSA claims, the fact that such claims may serve as both a deterrent and a punishment for those who violate the FLSA seems more in line with the enforcement rationale posited by the court in *Hoffmann-La Roche*.

Although the efficiency rationale for providing notice to arbitration-bound employees is not quite as strong as the enforcement rationale—because allowing notice requires courts to assess the validity of the underlying arbitration agreement—on balance, efficiency also seems to favor providing notice to arbitration-bound individuals. As pronotice courts have explained, a key aspect of determining whether an arbitration-bound individual may join an action after they have opted-in is determining the validity of any arbitration agreement that they have signed.[189] If arbitration-bound individuals are provided with notice early in a suit, they may opt-in and the parties may then litigate the validity of said arbitration agreement now that an arbitration-bound employee has joined the action.[190] If the agreement is valid, the court may sever all arbitration-bound employees at once

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attempt to avoid enforcement—would qualify as "intermediaries" had they been more prominent at the time of enactment. *Id.*

183 *See* Ruan, *supra* note 14, at 1122.

184 *See id.* at 1121–22.

185 *See In re* JPMorgan Chase & Co., 916 F.3d 494, 504 (5th Cir. 2019) (quoting Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989)).

186 *See* Recent Case, *supra* note 100, at 2605.

187 *Id.* at 2608. The author of this source argues that this is a net positive for plaintiffs because notice to arbitration-bound individuals serves a broad purpose of "promot[ing] the FLSA's remedial and enforcement goals." *Id.*

188 *Id.*

189 *See, e.g.*, Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 534–35 (D. Mass. 2019).

190 *See, e.g.*, *id.* at 535.

and prevent all other employees governed by the same agreement from joining the action at a later date.[191] If the agreement is invalid, the parties have already opted-in and the court may therefore proceed directly with the merits of the claim.[192]

This process seems more efficient than only providing notice to certain individuals who have not signed arbitration agreements, as individuals with arbitration agreements may hear of the action from their colleagues and then attempt to join the action at a later date. This would still require the court to determine the validity of the arbitration agreement.[193] If the court finds the arbitration agreement invalid after it has denied notice, the plaintiff can move to send notice again, which would only add more time to the lawsuit.[194]

Therefore, on balance, the twin goals of enforcement and efficiency seem to support sending notice to arbitration-bound individuals early in the collective action process. Furthermore, adoption of a new Federal Rule of Civil Procedure, which balances the concerns of both employees and employers, is necessary to ensure that these goals are at the forefront of every collective action certification decision.

IV. Next Steps: A New Federal Rule of Civil Procedure Governing Notice in FLSA Collective Actions

In 1934, Congress adopted the Rules Enabling Act,[195] which granted the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[196] Pursuant to the Rules Enabling Act, the Supreme Court should promulgate a new FRCP ("Proposed Rule") that establishes a framework for sending notice to "similarly situated" individuals in collective actions. The Proposed Rule should include a procedure for courts to follow when sending notice to all individuals, including those who have signed arbitration agreements, in order to help courts manage the myriad of procedural issues that exist with FLSA collective actions given the lack of statutory or appellate court guidance. Enacting such a rule will assist employees, who generally have less bargaining power in the workplace, while simultaneously

191 *See id.*

192 *See id.*

193 *See id.*

194 Although this issue hasn't arisen yet with arbitration-bound putative plaintiffs, generally plaintiffs do have the ability to renew motions for certification in collective action proceedings. *See, e.g.*, Brown v. Barnes & Noble, Inc., No. 1:16-cv-07333, 2018 WL 3105068, at *5–6 (S.D.N.Y. June 25, 2018).

195 28 U.S.C. § 2072.

196 *Id*. § 2072(a).

creating uniformity in collective action procedures regardless of where the lawsuit is initially filed.

This Proposed Rule should mirror the structure and content of the current class action notice provision—FRCP 23(c)(2).[197] FRCP 23(c)(2) provides an effective baseline for the Proposed Rule because class and collective actions share a key characteristic: both are types of mass litigation where courts may provide notice to other individuals who may not be aware that a lawsuit has been filed on their behalf, and individuals joined in such a lawsuit may litigate their claims together.[198] As noted above,[199] the key difference between class and collective actions is that collective actions require potential plaintiffs to opt-in to the action in question, whereas class members are joined automatically and must opt-out of the suit if they do not want to participate.[200] Given the similarities between class and collective actions, the widespread acceptance of FRCP 23(c)(2), and courts' familiarity implementing the rule, FRCP 23(c)(2) provides a helpful framework for a rule governing collective action notice.

FRCP 23(c)(2) specifies that courts must authorize "the best notice that is practicable under the circumstances" to the members of a class.[201] The rule also indicates that notice must include information regarding the pending claim, including who the class encompasses, what the action is about, how an individual may opt-out of the class, and the binding effect of a judgment on class members.[202] The Proposed Rule below adopts many of the provisions of FRCP 23(c)(2) while simultaneously accounting for the threshold opt-in and severance procedures that are unique to collective actions.

A. Proposed Rule: Notice Provisions in Collective Actions

1. Notice[203]

(A) When any collective makes a minimum showing that individuals are "similarly situated," the court may direct appropriate notice to the collective. The notice must clearly and concisely state in plain, easily understood language:
   i. The nature of the action;
   ii. The definition of the collective approved by the court;
   iii. The collective claims, issues, or defenses;

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197 *See* FED. R. CIV. P. 23(c)(2).

198 *See* Valte v. United States, 155 Fed. Cl. 561, 566–67 (2021).

199 *See supra* Part I.

200 *See Valte*, 155 Fed. Cl. at 566–67.

201 FED. R. CIV. P. 23(c)(2)(B).

202 FED. R. CIV. P. 23(c)(2)(B)(i)–(vii).

203 The text of this proposal adopts language from Rule 23(c)(2). *See* FED. R. CIV. P. 23(c)(2).

iv. That the collective is not binding on an individual unless they choose to opt-in to the action;
v. Instructions for filing an opt-in form to join the action;
vi. The binding effect of a collective judgment on members who choose to opt-in to the suit;
vii. Notice that the court may, upon a finding that individuals are not similarly situated, barred from proceeding with the action, or that claims require individualized defenses, sever opt-in plaintiffs from the pending action.

(B) If any party challenges the appropriateness of notice to members of the putative collective on the grounds that such individuals have agreed to arbitrate, mediate, or otherwise resolve their claims outside of a court of law, the parties shall proceed as follows:
i. The court may direct appropriate notice to the collective per (1)(A), despite any agreement to alternatively resolve disputes, after determining individuals are "similarly situated;"
ii. If an individual who has agreed to arbitrate, mediate, or otherwise resolve their claims outside of a court of law files an opt-in form with the court, the court shall determine the validity of the arbitration agreement before proceeding any further in the action.
a) If the agreement in question is found to be valid, the court will sever all individuals who have agreed to alternative dispute resolution and proceed only with plaintiffs without valid agreements; but
b) If the agreement is not valid, the suit will proceed with all individuals as joined, subject to section (1)(A)(vii) above.

(C) Upon a plaintiff's motion for authorization to send notice to "similarly situated" individuals and defendant's response indicating that a portion of the putative collective has agreed to alternative dispute resolution in the form of arbitration, mediation, or other agreement, the court shall determine the validity of the arbitration agreement by:
i. Defendant may advance their case that the agreement is valid;
ii. Plaintiff will have the opportunity to challenge the validity of the agreement;
iii. Defendant may offer evidence to rebut the plaintiff(s) claims;
iv. Court will then rule on the validity of the agreement.

a) If the agreement is valid, all opt-in plaintiffs subject to the agreement will be severed from the action; but
b) If the agreement is invalid, the claims will proceed on the merits.

Providing notice to arbitration-bound employees effectively closes the loophole that plaintiffs claim mandatory employment arbitration agreements have created in employee workplace rights by ensuring that all impacted individuals receive notice at the outset of a lawsuit that their workplace rights may have been violated and that they can seek recovery.[204]

Although initially allowing potential putative collective members to receive notice, the rule allows defendants to sever employees once their agreements have been validated.[205] For example, an individual employee may file a collective action in court alleging that their rights have been violated under the FLSA and move to send notice to other similarly situated employees per § 216(b) of the FLSA.[206] A defendant may then oppose notice and allege that members of the proposed collective are governed by a mandatory arbitration clause or that employees have waived their right to proceed with a collective action.[207] Now, however, instead of the court conducting an ad hoc analysis and creating its own method for determining whether arbitration-bound employees may proceed as part of the collective action,[208] the court would follow the provisions laid out in Proposed Rule (1)(B).[209] Under Proposed Rule (1)(B)(i), the court should first determine whether the employees in question are "similarly situated."[210] To determine whether employees are similarly situated, the court will follow established precedent.[211] If the court determines that employees are similarly situated, it may authorize notice to all similarly situated individuals, including those employees with arbitration agreements.[212] Similar to the notice provided in class actions, the collective action notice will explain the nature of the lawsuit, who is eligible to join, and how to opt in.[213] Depending on who opts in to the action, the court will then follow one of three potential paths:

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204 *See* Mulvaney, *supra* note 81.

205 *See supra* Proposed Rule (1)(B)(ii)(a).

206 *See* 29 U.S.C. § 216(b).

207 *See, e.g.*, Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020).

208 *See, e.g.*, *id.* at 1050–51.

209 *See supra* Proposed Rule (1)(B).

210 *See supra* Proposed Rule (1)(B)(i).

211 *See supra* note 50.

212 *See supra* Proposed Rule (1)(A).

213 *See supra* Proposed Rule (1)(A)(i)–(vii).

No Arbitration-Bound Employees. The first path only arises if no employees who have signed arbitration agreements opt into the action. If no arbitration-bound employees file their opt-in paperwork with the court, the court has no need to determine the validity of any existing arbitration agreements, and the court will proceed with the collective action suit pursuant to existing common law.

Valid Arbitration Agreement. If an employee who has signed an arbitration agreement opts in to the action after notice has been sent, the court will evaluate the validity of the arbitration agreement pursuant to Proposed Rule (1)(C).[214] To challenge the validity of the arbitration agreement, employees may testify to a variety of fact-specific issues, including that the arbitration agreement in question lacked consideration, that the employee did not consent to or acknowledge arbitration, or that the agreement was "procedurally unconscionable."[215] If the court determines that the agreement is valid, any opt-in plaintiffs covered by the valid arbitration agreement will be severed from the lawsuit per Proposed Rule (1)(B)(ii)(a).[216] Although the individuals may be severed from the existing action, they have been made aware of their rights and can choose to proceed with their claims in arbitration.[217] Although severed plaintiffs will not be able to proceed in the current action, this process still promotes the FLSA's enforcement rationale because affected individuals have been made aware of their rights, the potential violation of those rights, and they can still seek to enforce the FLSA through arbitration of their claims.[218] This process also supports efficiency, because the court will determine at an early stage, once all the opt-in requests have been received, which plaintiffs who are interested in joining the suit may proceed with litigation and which plaintiffs must proceed with their claims through arbitration.[219]

Invalid Arbitration Agreement. If an employee with an arbitration agreement opts into the action and the court determines that the arbitration agreement is invalid for one or more of the reasons detailed above, the employee will be permitted to join the action, and the court will proceed with the litigation like normal.[220] Making a determination on the validity of the agreement after notice has been sent to employees with arbitration agreements supports the efficiency rationale. If the court had not sent notice to all potential opt-ins including individuals governed by arbitration clauses, they may face another motion to

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214 *See supra* Proposed Rule (1)(C).

215 Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1011 (6th Cir. 2023).

216 *See supra* Proposed Rule (1)(C)(iv)(a), (B)(ii)(a).

217 *See supra* Proposed Rule (1)(B)(ii)(a).

218 *See* Recent Case, *supra* note 100, at 2608; *see also supra* Section III.B.

219 *See supra* Proposed Rule (1)(B).

220 *See supra* Proposed Rule (1)(C)(iv)(b).

provide notice to all individuals once the agreement has been deemed invalid.[221] This would delay proceedings as the parties argue the renewed motion and as the court considers whether additional notice would be proper. By providing such notice early in the suit, all similar claims can be joined in one lawsuit after one period of notice and deliberation on the validity of the arbitration agreement in question.

Ultimately, this Proposed Rule will bring FLSA collective action notice requests back in line with the purpose of the FLSA and the Supreme Court's interpretation of notice in *Hoffmann-La Roche* by ensuring enforcement of the FLSA's workplace rights provisions and by efficiently aggregating similar claims into one lawsuit. Although the Rule proposes sending notice to all eligible plaintiffs at the start of a collective action, it still gives defendants several opportunities to sever individuals from the suit who have lawfully agreed to arbitrate their claims.[222] By sending notice to all potentially impacted individuals, the Proposed Rule increases the chances that individuals who would not have filed a suit on their own, file an opt-in to join an existing action. Although this may result in more damage awards to plaintiffs, it may also deter defendants from committing mass wage and hour violations in the first place.[223] Therefore, the benefits to plaintiffs, who generally have less bargaining power and fewer resources, should prevail. Additionally, instead of requiring courts to adopt different procedures which treat plaintiffs and defendants across circuits differently, the Proposed Rule will establish one centralized procedure to ensure consistent outcomes regardless of where the lawsuit is filed.

Conclusion

Collective action lawsuits are an important tool that help low-income employees overcome their limited leverage and unequal bargaining power with their employer. As a result, the enforcement mechanism in the FLSA has corrected some of the inherent inequality present in the employee–employer relationship. However, because employees have been successful in enforcing their rights and in securing large damage awards, employment contracts with arbitration agreements that prohibit such actions are on the rise. These arbitration agreements often limit an employee's ability to bring a lawsuit with other "similarly situated" individuals in their workplace. Because of the small individual recovery amounts these lawsuits result in, limiting

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221 *Cf.* Smith v. United States, 163 Fed. Cl. 155, 161, 164 (2022) (illustrating that employees may submit renewed motions for conditional certification of collective actions after a previous motion has been granted in part and denied in part).

222 *See supra* Proposed Rule (1)(B).

223 Ruan, *supra* note 14, at 1122.

an employee's ability to bring a suit collectively disincentivizes them from bringing an action at all. As courts attempt to navigate this difficult balance between employer and employee interests, they must also attempt to make sense of a morass of complex collective action procedural hurdles. One such hurdle, when to provide notice to employees of the pendency of a collective action, lacks any consensus among circuit or district courts.

Only three circuits have denied sending notice to individuals governed by arbitration agreements, while a handful of district courts across the country have approved such notice. Because notice is such an early step in a collective action litigation, many district court decisions on the issue do not get appealed. Nonetheless, providing notice to arbitration-bound individuals is hotly contested by parties. Therefore, a new FRCP that balances party interests while providing clear guidance to courts on how best to proceed with collective action notice in the future will help clarify one step in an increasingly complex litigation process. Although the rule proposed by this Note does not solve all of the issues presented by collective action litigation, it is hopefully one step forward in untangling a process that is vital to protecting disadvantaged employees from unfair and unlawful wage and hour abuses.