Legal Update Article

Ninth Circuit Hands Employers Split Decision on Key Procedural Aspects of FLSA Collective Actions

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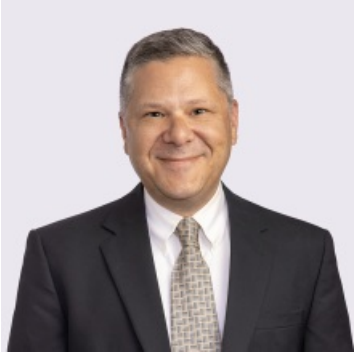

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Takeaways

- The Ninth Circuit joins the solid majority of federal circuits in holding the U.S. Supreme Court's *Bristol-Myers* decision applies to FLSA collective actions, thereby making it much harder for employees to forum shop when pursuing nationwide collective actions.
- However, the appellate panel preserved the circuit's use of two-stage "conditional" certification of putative FLSA collective actions, which typically lets plaintiffs proceed on a collective basis based on a minimal showing they are similarly situated to other employees on whose behalf they seek to proceed.
- The court also held out the possibility that employees who *may* have binding arbitration agreements preventing them from proceeding with their claims in court could receive notice of a pending collective action.

Related links

- *Harrington v. Cracker Barrel*
- Seventh Circuit Stands Firm on *Bristol-Myers* Application: Employee Forum Shopping on Collective Actions Gets Harder
- Sixth Circuit Adopts New Standard to Decide Whether to Send Notice to Potential FLSA Opt-Ins

Article

A recent decision by the U.S. Court of Appeals for the Ninth Circuit hit a trifecta of important legal procedures affecting litigation of Fair Labor Standards Act (FLSA) collective actions. *Harrington v. Cracker Barrel Old Country Store, Inc.*, Nos. 23-15650, 24-1979 (July 1, 2025). The result was a partial win for employers and a growing split among the circuits that makes it harder to navigate these evolving procedural questions when defending such cases.

First: The Ninth Circuit held the U.S. Supreme Court's *Bristol-Myers Squibb Co. v. Superior Court of California,* 582 U.S. 255 (2017), applies to FLSA collective actions, which makes it harder for employees to forum shop when pursuing nationwide collective actions.

Second: The appellate panel declined, however, to abandon the "generally accepted" two-stage certification process for collective actions.

Third: The appeals court held that district courts do not have to resolve a dispute over whether prospective opt-in plaintiffs are subject to arbitration before sending them notice of the right to participate in a collective action.

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana,

Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

Proposed Collective Action

In *Harrington*, servers who worked at Cracker Barrel restaurants in Arizona filed a putative collective action in Arizona federal court alleging the restaurant chain's tip credit policy violated the FLSA. Cracker Barrel argued that notice of the collective action should not be sent to current and former employees outside of Arizona, over whom the court does not have personal jurisdiction. It also contended notice should not go to current and former employees who arguably waived their right to sue in court in an arbitration agreement.

The district court rejected the employer's arguments. It found the plaintiffs met their low preliminary burden of showing potential opt-in plaintiffs were similarly situated. Therefore, the court granted conditional certification and issued nationwide notice of the collective action.

Bristol-Myers Applied

Addressing a case of first impression, the Ninth Circuit panel ruled that *Bristol-Myers* applies to FLSA collective actions. It joins the clear majority of federal circuit courts to have decided the issue: the Third, Sixth, Seventh, and Eighth Circuits; only the First Circuit has held otherwise. (See Seventh Circuit Stands Firm on *Bristol-Myers* Application: Employee Forum Shopping on Collective Actions Gets Harder.)

The emerging consensus is that out-of-state plaintiffs cannot join a collective action unless the forum court has general jurisdiction over the defendant-employer. Where the court's personal jurisdiction is based on specific jurisdiction rather than general jurisdiction, each opt-in plaintiff's claim must have a sufficient connection to the defendant's activities in the forum state. Courts must determine jurisdiction as to each individual claim, not just as to the suit as a whole. This means an employer may not be subjected to a nationwide collective unless the plaintiffs sue in the state where the employer is headquartered or incorporated (in this case, Tennessee).

Because the Arizona federal court did not have jurisdiction over the claims of employees who worked for Tennessee-based Cracker Barrel outside Arizona, the Ninth Circuit held the district court erred in granting preliminary certification to a nationwide collective and in authorizing nationwide notice. Thus, the appeals court narrowed the potential collective from more than 106,000 employees nationwide to the 3,000 or so who worked in Arizona. The panel remanded the case to the district court to reconsider preliminary certification.

In the growing number of circuits that have adopted *Bristol-Myers* in the FLSA context, collectives will be limited to employees in the state where the suit is filed. However, an employer still faces the prospect of a nationwide FLSA collective action brought against them in the state in which it has its principal place of business, is incorporated, or is subject to general jurisdiction.

Application of *Bristol-Myers* to FLSA collective actions already has caused an uptick in suits filed in the state where a company is headquartered. This trend is likely to continue.

Two-Step Certification Affirmed

The Ninth Circuit preserved the two-step process for certifying collective actions, explaining that it was bound by its precedent in *Campbell v. City of Los Angeles,* 903 F.3 1090 (2018). It rejected the trend in other circuits.

The two-step framework allows a court to grant preliminary (or "conditional") certification and issue notice of the suit to potential opt-in members if the plaintiffs make an initial facially satisfactory showing that they are similarly situated to other employees who are potential plaintiffs. The court applies a more rigorous burden in the final step after pretrial discovery and may grant final certification or decertify the collective. Cracker Barrel urged the Ninth Circuit panel to adopt the Fifth Circuit's requirement that plaintiffs make a rigorous initial showing before the court will issue notice.

Notice; Arbitration Agreements

Cracker Barrel employees routinely enter into arbitration agreements, waiving their right to sue in court. But there were questions of fact as to which employees' agreements were enforceable (potentially barring them from joining the case). Over Cracker Barrel's objection, the district court granted preliminary certification and authorized nationwide notice, saying it would resolve arbitrability questions at the second stage of the proceedings.

Ruling on this issue of first impression, the Ninth Circuit panel held that a district court may authorize notice to prospective opt-in plaintiffs when the existence and validity of an arbitration agreement are in dispute and can resolve the dispute after those prospective plaintiffs have opted in.

The Ninth Circuit also held that a district court may not issue notice to prospective opt-in plaintiffs when it is undisputed they are bound by an arbitration agreement.

Cracker Barrel Seeks Rehearing

On July 15, Cracker Barrel filed a petition for rehearing or *en banc* rehearing of the Ninth Circuit panel's decision.

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Please contact a Jackson Lewis attorney if you have questions about *Harrington* or application of the procedural issues addressed in the case to class and collective actions and its application to your business.