

SETTLEMENTS 101: THE FAIR LABOR STANDARDS ACT

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Public Policy Limits the Ability to Settle Wage Claims

The principle that one cannot consent to work for less than what is prescribed by FLSA, so as to prevent circumvention of the Act, is long-established. *Overnight MotorTransp. Co. v. Missel*, 316 U.S. 572 (1942). For similar reasons, courts have also imposed strict limitations on when and how claims under the Act can be settled. Nearly sixty years ago, in *Brooklyn Sav. Bank v. O'Neill*, and its companion case, *Dize v. Maddrix Arsenal Bldg Corp.*, the Court held that “*in the absence of a bona fide dispute between the parties as to liability,*” one cannot release one’s right to liquidated damages under § 16(b).¹ 324 U.S. 697, 704 (1945).

The Court rejected private waivers of FLSA claims because the rights are of a private/public nature, by which it meant that the individual rights are part of a uniform national policy of protecting “certain groups of the population from

¹ The Court characterized liquidated damages as “compensation for retention of a workman’s pay” rather than a penalty, therefore making the waiver of liquidated damages equivalent to the waiver of backpay owed. *Brooklyn Sav. Bank*, 324 U.S. at 707-09.

substandard wages and excessive hours which endangered the national health and well-being." *Brooklyn Sav. Bank*, 324 U.S. at 706-07. To allow individual waiver of their rights to backpay or liquidated damages under FLSA would "thwart the legislative policy [FLSA] was designed to effectuate" by enabling employers to utilize their superior bargaining power to circumvent the FLSA by means of individual waivers. *Id.* at 704-07. Furthermore, individual waivers of FLSA claims would undermine FLSA's deterrent role and punish employers who comply with FLSA's demands. *Id.* at 710.

In *Schulte v. Gangi*, 328 U.S. 108 (1946), the Court extended its ruling in *Brooklyn Sav. Bank* to prohibit the private waiver of FLSA rights to liquidated damages by settlement where there existed a bona fide dispute over FLSA coverage. *Id.* at 116. The case involved a suit for liquidated damages following the employer's payment of overtime wages owed in exchange for a release signed under seal. *Id.* at 111-12. While the Court recognized the impediment that its decisions created to resolving FLSA claims short of full litigation, it rejected this practical challenge in favor of the stronger policy favoring the securing of minimum wages.

As a result of these cases, employers were often reluctant to reach voluntary settlements with employees or the Department of Labor over claims for backpay because they could never ensure that they wouldn't later be sued for liquidated damages and attorneys fees. *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977). Consequently in 1949, Congress amended the FLSA

to allow employees to waive FLSA claims under the supervision of the Secretary of Labor. See 1949 Amendments to the FLSA, Pub. L. No. 393, 81 Stat. 923031 (codified at 29 U.S.C. § 216(c) (2004)). The Amendments were designed to encourage employers to agree to voluntary settlements with the Wage and Hour division. *Sneed*, 545 F.2d at 539.

In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Court held individuals could not be precluded from enforcing their FLSA rights where their union had unsuccessfully submitted the same claims to a joint grievance committee pursuant to the union's collective bargaining agreement. While the Court noted the existence of a tension between the national policies favoring collective bargaining and the policy guaranteeing all employees substantive rights, it rejected the argument that courts should defer to the outcome of the collective bargaining process. The Court reiterated the public nature of FLSA rights and the notion that the FLSA sets a "uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Id.* at 741 (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).

Settlement of Wage Claims Must Be Supervised by the DOL or the Courts

Today, most courts recognize only two valid ways by which an individual can release or settle a FLSA claim: 1) a DOL-supervised settlement under 29

U.S.C. § 216(c), or 2) a court-approved stipulation of settlement.² *Lynn's Food Stores v. United States*, 679 F.2d 1350, 1353 (11th Cir.1982); *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960 (5th Cir. 1947) (enforcing a state court stipulated judgment entered upon disputed issues of both law and fact as res judicata to bar a federal FLSA suit).

DOL-Supervised Settlements, Generally

29 U.S.C. 216(c) provides that “The Secretary [of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207... and the agreement of any employee to accept such a payment shall upon payment in full constitute a waiver by such employee [of rights under FLSA].”

To constitute a valid waiver under § 216(c), the employee must “agree to accept the payment which the Secretary determines to be due by the Secretary, and [] there must be payment in full.” *Sneed*, 545 F.2d at 539; see *Solis v. Hotels.com*

² Several unique exceptions can be found. In *Thomas v. Louisiana*, 534 F.2d 613 (5th Cir. 1976), the Fifth Circuit enforced an out-of-court settlement on behalf of state employees of FLSA claims in a unique set of circumstances. Plaintiffs had won a jury verdict, but before judgment was entered, it was nullified by the Supreme Court’s decision in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), in which it held that § 216(b) of FLSA could not be read to allow suits against a state. The settlement that included two years of overtime, but no liquidated damages, attorneys’ fees, or costs. Shortly thereafter, Congress amended section 16(b) to overturn the Supreme Court’s decision. The Fifth Circuit held that the settlement agreement was enforceable, despite that it was never approved by a court, because there was “little danger of employees being disadvantaged by unequal bargaining power.” 534 F.2d at 615.

In *O’Connor v. United States*, 308 F.3d 1233 (Fed.Cir. 2003), the Federal Circuit held that a federal employees union could waive its members’ FLSA rights in an out-of-court settlement that the court found to constitute an accord and satisfaction. The Court rejected plaintiffs’ arguments based on *Brooklyn Savings Bank* and *Schulte* because they involved private sector employees. *Id.* at 1242-44. The court noted that federal policy encouraging labor unions for resolution of workplace disputes avoids the problem of an imbalance of bargaining power with which the Court’s decisions in *Brooklyn Savings Bank* and *Schulte* were concerned. *Id.* at 1244.

Texas, Inc., 2004 WL 1923754 (N.D.Tex. 2004) (waiver is not subject to avoidance by fraud as long as Secretary determines the amount due, the employee agrees to the waiver and accepts payment in full). “Payment in full” refers to the amount determined to be due in the DOL’s settlement of the claim and cannot later be voided by showing that the employee was in fact owed a greater amount.

A threshold question is whether the Secretary adequately supervised the payment. *Niland v. Delta Recycling Corp.*, 377 F.3d 1244, 1247 (11th Cir. 2004). *Niland* involved a voluntary compliance program in which the employer conducted a self-audit and made payments of back wages to those it found were owed money according to an arrangement negotiated between the employer and the DOL. The Court found that the DOL’s negotiation and review of, *inter alia*, the agreement, the formulas and data to be used to calculate back wages, the language to notify employees, and the waiver language was sufficient to constitute DOL supervision. *Id.*

There can be no waiver of FLSA claims under a 216(c) settlements without the execution of a signed release. *Walton v. United Consumers Club*, 786 F.2d 303, 307 (7th Cir. 1986). The DOL generally requires employees to sign a release to receive a payment that it believes constitutes full settlement of the FLSA claims. *Id.*

The Department apparently distinguishes among settlements. When it thinks it has achieved “enough” for the employees – something close to full payment of the wages and overtime due – it sends them agreements explicitly releasing the right to sue, and it

requests them to sign these forms if they wish to take the money. When the Department thinks it has fallen far short, it does not solicit these signatures.

Id. at 306.

FLSA does not require that the form WH-58 be used, as long as the DOL authorizes the waiver language. *Niland v. Delta Recycling Corp.*, 377 F.3d 1244 (11th Cir. 2004). The acceptance and depositing of a check may constitute a release of claims where the employee is notified in writing that the acceptance of the payment, the employee gives up the right to sue under the FLSA for back wages. *Heavenridge v. Ace-Tex Corp.*, 1993 WL 603201 (E.D.Mich. 1993). Absent language of release, however, the payment is considered to constitute only partial payment. *Walton*, 786 F.2d at 306.

Court-Supervised Settlements

The exception for court-approved settlements is judicially created. **Cite.** In dicta in *Gangi*, the Court acknowledged that Department of Labor attorneys prior to the addition of 216(c), regularly settled FLSA claims for an amount that included all unpaid wages but did not necessarily include all of the liquidated damages. The Court noted that the “requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties.” 328 U.S. at 113 n.8.

Courts have been willing to allow stipulated judgments because of the greater procedural assurances of an adversarial context. *Lynn's Food Stores*, 679 F.2d at 1354. As a result of the presence of the court and attorneys representing the employees, "a [court-approved] settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching." *Id.*

When presented with a proposed stipulation of settlement of an FLSA private claim, "a court must scrutinize the settlement for fairness and determine that the settlement is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003)(J. Thompson)(internal citations and quotations omitted).

One court compared the standard for a court's review of FLSA settlements to that which governs settlement of class actions under Fed. R. Civ. P. 23(e). *Camp v. The Progressive Corp.*, 2004 WL 2149079, *4 (E.D.La. 2004) ("cases interpreting Rule 23(e) are analogous and applicable to the instant FLSA [collective] actions."). The *Camp* litigation involved a FLSA collective action along with five consolidated cases, some of which were state class actions. Under Rule 23(e), "[t]he district court must consider many factors, including the complexity of the litigation, comparison of the proposed settlement with the likely result of litigation, experience of class counsel, scope of discovery preceding settlement, and the ability of the defendant to satisfy a greater

judgment.” *In re Drexel Burnham Lambert, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992)(citation omitted).

In approving the settlement in *Stallnaker*, the court noted the existence of “bona fide disputes over FLSA provisions, namely FLSA coverage and the amount of backpay.” 293 F.Supp.2d at 1263.

Notice to Aggrieved Employees

In the case of a collective action, collective-wide settlements -- as opposed to settlements with the representative plaintiff(s) only -- will involve sending notice to all similarly situated employees of the settlement, its terms, and the opportunity to participate in the settlement and recover. Such notice will generally track the form of notice sent to similarly situated employees pursuant to 29 U.S.C. § 216(b).

There are no clear-cut requirements governing the form of such notices. Indeed, the Supreme Court has expressly held that such “details” are best left to a trial court’s broad discretion. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989). Recently, two trial courts, exercising that discretion over the details of FLSA collective action management, have facilitated the issuance of strikingly similar § 216(b) notices, suggesting that some normative standards for such details are beginning to develop. See *Solis v. Hotels.com Texas Inc.*, 2003 WL 22272008 (N.D. Tex. Oct. 1, 2003); *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F. Supp. 101 (S.D.N.Y. 2003). Both courts required that the notice describe the

notice's purpose, the nature of the underlying lawsuit, the composition of the class or collective being notified, the right of the employee to participate, the means by which the employee was to trigger participation, the effects of participation, the effects (none) of not participating, the fact that retaliation for participating is not allowed, and contact information for counsel representing the collective. *Solis* 2003 WL 22272008 at *2-4; *Gjurovich*, 282 F. Supp.2d at 109-11.

Neither of these cases involved a settlement of the underlying action. The general notice principles of these cases and the Rule 23 analogy of *Camp*, 2004 WL 2149079, *4 , do provide a roadmap for settlement notice. As in Rule 23 cases, and as in *Solis* and *Gjurovich*, it is fair to conclude that notice must be given, that the court must approve the form of that notice, that the notice inform the collective of the right to come forward and participate and the effect of doing so or not, and – to facilitate intelligent decision making by would-be participants – that the notice should likely include some description of settlement or the methodology to be used in crafting the settlement. *See, e.g., Amchem Prods. V. Windsor*, 521 U.S. 591, 628 (1997) (notice in Rule 23 settlement must provide absent class members with information necessary to an intelligent decision on whether to participate).

Attorneys Fees As Affecting Court-Supervised Settlements

Courts look favorably on separate negotiation of FLSA damages and attorneys' fees, to avoid a conflict of interest between the attorney and his clients.

Cisek v. Natl Surface Cleaning, Inc., 954 F. Supp. 110, 110-11 (S.D.N.Y. 1997); *Cruz v. Vel-A-Da, Inc.*, 1993 WL 659253 (N.D. Ohio 1993). However, courts have been unwilling to impose an outright ban on settlements where damages and attorneys' fees are negotiated together. Instead, the court must carefully scrutinize the settlement to "ensure that it is untainted by counsel's conflict." *Cisek*, 954 F.Supp. at 111 (approving settlement where damages reflected 84% of what plaintiffs would recover had they prevailed entirely and attorneys' fees are smaller as a proportion of lodestar than 84%).

Private Releases Invalid

Time and again, courts have refused to enforce FLSA waivers in contexts other than the two prescribed methods discussed above. Courts refuse to enforce general releases to bar FLSA claims where the release was not given in settlement of a bona fide dispute over FLSA claims. *McConnell v. Applied Performance Techs. Inc.*, 2002 WL 483540 (S.D. Ohio 2002) (FLSA rights not waived by otherwise applicable general release entered into as settlement of prior non-FLSA employment litigation, even where plaintiff is educated and experienced businessman). Courts also refuse to give force to specific waivers of FLSA rights obtained through non-court settlements of FLSA claims. *Lynn's Food Stores*, 679 F.2d 1350 (rejecting employer's request for declaratory judgment enforcing private settlement of FLSA claims, estimated by DOL at more than \$10,000, for pro-rata share of \$1,000).