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## New Federal Decision Confirms Need for Approval of FLSA Settlements

By Ola A. Nunez

Most settlements of employment disputes are entered into privately and without any judicial scrutiny or approval of the settlement terms. From an employer's standpoint, confidentiality often constitutes an integral term of settlement, which would be defeated if required to publicly file a settlement agreement. However, when it comes to wage-and-hour disputes arising under the Fair Labor Standards Act ("FLSA"), the permissibility of private, confidential settlements entered into absent approval of the district court or Department of Labor ("DOL") has been an area of uncertainty for legal practitioners and their clients and an area of disagreement among federal circuits for quite some time.

On August 7, 2015, the United States Court of Appeals for the Second Circuit (covering New York, Connecticut, and Vermont) weighed in on this debate and settled the issue for employers located in these states. In [Cheeks v. Freeport Pancake House, Inc.](#), the Second Circuit held that absent district court or DOL approval, parties cannot settle FLSA claims through a private, stipulated dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The Second Circuit left unresolved whether parties can privately settle FLSA claims through a privately stipulated dismissal *without prejudice* (meaning that the plaintiff could later timely re-file the complaint).

Cheeks brought claims against his former employer under both the FLSA and New York Labor Law. During the discovery phase of the lawsuit, the parties agreed to settle the action privately and

submitted a joint stipulation and order of dismissal with prejudice under Rule 41(a)(1)(A)(ii), which provides the general rule that parties may voluntarily stipulate to dismissal of claims without the court's permission or review, unless the claims fall within an exception to Rule 41. The district court, which refused to enter the order absent judicial review of the settlement agreement, directed the parties to file a copy of the settlement agreement on the public docket. The district court also directed the parties to "show cause," i.e., to explain, through affidavits or other documentary evidence, why the proposed settlement was fair and reflected a reasonable compromise of disputed issues, rather than a mere waiver of the employee's statutory rights "brought about by an employer's overreaching."

In an effort to avoid disclosing the terms of their settlement, the parties instead asked the district court to stay the proceedings and to certify to the Second Circuit the question of whether FLSA actions are an exception to Rule 41(a)(1)(A)(ii). The Second Circuit agreed to hear the issue, and at the oral argument, the parties argued that FLSA actions were not an exception to the general rule. After the oral argument, the Second Circuit sought the DOL's view on the issue. The DOL disagreed with the parties' position, stating its belief that FLSA claims did fall within the "applicable federal statute" exception to Rule 41.

As part of its analysis of this novel issue, the Second Circuit first looked to the language of the FLSA and the accompanying Advisory Committee's notes, and noted that both were silent as to whether the FLSA constituted an "applicable federal statute" within the meaning of Rule 41. The Second Circuit noted further that neither the Supreme Court nor any other federal appellate court had addressed this precise issue.

In seeking guidance on this issue, the Second Circuit looked to past federal decisions, including two 1940s Supreme Court decisions that had established that employees may not waive the right to recover liquidated damages under the FLSA and may not privately settle the issue of whether an employer is covered under the FLSA. Yet these two Supreme Court decisions did not answer whether employees could enforce private FLSA settlements where there is a bona fide dispute as to liability, such as the amount of compensation owed to an employee or the number of hours worked.

The Second Circuit also looked to two sister circuits for guidance. The Eleventh Circuit (covering Alabama, Georgia, and Florida) had answered this question affirmatively, holding that private settlements would be enforced as long as either the DOL or a district court has first determined the settlement to be a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." The Fifth Circuit (covering Texas, Louisiana, and Mississippi), in comparison, held that where a bona fide dispute exists as to liability, a private release of FLSA claims entered into between a union and an employer was permissible without court or DOL approval.

Next, the Second Circuit considered the decisions of district courts within its own circuit. One district court had held that because the FLSA was silent on whether it constituted an "applicable federal statute" within the meaning of Rule 41, that meant it did not require court approval of settlements of FLSA actions. Yet, the majority of district courts within the Second Circuit required judicial approval of private FLSA settlements.

These decisions, taken together with the underlying purpose of the FLSA "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work," formed the basis for the Second Circuit's conclusion that the FLSA was an "applicable federal statute" that exempted it from the general rule under Rule 41(a)(1)(A)(ii). The Second Circuit highlighted reasons that its circuit's district courts had recently rejected proposed FLSA settlements, including: "highly restrictive" confidentiality provisions; overbroad releases requiring waiver of unknown claims and claims unrelated to wage-and-hour issues; provisions setting plaintiff's fees at over 40% of the total settlement payment; and pledges by a settling-plaintiff's attorney not to represent any other person bringing similar claims against the defendant-employer.

This decision highlights the importance of employers consulting with their legal counsel when considering settling FLSA claims to review the potential enforceability and validity of such settlements, including commonly included confidentiality provisions.

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