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W A G E A N D H O U R

The Obstacles to Private Resolution of FLSA Claims

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Special to the Legal

A question that has bedeviled employers for decades: Can employers obtain a release of claims under the Fair Labor Standards Act (FLSA) in the absence of U.S. Department of Labor (DOL) or court approval? A recent decision in the U.S. District Court for the Southern District of New York, *Gaughan v. Rubenstein*, adds more fuel to the fire, dismissing a plaintiff's FLSA claims against Lee Rubenstein and holding that the plaintiff's "pre-litigation settlement agreement" released her FLSA claims, even without the imprimatur of the DOL or a court.

HOW THE COURTS PREVIOUSLY HAVE RULED

Until recently, wage-and-hour practitioners generally have looked



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to the U.S. Court of Appeals for the Eleventh Circuit's 1982 decision in *Lynn's Foods Stores v. United States* as the governing standard. In *Lynn's Foods*, the Eleventh Circuit held that there were only two ways an employee could release a private FLSA claim, a payment supervised by the DOL or "a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by employees under the FLSA, is a fair and reasonable resolution of a

bona fide dispute over FLSA provisions." In reaching its conclusion, the Eleventh Circuit relied upon several Supreme Court decisions analyzing the inability of employees to contract away their rights to minimum wage and overtime under the FLSA and relying upon the "great inequalities in bargaining power between employers and employees."

Enter the Fifth Circuit's 2012 decision in *Martin v. Spring Break '83 Productions*, which took a less categorical approach. In *Martin*, the plaintiffs filed a grievance with their union contending that they were not paid wages for work performed. After investigating the grievance, the union and defendant entered into a settlement agreement "pertaining to the disputed hours allegedly worked" by the plaintiffs. Before the settlement agreement was signed by union

representatives, plaintiffs brought suit under the FLSA. Rejecting the argument that the release was invalid “because individuals may not privately settle FLSA claims,” the Fifth Circuit held that the payment offered to and accepted by

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the plaintiffs under the settlement agreement was “an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves.”

The Second Circuit entered this fray in 2015 in the *Cheeks v. Freeport Pancake House* case, narrowly holding that where the plaintiff had already filed a lawsuit under the FLSA, she could not privately agree to release her FLSA claims and stipulate to their dismissal with prejudice under

Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure. Citing to the “unique policy considerations underlying the FLSA,” which the Second Circuit reasoned was “distinct from all other employment statutes,” it found the FLSA to be an exception to Rule 41(a)(1)(A)(ii)’s “general rule that parties may stipulate to the dismissal of an action without the involvement of the court.”

None of these cases addresses the most common fact pattern confronting employers and employees, that is, when an individual employee contends that he was not paid in accordance with the FLSA outside the litigation context.

THE ‘GAUGHAN’ CASE

Following the termination of her employment, plaintiff Aylin Gaughan retained an attorney, who sent a demand letter to Lee Rubenstein demanding unpaid minimum wages and overtime under the FLSA as well as liquidated damages. The parties engaged in “several months of negotiation” and ultimately the parties agreed to a private settlement of Gaughan’s FLSA claims, executing an agreement containing a broad general release of any and all claims. After executing the

agreement and receiving the settlement funds, several months later Gaughan brought suit pro se.

After concluding that the Second Circuit’s *Cheeks* case did not apply because it related to an agreement reached following the filing of an FLSA lawsuit, the district court in *Gaughan* looked to *Lynn’s Foods* and *Martin*, reconciling their seemingly inconsistent conclusions by “their vastly different facts, particularly relating to whether the employees had been ably represented at the time they entered into the settlement agreements.” The *Lynn’s Foods* plaintiffs were not represented by attorneys and had settled their claims individually in the midst of a DOL investigation for a small fraction of the wage loss amount calculated by the DOL. In fact, according to the facts recited by the Eleventh Circuit some of the employees who signed the agreements were unaware of the DOL’s calculations and others could not speak English. In contrast, the plaintiffs in *Martin* were represented by counsel and agreed to waive their rights under the FLSA “in return for a significant sum of money ... entirely outside the context of litigation.” The district court in *Gaughan* concluded

that the “pre-litigation settlement agreement” between the plaintiff and Rubenstein was “consistent with the FLSA” and accordingly dismissed the plaintiff’s FLSA claims against Rubenstein. The court relied on “the procedural and substantive indicia of fairness present” reasoning that failure to find that the plaintiff had waived her FLSA claims against Rubenstein would “inhibit productive settlements.”

While the Third Circuit has not yet weighed in on this issue, several district court decisions, including the 2016 Eastern District of Pennsylvania decision in *Kraus v. PA Fit II*, continue to hold fast to the *Lynn’s Foods* line of cases.

HOW EMPLOYERS SHOULD RESPOND

So what is an employer to do given the above? First, recognize that the general rules of the road do not apply to FLSA claims and that it may be difficult (or impossible depending on the circuit the employee is located in) to obtain a waiver and release of FLSA claims by way of private agreement. While in theory this means that employers can contact the DOL or seek court approval, in reality employers often are loathe

to pursue those routes. Certainly in the context of active litigation, employers entering into private agreements to settle FLSA claims in the absence of court approval do so at their own peril and in any event may not allowed to resolve claims in that manner.

Second, armed with the teachings of *Lynn’s Foods*, *Martin*, *Cheeks* and *Gaughan*, employers should consider the following:

- When an employee reports a failure to pay minimum wage or overtime, investigate the employee’s report and ask the employee for any information to estimate the hours worked or wages unpaid. After completing this process, obtain written confirmation from the employee that the unpaid wage calculation ultimately arrived at by the employer (if any) was made in good faith, based on detailed information, and is a fair compromise of the bona fide dispute as to the hours worked (and wages owed).

While ultimately this does not buy the employer “full peace,” it certainly could serve as a set-off in any future litigation. Depending on the circuit and the circumstances, a waiver and release of FLSA claims could potentially be obtained.

- Whether the employee is represented by counsel could be a

significant factor in a court’s analysis of the enforceability of a waiver and release of FLSA claims in the absence of DOL or court approval.

- The amount recovered by the employee (in relation to the amount demanded) can be another factor in assessing the fairness and reasonableness of the settlement.

- Ultimately the reasonableness of any private resolution may be analyzed by a court after the employee asserts a claim.

Given the increase in FLSA litigation over the last several years and the divergence of the case law, hopefully the Supreme Court will provide clarity on this question in the not-too-distant future. In the interim, employers should beware of the significant stumbling blocks to private resolution of FLSA claims. •