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Private FLSA Deals On Firmer Footing After NY Ruling

By **Bill Donahue**

Law360, New York (March 06, 2013, 2:33 PM ET) -- A New York federal judge's recent ruling that private settlements in Fair Labor Standards Act suits don't need court approval is the latest dissent by a court against the long-standing requirement, and attorneys say it could give employers more freedom to end federal wage-and-hour actions confidentially and quickly.

On Feb. 22, a few months after ruling that teacher Donna Picerni was not allowed to end her wage lawsuit against Bilingual SEIT & Preschool Inc. without court approval, U.S. District Judge Brian Cogan had a change of heart. Noting that nothing in the FLSA expressly bars litigants from dismissing cases without approval, he vacated his own previous decision and brought the case to a close.

The judge's initial hesitancy was rooted in years of court-imposed restriction on the way employees and employers settle disputes brought under the workplace statute. Courts have long feared that allowing workers to easily waive their rights in return for a quick payout would thwart Congress' aim of improving general working conditions.

“You have to think about the context in which the FLSA was passed,” Lee Schreter, co-chair of Littler Mendelson PC's wage-and-hour group, said. “It was a very different time. Some employers were forcing workers to accept pay in scrip that could only be redeemed in a company store. The workplace looks very different than that today.”

Changes to the workplace notwithstanding, the practical legacy of the concern for Congress' intentions has been the so-called Lynn's Food standard, which was created by the Eleventh Circuit in 1982 and is still driving much of the national conversation today. Under Lynn's Food, courts have found unenforceable any settlement of FLSA claims that isn't prechecked for fairness by either a judge or the U.S. Department of Labor.

And though the Eleventh Circuit's approval requirement isn't quite the law of the land, it's become nationally influential in the absence of significant case law on the subject. As a result, many attorneys have advised their clients that — if they want a truly binding release of liability — they should file FLSA settlements with a federal court. Some judges, like Judge Cogan, have gone even further, refusing to allow parties to end a lawsuit without court supervision.

“This has been a thorn in the side of employment practitioners since [1982],” said David Barmak of Mintz Levin Cohn Ferris Glovsky & Popeo PC. “You have to advise clients always that, while the law is unsettled, the Eleventh Circuit says you need court approval. Without that, the settlement could be upended.”

But attorneys say recent developments, starting with a Fifth Circuit ruling last year and continuing with Judge Cogan's recent reversal, have put a crack in the system of court approval and could give employers easier access to preferable, confidential settlement deals.

Handed down in July, the Fifth Circuit ruling said that a union-negotiated settlement precluded several union members who had worked as lighting and rigging technicians on the movie “Spring Break '83” from bringing FLSA claims, even though the settlement had never been approved by a court or the DOL.

Differentiating itself from Lynn's Food, the ruling essentially said that if a settlement was fair for workers when it was reached, it shouldn't automatically be held as unenforceable simply because it's being judged after-the-fact.

The significance of Judge Cogan's more recent decision was that it rejected a different, even more zealous interpretation of Lynn's Food — that not only are private FLSA releases unenforceable in the event the employee chooses to sue again, but that parties are actually restrained from dismissing active wage litigation without a judge's approval.

Though not all judges have adopted this stricter requirement, the new ruling should give ammunition to those judges who felt they had no choice but to supervise settlements under the currently ambiguous case law, said Thomas Linthorst of Morgan Lewis & Bockius LLP.

“For those courts that have been injecting themselves into settlements regardless of whether they've been invited to do so, I think Judge Cogan's decision hopefully will put them at ease that they are not required by the FLSA to inject themselves,” Linthorst said.

Noah A. Finkel, a wage-and-hour partner at Seyfarth Shaw LLP, said that though other judges have allowed FLSA cases to be dismissed without approval, they had done so in a way that didn't generate any case law to support the practice.

“In the past there have been a couple of published court decisions that reject the notion that parties can dismiss their case without court approval. There never really has been any case law that parties can do so,” Finkel said. “[So] if a judge was inclined to do that, there wasn't any case law for that judge to look at.”

“[Judge Cogan] has just done that, and he's done it in a pretty persuasive way,” Finkel said.

Whether brought on by the fear of unenforceability or the immediate command of a judge, the requirement to publicly file settlement agreements is less than ideal for employers. Public settlements can draw copycat suits and media attention, and fairness proceedings add time and cost to litigation.

Taken together, the recent rulings will make it more of a realistic option for employers to consider the highly preferable private settlements, said Christopher C. Murray of Ogletree Deakins Nash Smoak & Stewart PC.

“I think it’s probably becoming more common now to discuss with a client the pros and cons of seeking court approval of an FLSA settlement,” Murray said. “With every additional case that follows Spring Break ’83, attorneys will feel more confident in proposing that a client who wants confidentiality consider foregoing court-approval.”

The ultimate issue, however — whether the FLSA requires either government or court approval of settlement releases — remains unsettled. The U.S. Supreme Court declined to consider the Fifth Circuit ruling and attorneys interviewed consider it unlikely that the Second Circuit will rule on Judge Cogan's recent decision, but the issue is ripe for high court guidance, according to Mintz Levin's Barmak.

“What it will take is to have the right case to present the issue,” Barmak said, noting a confluence of appropriate circumstances, like a split between the Fifth and Eleventh circuits, previous Supreme Court rulings that didn't squarely resolve the question, and the high frequency of FLSA litigation.

The case is Picerni v. Bilingual SEIT & Preschool Inc., case number 1:12-cv-04938, in the U.S. District Court for the Eastern District of New York.

--Editing by John Quinn and Lindsay Naylor.