



# It's Time To Authorize Private FLSA Releases

Insights

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Employers sometimes discover that, due to mistake, inadvertence, misunderstanding, or a lack of knowledge, they have not paid all of the wages required under the federal Fair Labor Standards Act. In many instances, this does not occur in the context of a lawsuit or a U.S. Department of Labor compliance audit. Instead, management learns this as the result of, for example, an internal review.

The employer is prepared to pay the wages due but wants to be sure that it will not then also face claims for additional sums, such as an equal amount as liquidated damages and/or attorney's fees and court costs. May such claims simply be precluded in a release?

## A Rock And A Hard Place

Unfortunately, the predominant view among the courts is that FLSA claims may be conclusively resolved only (i) under USDOL's supervision, or (ii) when a judge has scrutinized the settlement of a lawsuit for fairness and has entered a judgment dismissing the case. The relatively few, limited exceptions represent a still-evolving view that often does not provide the certainty management seeks.

Many believe that a well-intentioned employer should be encouraged to make voluntary payments outside of those situations by giving management confidence that doing so terminates its FLSA liability to these employees for the period to which the payments relate. Leaving employers in doubt about this does not promote these voluntary actions.

This very rationale led Congress to act upon USDOL's suggestion in 1949 that the agency be statutorily authorized to supervise an employer's payment of FLSA back-wages. In that context, an employee's acceptance of the sum tendered waives any further right to claim additional amounts for the timeframe the payment covers. See 29 U.S.C. § 216(c). But, for a number of reasons, this has not been sufficient to address the many scenarios in which a release might be pertinent.

## Why Not The FLSA?

"Remedial" federal laws like the FLSA were just coming to the fore in the Depression Era. Consequently, the public policy of that time tended to disfavor releases of the rights they provided. See, e.g., *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

Since then, however, it has become acceptable to permit appropriate releases under other employment laws that have proliferated in later decades. So long as it is clear that a person has knowingly and voluntarily released his or her FLSA claims, there is no justification for carving-out that particular statute as having some different status in this regard.

One approach (but by no means the only one) might be an FLSA amendment that analogizes to the relevant standards for waivers of federal Age Discrimination in Employment Act claims. *See* 29 U.S.C. § 626(f). For instance, such a provision might require that the release must:

- ◇ Be written so as to be understandable by the average person;
- ◇ Specifically refer to rights or claims arising under the FLSA;
- ◇ Affect only FLSA rights or claims arising during the timeframe specified in the document;
- ◇ Say that the individual may consult with an attorney prior to signing it;
- ◇ Give the individual some reasonable period of time to consider it; and
- ◇ Give the individual a period of time after signing it to revoke the release (but neither would the employer be required to make any payment until either the period has expired or the individual has expressly waived the right to revoke).

### **The Bottom Line**

USDOL's ability to effectuate compliance through investigations is limited by a variety of factors. And it is surely counterproductive to divert resources that an employer would be prepared to channel toward voluntary back-wage payments to things like attorney's fees and litigation costs instead, especially those expenditures that are necessitated simply in order to have a court approve an agreement that the litigants have already embraced.

The goals embodied by the FLSA will be greatly facilitated if employers are given a means through which they can take the initiative to correct any actual or arguable noncompliance while at the same time gaining reliable protection against further claims.