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## FLSA settlements and arbitration

The U.S. Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), reaffirmed the now well-established principle that parties can contract to pursue claims under the Fair Labor Standards Act through arbitration.

Indeed, with each passing year the number of FLSA claims brought in arbitration, as well as federal court, has increased exponentially.

While FLSA claimants in arbitration retain all of the substantive rights guaranteed by the FLSA, interesting questions arise as to how that principle applies with respect to the settlement of FLSA claims in arbitration.

Although arbitration is, by definition, confidential and is often a privately negotiated process in which the arbitrator's authority is strictly defined by the parties' agreement, the FLSA establishes rights — such as the right to minimum wages and to be compensated for overtime — as to which there is a broader public interest. See 29 U.S.C. §201; *Brooklyn Savings Bank v. O'Neill*, 325 U.S. 893, 901 (1945).

Based on the public interest in ensuring that employees receive appropriate compensation required by the FLSA, courts have questioned whether FLSA claims can be privately settled, and in many jurisdictions have concluded they cannot. See

*Walton v. United Consumers Club Inc.*, 786 F.2d 303 (1986); *Lynn's Food Stores Inc. v. U.S. Department of Labor*, 679 F.2d 1350, 1352 (11th Cir. 1982) (explaining that the settlement of back wage claims arising under the FLSA may become final and enforceable only if supervised by the labor secretary or approved by a court).

But see *Martin v. Spring Break '83 Productions LLC*, 688 F.3d 247, 255-56 (5th Cir. 2012) (private settlement through union representation, predicated on a bona fide dispute about hours worked, rather than a compromise of guaranteed FLSA substantive rights, is enforceable).

In addition, where settlements are reached in cases being litigated, courts have uniformly concluded that the settlements must be reviewed for reasonableness notwithstanding a confidentiality provision in a settlement agreement.

What then should counsel and arbitrators consider when settling FLSA claims in the context of arbitration?

Should parties seek to have a settlement embodied in a consent award requiring the arbitrator's approval? Does arbitral approval matter if court approval is still required? How and to what degree must arbitrators oversee the parties' settlement?

Can arbitrators refuse to

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approve a settlement and, if so, on what basis? Should these questions be answered differently with respect to individual, as opposed to collective action, FLSA proceedings?

One distinction between arbitral and court settlements of FLSA claims is clear: If the parties to an arbitration reach a settlement and consent to the discontinuance of the arbitration, the

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arbitrator cannot foreclose the discontinuance and the settlement may remain confidential. See, for instance, JAMS Employment Arbitration Rule 13(a).

By contrast, once federal litigation of an FLSA claim commences, consistent with Rule 41 of the Federal Rules of Civil Procedure, parties cannot simply settle the claim and discontinue the action; any settlement of the claim

must be reviewed and approved by the court. See *Cheeks v. Freeport Pancake House Inc.*, 796 F.3d 199, 206 (2d Cir. 2015), and *Lynn's Food Stores*.

Nevertheless, in this arbitrator's experience, parties to FLSA-based arbitrations are increasingly requesting that the settlement they reach be embodied in an arbitral consent award and, in doing so, recognize that their settlement should be reviewed and approved by the arbitrator.

The American Arbitration Association Rules state simply, "If the parties settle their dispute during the course of the arbitration and mutually request, the arbitrator may set forth the terms of the settlement in a consent award."

Moreover, because there is frequently a need to have a court confirm and enforce the settlement agreement, counsel and arbitrators recognize that many of the same shortcomings courts have identified in reviewing FLSA settlements, even if not "illegal" or strictly required by the FLSA, should be taken into account in settling and approving FLSA arbitrations.

While arbitral settlements of FLSA claims may allow for a greater degree of flexibility than settlements in litigation, in the end, regardless of context, there is a need to ensure that employees' fundamental FLSA rights have not been unfairly compromised.