

**THE FLSA PERMISSION SLIP:  
DETERMINING WHETHER FLSA SETTLEMENTS  
AND VOLUNTARY DISMISSALS  
REQUIRE APPROVAL**

*Alex Lau\**

*The Fair Labor Standards Act of 1938 (FLSA) seeks to protect the poorest, most vulnerable workers by requiring that they be paid a minimum wage and compensated for their overtime labor. When employers do not pay their workers minimum wage or overtime compensation and thereby violate the FLSA, workers have the power to sue their employers for remuneration. Like many other types of cases, most FLSA cases settle before going to trial. Unlike those other types of cases, however, most courts have held that settlements of FLSA cases must be approved to be enforceable. Even though Federal Rule of Civil Procedure 41 generally allows parties to settle lawsuits by voluntarily dismissing their lawsuits without approval, these courts have held that the FLSA should be an exception to Rule 41. Some courts, however, have held that settlements of FLSA cases should not require approval to be enforceable.*

*This Note addresses and analyzes the differences between these approaches. It seeks to balance the protection the FLSA intends to provide workers and the ability of parties to freely settle disputes embodied in Rule 41. To strike this balance, this Note suggests that settlements of lawsuits brought under the FLSA should not require approval, because the Act should be subject to and not exempt from Rule 41. However, settlements of causes of action arising under the FLSA should require approval to ensure the necessary protection the Act was meant to provide to the workers it serves.*

INTRODUCTION.....	229
I. WHY THE PERMISSION SLIP SHOULD OR SHOULD NOT BE SIGNED: AN OVERVIEW OF THE FLSA, RULE 41, AND OTHER FEDERAL EMPLOYMENT STATUTES .....	232
A. <i>The Fair Labor Standards Act of 1938</i> .....	232
1. A Uniquely Protective Statute: The FLSA’s Enactment...	232

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\* J.D. Candidate, 2018, Fordham University School of Law; B.A., 2013, Georgetown University. I would like to thank Professor James Brudney for his guidance and advice and my family and friends for their love, support, and patience.

2. Enforcement of the FLSA .....	233
3. A Question Left Unanswered: How to Deal with FLSA Settlements .....	235
B. <i>Federal Rule of Civil Procedure 41</i> .....	237
1. Voluntary Dismissals .....	237
2. Which Rules and Statutes Require Court Approval of Dismissals? .....	238
3. Why These Rules and Statutes Require Court Approval of Dismissals .....	239
C. <i>The Odd Man Out: Comparing the FLSA's Treatment of        Settlements to That of Other Federal Employment Statutes</i> ...	241
1. Other Federal Employment Statutes .....	241
2. Treatment of Voluntary Dismissals and Settlements by Other Federal Employment Statutes .....	242
II. WHICH COURTS REQUIRE THE PERMISSION SLIP TO BE SIGNED?: THE CIRCUIT SPLIT OVER WHETHER APPROVAL IS REQUIRED .....	243
A. <i>The Eleventh Circuit Leads and (Almost) Everyone Follows:        The Majority View That FLSA Settlements Require        Approval</i> .....	244
B. <i>The Fifth Circuit Tries to Lead and No One Follows: The        Minority View That FLSA Settlements Do Not Require        Approval</i> .....	245
C. <i>Another Question Left Open?: Is the FLSA an Applicable        Federal Statute Under Rule 41?</i> .....	247
D. <i>The Martin of Rule 41: Picerni</i> .....	248
III. SHOULD THE PERMISSION SLIP HAVE TO BE SIGNED?: A SOLUTION TO THE APPROVAL REQUIREMENT .....	250
A. <i>Reconciling the Lynn's Food-Martin Circuit Split and the        Cheeks-Picerni Conflict</i> .....	250
B. <i>The FLSA Is Not an Applicable Federal Statute Under Rule        41</i> .....	252
1. The FLSA Does Not Fit the Applicable Federal Statute Mold .....	252
2. Prejudice .....	255
C. <i>Parties Should Be Able to Dismiss FLSA Lawsuits Without        Court Approval If the Dismissal Is Knowing and Voluntary        and of a Bona Fide Dispute</i> .....	255
1. <i>Lynn's Food: The Importance of the Context of a        Lawsuit</i> .....	255
2. Doing Justice to the Parties .....	256
3. Implications of the 1947 Act .....	257
4. Implications of the Fair Labor Standards Amendments of 1949 .....	258
5. Adopting the Knowing and Voluntary and Bona Fide Dispute Provisions .....	258

<i>D. Enforceability of Private Settlements of FLSA Causes of Action</i> .....	259
1. Practical Concerns Regarding Private Settlements of FLSA Causes of Action .....	260
2. Implications of the FLSA's Enforcement Provisions .....	261
3. The FLSA Is Different from Other Employment Statutes .....	261
4. Adopting the Bona Fide Dispute Provision .....	263
<i>E. Congress Needs to Take Action</i> .....	263
CONCLUSION .....	264

## INTRODUCTION

A Department of Labor (DOL) investigation leads to a finding that a grocery store has violated the Fair Labor Standards Act (FLSA) and owes its employees more than \$10,000 in back wages.<sup>1</sup> After the employer is unsuccessful in negotiating a settlement with the DOL, it works to settle quickly and inexpensively with its employees.<sup>2</sup> The employer goes to the employees directly and offers them \$1000 to be split among those who agree to settle the claims.<sup>3</sup> The employer and its representative imply that the employees are not entitled to the money they would get from the settlement, tell them that they do not deserve the money, and fight back against concerns from employees about their pay.<sup>4</sup> Fourteen employees sign the agreement.<sup>5</sup> Some of these employees do not speak English and none of them consult an attorney or seem to know about the DOL's finding.<sup>6</sup> The employer then brings a declaratory judgment action to have the settlement judicially approved.<sup>7</sup> This Note explores whether such settlements must be supervised or approved by a court or the DOL.

The grocery store workers described above represent the type of workers the FLSA seeks to protect: vulnerable, impoverished, and uninformed. Some of these workers are afraid to bring lawsuits or go to trial for fear of retaliation at work, or worse, losing their jobs.<sup>8</sup> For all of those risks, there is not much reward. Many FLSA cases are not worth enough for individual plaintiffs to go to trial, and they end up settling for meager amounts.<sup>9</sup>

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1. *See* *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982).

2. *See id.*

3. *See id.*

4. *See id.* at 1354–55.

5. *See id.* at 1352.

6. *See id.* at 1354.

7. *See id.* at 1351–52.

8. Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 296–97 (2008); Janice Harper, *What to Expect If You Sue Your Employer*, HUFFINGTON POST (Mar. 11, 2012), [http://www.huffingtonpost.com/janice-harper/what-to-expect-when-you-s\\_b\\_1194955.html](http://www.huffingtonpost.com/janice-harper/what-to-expect-when-you-s_b_1194955.html) [<https://perma.cc/BBL3-4C9P>].

9. *See* *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013). Since 2007, the mean settlement value per plaintiff in FLSA cases has been \$5472, while the median settlement value per plaintiff during that time is even lower, at just \$2576.

Because many employees are afraid to bring lawsuits, and those who do are incentivized to settle, there is little reason for employers who violate the FLSA to discontinue their unlawful practices. On the off chance they get caught, they will likely be able to settle for a small amount. Further, settlement agreements of FLSA claims often include confidentiality provisions and require employees to agree to waive any other existing claims they may have against the employer.<sup>10</sup> Confidentiality provisions stymie additional claims by keeping workers from learning about suits. The waiver of claims prevents workers who bring suit from bringing other possibly legitimate claims against their employers. These types of provisions in settlement agreements allow employers to continue to take advantage of their workers.

The concern over unfair settlements has led some courts to require settlements of FLSA causes of action and voluntary dismissals of FLSA lawsuits under Federal Rule of Civil Procedure 41 to be approved by a court or the DOL.<sup>11</sup> The rationale behind an approval requirement is that it keeps predatory employers from taking advantage of vulnerable employees in unfair settlement agreements.<sup>12</sup> Approval requirements not only ensure that individual workers are not taken advantage of, but also that workers as a whole are protected.<sup>13</sup> Such requirements thereby bolster the threat and consequences for those employers that do violate the FLSA.<sup>14</sup> They also give employees extra bargaining power in a relationship where their power is usually lacking.<sup>15</sup>

Some courts have been resistant to an approval requirement. They reason that private settlements should be respected.<sup>16</sup> They hold that an approval requirement is not practical because most FLSA cases are not worth enough for either party to take further action if a settlement is not approved.<sup>17</sup> These courts recognize the balancing act between protecting workers as a whole and protecting individual employee-plaintiffs who may not have the resources to

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See Stephanie Planchich, Neil Fanaroff & Janeen McIntosh, *Trends in Wage and Hour Settlements: 2015 Update*, NERA ECON. CONSULTING 7 (July 14, 2015), [http://www.nera.com/content/dam/nera/publications/2015/PUB\\_Wage\\_and\\_Hour\\_Settlements\\_0715.pdf](http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf) [<https://perma.cc/8Y8H-25UA>].

10. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015) (citing *Lopez v. Nights of Cabiria, LLC*, No. 14-cv-1274, 2015 WL 1455689, at \*1–7 (S.D.N.Y. Mar. 30, 2015)).

11. See, e.g., *id.*; *Lynn's Food*, 679 F.2d at 1352–53, 1355.

12. *Cheeks*, 796 F.3d at 203 (citing *Lynn's Food*, 679 F.2d at 1352).

13. Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 133–34 (2013) (stating that even though the court's first consideration in approving FLSA settlements should be whether the settlement is fair to the employee-plaintiff, the court also needs to consider whether such a settlement would help keep similar situations from happening to other workers).

14. See *Cheeks*, 796 F.3d at 207.

15. See *id.*

16. See *Martin v. Spring Break '83 Prods.*, 688 F.3d 247, 255 (5th Cir. 2012); *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005).

17. See *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013).

continue to litigate if their settlement agreements are not approved. Even though an approval requirement may help to ensure the overall protection of vulnerable workers from unscrupulous employers, that may be of little assurance to the non-English-speaking grocery store employee whose case is not worth much and who needs money.<sup>18</sup>

This Note will discuss whether settlements of FLSA causes of action and lawsuits should have to be approved by a court or the DOL to be enforceable. This Note uses the term “cause(s) of action” to refer to facts that would enable a person to bring a lawsuit, while the terms “lawsuit(s)” and “action(s)” refer to an actual lawsuit that has been initiated based on a cause of action.

Part I provides an overview of the statutes and rules involved in the issue of requiring approval of FLSA settlements. Part I.A discusses the FLSA, its legislative history, amendments, and relevant case law interpretations. Part I.B discusses Rule 41, which governs voluntary dismissals in federal lawsuits. This part analyzes Rule 41’s history and discusses the statutes and Federal Rules of Civil Procedure that are exceptions to Rule 41. Part I.C discusses other relevant federal employment statutes, such as Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>19</sup> the Age Discrimination in Employment Act of 1967 (ADEA),<sup>20</sup> and the Family and Medical Leave Act (FMLA).<sup>21</sup> This Part discusses whether settlements and voluntary dismissals under these acts should be treated differently from those under the FLSA.

Part II discusses how courts have analyzed whether private settlements of FLSA causes of action and voluntary dismissals of FLSA lawsuits should require court or DOL approval to be enforceable. Parts II.A and II.B analyze the circuit split between the Eleventh and Fifth Circuits over whether private settlements of FLSA claims must be approved by a court or the DOL to be enforceable. Parts II.C and II.D discuss a Second Circuit case and an Eastern District of New York case that differ over whether voluntary dismissals of FLSA lawsuits must be approved by a court or the DOL to be enforceable.

Part III argues that private settlements of FLSA causes of action should require DOL or court approval to be enforceable but that settlements and voluntary dismissals of FLSA lawsuits should not require DOL or court approval to be enforceable. Part III.A discusses how the Second Circuit-Eastern District of New York discrepancy mirrors the Eleventh Circuit-Fifth Circuit split. Part III.B discusses why the FLSA is not an applicable federal statute under Rule 41. Part III.C explains why parties should be able to voluntarily dismiss and settle lawsuits brought under the FLSA without court or DOL approval if those dismissals and settlements are made knowingly and voluntarily and are of a bona fide dispute. Part III.D suggests that parties should not be able to do the same for causes of action arising under the FLSA. Finally, Part III.E proposes an amendment to the FLSA that Congress should adopt to implement these changes.

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18. *See* *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352, 1354 (11th Cir. 1982).

19. 42 U.S.C. §§ 2000e–2000e-17 (2012).

20. 29 U.S.C. §§ 621–634 (2012).

21. 29 U.S.C. §§ 2601–2654 (2012).

I. WHY THE PERMISSION SLIP SHOULD OR SHOULD NOT BE SIGNED:  
AN OVERVIEW OF THE FLSA, RULE 41,  
AND OTHER FEDERAL EMPLOYMENT STATUTES

Whether settlements of FLSA causes of action and voluntary dismissals of FLSA lawsuits should require court or DOL approval implicates both the FLSA and Rule 41. To understand this issue, it is important to understand the reasons these rules were created, what they sought to accomplish, and how the understanding of them has developed over time. Part I.A provides this information about the FLSA, while Part I.B provides this information about Rule 41. To put this Note into context, Part I.C compares the FLSA to other federal employment statutes. This analysis focuses on how the similarities and differences among these statutes are reflected in their respective treatment of private settlements of causes of action and lawsuits.

A. *The Fair Labor Standards Act of 1938*

Part I.A.1 discusses the FLSA's intended purpose. Then, Part I.A.2 outlines the FLSA's enforcement provisions, including how claims can be brought and the penalties imposed for violating the FLSA. Next, Part I.A.3 explains the FLSA's lack of guidance regarding how FLSA claims can be settled and analyzes how Congress and the courts have approached FLSA settlements.

1. A Uniquely Protective Statute: The FLSA's Enactment

The FLSA was first introduced on the Senate floor on May 24, 1937.<sup>22</sup> It was passed in response to a finding “of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>23</sup> Its goal was “to correct and as rapidly as practicable to eliminate [these conditions].”<sup>24</sup>

To accomplish this goal, Congress established a national minimum wage<sup>25</sup> and provided for overtime compensation.<sup>26</sup> From the time the FLSA was introduced on the Senate floor to the day it was passed, much of President

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22. S. 2475, 75th Cong. (1937).

23. 29 U.S.C. § 202(a) (2012).

24. *Id.* § 202(b). While the FLSA mentioned improving commerce as one of its goals in addition to improving labor conditions, it was included mostly to ensure that the Act would be allowed under the then-hotly debated Commerce Clause. *See id.* § 202. The Commerce Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. Drafters of New Deal legislation saw the Commerce Clause as the best route for passing their legislation and, as a result, often made overt references to commerce—as they did with the FLSA—in an attempt to cover their legislation under the Commerce Clause. *See, e.g.*, 7 U.S.C. § 1282 (2012) (citing commerce as a reason to pass the Agricultural Adjustment Act, which was passed in 1933); 29 U.S.C. § 151 (2012) (citing commerce as a reason to pass the National Labor Relations Act, which was passed in 1935).

25. 29 U.S.C. § 206.

26. *Id.* § 207.

Franklin D. Roosevelt's discussion of it<sup>27</sup>—as well as Congress's<sup>28</sup>—focused on providing much-needed protection for the lowest class of workers. The Act sought to prevent employers from undercutting each other's wages in a “race to the bottom” that increased the number of impoverished workers and decreased the already low standard of living among the working class.<sup>29</sup> Without minimum wages and overtime compensation, employers would continue to make their employees work longer hours in worse conditions for less money.<sup>30</sup>

## 2. Enforcement of the FLSA

Claims regarding violations of the FLSA's minimum wage and overtime provisions can be enforced under the FLSA in three ways: (1) employees<sup>31</sup> can bring private lawsuits against their employers,<sup>32</sup> (2) the Secretary of Labor can bring lawsuits on behalf of employees against their employers,<sup>33</sup> or (3) the Secretary of Labor can supervise the payment of back wages owed to employees from employers.<sup>34</sup>

Originally, the only way to enforce the FLSA was through the first option; the second and third options were added to the Act as part of the Fair Labor Standards Amendments of 1949.<sup>35</sup> They were added to provide alternatives

27. See H.R. DOC. NO. 75-458, at 2–3, 8 (1938); H.R. DOC. NO. 75-255 (1937); FRANKLIN D. ROOSEVELT, *Fireside Chat*, in 1938 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 391, 391–92 (Samuel I. Rosenman ed., 1941).

28. See H.R. REP. NO. 75-1452, at 8 (1937) (“[I]t is plain that this administration is privileged to give relief to that large majority who constitute one-third of our population, referred to by [President Roosevelt] as ‘ill-nourished, ill-clad, and ill-housed.’” (quoting H.R. DOC. NO. 75-255, at 1)); S. REP. NO. 75-884, at 3–4 (1937) (“It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.”).

29. Wilkins, *supra* note 13, at 112–13 (quoting ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 6 (2009), [https://nelp.3cdn.net/e470538bfa5a7e7a46\\_2um6br7o3.pdf](https://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf) [<https://perma.cc/4987-6LMA>]).

30. See *id.*

31. The FLSA applies to employees who are “engaged in commerce or in the production of goods for commerce, or [are] employed in an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. §§ 206(a), 207(a)(1). “Commerce” is defined broadly as “trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.” *Id.* § 203(b). “[E]ngaged in the production of goods” is defined as “producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.” *Id.* § 203(j). “Enterprise engaged in commerce or in the production of goods for commerce” is defined as an enterprise with employees engaging in such activities or “handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce” and “whose annual gross volume of sales made or business done is not less than \$500,000.” *Id.* § 203(s)(1)(A).

32. *Id.* § 216(b).

33. *Id.* § 216(c).

34. *Id.*

35. Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, ch. 736, 63 Stat. 910, 919 (codified at 29 U.S.C. § 216(c)).

to private lawsuits that could benefit both employees and employers.<sup>36</sup> The Secretary of Labor bringing a lawsuit or supervising payment benefits employees because employers will be more responsive to the DOL than they will be to employees. Thus, if the DOL pursues wages owed to employees under the FLSA, employers will be more likely to pay than if employees bring claims themselves.<sup>37</sup> These options also protect employers because once the Secretary of Labor files a complaint to initiate a lawsuit or the employee accepts wages under a DOL-supervised payment, the employee forfeits his right to bring his own lawsuit for the same wages or to privately receive such wages.<sup>38</sup> This stamp of approval from the Secretary of Labor reassures employers that they will be protected against subsequent private lawsuits.<sup>39</sup> No such supervision provision exists in the FLSA for settlements of private lawsuits.<sup>40</sup>

If an employer is found liable under the FLSA, he will owe the aggrieved employee any unpaid wages or overtime compensation and an equal amount of liquidated damages.<sup>41</sup> In addition, the employer must pay attorney's fees and costs incurred by the employee in bringing the suit.<sup>42</sup>

Section 216(b) of the FLSA gives employees the power to bring collective actions.<sup>43</sup> Collective actions involve employees bringing lawsuits against their employers on behalf of themselves "and other employees similarly situated."<sup>44</sup>

Collective actions differ from the more well-known Rule 23 class actions, which are discussed later in this Note.<sup>45</sup> An important difference between the two is that in collective actions, plaintiffs have to opt in to the lawsuit if

36. See H.R. REP. NO. 81-267, at 32 (1949) ("The underpaid employee may choose between action by the Secretary for simply the amount which is owed to him and an individual action brought under [29 U.S.C. § 216(b)] . . .").

37. See *id.* at 14.

38. See 29 U.S.C. § 216(c).

39. See S. REP. NO. 81-640, at 8 (1949); H.R. REP. NO. 81-267, at 31-32.

40. See 29 U.S.C. § 216(b).

41. *Id.* § 216(b)-(c).

42. *Id.* § 216(b).

43. *Id.*

44. *Id.* Collective actions make up about 25 to 40 percent of FLSA lawsuits. See Allison Frankel, *Wells Fargo, U.S. Chamber Fail to Rewrite Wage-and-Hour Case Rules*, REUTERS (Mar. 15, 2013), <http://blogs.reuters.com/alison-frankel/2013/03/15/wells-fargo-u-s-chamber-fail-to-rewrite-wage-and-hour-case-rules/> [<https://perma.cc/9HYR-RMXG>] (noting that 2500 FLSA collective actions were filed in 2011); *XMPT Survey Report*, LITTLER 2 (Oct. 2013), <https://www.littler.com/files/press/pdf/2013-Littler-Mendelson-Xmpt-Survey-Report-October-2013.pdf> [<https://perma.cc/FXY6-A3Y9>] (noting that 2507 FLSA collective actions were filed in 2012); see also Richard L. Alfred, *FLSA Suits Continue to Skyrocket: New Record High in 2015, More Than 9,000 Expected in 2016*, SEYFARTH SHAW (Nov. 20, 2015), <http://www.seyfarth.com/news/FLSA-Suits-Skyrocket> [<https://perma.cc/BPG7-C3Y5>] (noting that 8152 FLSA lawsuits were filed in total in 2012 and 6335 FLSA lawsuits were filed in total in 2011); Teresa S. Valderrama, *FLSA Claims and Collective Actions: How to Avoid Claims and Defend Them*, ASS'N CORP. COUNSEL 3 (Feb. 12, 2008), <http://www.acc.com/chapters/houst/upload/20080212CA.pdf> [<https://perma.cc/YFX9-Q2BW>] (noting that of the 3000 FLSA lawsuits filed in 2004, close to 800 of them were collective actions).

45. See *infra* Part I.B.



they want to be part of it.<sup>46</sup> In class actions, however, plaintiffs are automatically involved in the lawsuit and have to opt out if they do not want to be part of it.<sup>47</sup> As a result, there are usually more plaintiffs in class actions than in collective actions.<sup>48</sup> This can lead to a principal-agent dynamic in class actions, in which the lead plaintiffs represent a much larger group of plaintiffs, most of whom are not engaged in the lawsuit.<sup>49</sup> Plaintiffs in FLSA collective actions, however, are part of the lawsuit because they want to be, not because they do not care enough to leave it.<sup>50</sup> Thus, the principal-agent dynamic prevalent in class actions is not a concern in collective actions.

### 3. A Question Left Unanswered: How to Deal with FLSA Settlements

Early U.S. Supreme Court cases held that employees could not settle for less than what they were owed under the FLSA nor waive their right to liquidated damages without a bona fide dispute between the parties over the number of hours worked or compensation owed.<sup>51</sup> In these cases, the Court reasoned that allowing workers to settle for less than what they were owed under the law would be a violation of the FLSA. If there was no dispute over the amount owed to the employee or the number of hours worked by the employee, then the employer should have to pay the employee the amount the FLSA calls for.<sup>52</sup> The Court also focused on the FLSA's protection of the lowest class of workers.<sup>53</sup> Allowing these workers to settle for less than what they were owed under the FLSA would be antithetical to the Act's purpose—to ensure a minimum wage and standard of living for all.<sup>54</sup>

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46. See Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 277–78 (2009).

47. See *id.*

48. See Brunsdon, *supra* note 8, at 292–94.

49. Scott A. Moss & Nantiya Ryan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 531–32 (2012).

50. *Id.* at 527, 555–58; see also Brunsdon, *supra* note 8, at 296–301. Congress deliberately provided for collective actions to avoid class action situations in which small groups of representatives would bring lawsuits on behalf of a larger group of unengaged employees. See Brunsdon, *supra* note 8, at 280 n.59 (citing 93 CONG. REC. 2182 (1947) (statement of Sen. Forrest C. Donnell)).

51. See *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

52. See *Gangi*, 328 U.S. at 116 (noting that a compromise of a dispute not having to do with the compensation owed or number of hours worked “thwarts the public policy . . . embodied in the [FLSA] by reducing the sum selected by Congress as proper compensation for withholding wages”); *O'Neil*, 324 U.S. at 707 (“No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the [FLSA].”).

53. See *Gangi*, 328 U.S. at 116; *O'Neil*, 324 U.S. at 706.

54. See *Gangi*, 328 U.S. at 116 (stating that “the purpose of the [FLSA], which we repeat from the *O'Neil* case was to secure for the lowest paid segment of the Nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by” compromise of a dispute not having to do with the compensation owed or number of hours worked); *O'Neil*, 324 U.S. at 706 (“The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency . . .”).

Further, the Court focused on the quasi-public<sup>55</sup> rights conferred by the FLSA.<sup>56</sup> Individuals that bring lawsuits under the FLSA serve as private attorneys general.<sup>57</sup> Such lawsuits not only benefit and achieve justice for these individuals, but ensure the fair competition and wages necessary to maintain a minimum standard of living for all workers.<sup>58</sup> The Court reasoned that because a quasi-public right “may not be waived or released if such waiver or release contravenes the statutory policy,” employees could not waive their right to what they were owed under the FLSA.<sup>59</sup>

The Court held that employees could not waive their FLSA rights or settle a case if there was not a bona fide dispute over the number of hours worked or compensation owed. However, it left open the question of whether parties could settle FLSA claims where such a dispute did exist.<sup>60</sup> The Portal-to-Portal Pay Act of 1947<sup>61</sup> (the “1947 Act”) sought to answer this question.

The 1947 Act allowed FLSA claims to be privately settled where a bona fide dispute existed over what was owed to the employee.<sup>62</sup> Both lawsuits and causes of action could be settled.<sup>63</sup> The 1947 Act pushed back against<sup>64</sup> early Supreme Court cases<sup>65</sup> by allowing liquidated damages to be waived *even where a bona fide dispute did not exist*.<sup>66</sup> Settlements of FLSA claims or waivers of liquidated damages did not have to be approved.<sup>67</sup> But the 1947 Act only allowed FLSA claims to be settled and liquidated damages to be waived if such claims and damages were based on FLSA violations that occurred before the 1947 Act’s passage.<sup>68</sup>

This retrospective application was the result of a practical compromise by Congress. It realized it needed to take drastic measures to deal with a flood of FLSA litigation that resulted from early Supreme Court cases.<sup>69</sup> However,

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55. Wilkins, *supra* note 13, at 112–16 (discussing and defining “quasi-public” rights).

56. *O’Neil*, 324 U.S. at 704 (defining a right conferred by the FLSA as “a statutory right conferred on a private party, but affecting the public interest”).

57. Wilkins, *supra* note 13, at 115–16.

58. *Id.*

59. *O’Neil*, 324 U.S. at 704.

60. *See* D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–15 (1946) (concluding that it is unnecessary “to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment”).

61. 29 U.S.C. §§ 251–262 (2012).

62. *Id.* § 253(a).

63. *Id.* (“Any cause of action under the [FLSA] . . . or any action . . . to enforce such a cause of action, may hereafter be compromised in whole or in part . . .”).

64. *See id.* § 251; *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 623 (W.D. Tex. 2005); *Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes: Hearings on H.R. 584 and H.J. Res. 91 Before the Subcomm. No. 2 of the H. Comm. on the Judiciary*, 80th Cong. 301 (1947) (statement of Robert B. Beach, Vice President and Executive Secretary, National Association of Building Owners and Managers); 52 CONG. REC. 2250, 2254 (1947); 52 CONG. REC. 1543, 1555 (1947).

65. *See supra* note 51 and accompanying text.

66. 29 U.S.C. § 253(b).

67. *Id.* § 253.

68. *Id.*

69. *See id.* § 251(a) (“The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby

Congress worried that by applying the 1947 Act to future FLSA claims, the FLSA would effectively be gutted as employers likely would be able to settle causes of action and lawsuits for less than what the FLSA required of them.<sup>70</sup> Thus, the 1947 Act was essentially a Band-Aid for preexisting FLSA claims. With its retrospective application, the 1947 Act did not provide any guidance about whether future claims or lawsuits based on FLSA violations that occurred after its passage could be settled privately without approval.<sup>71</sup>

### B. Federal Rule of Civil Procedure 41

Part I.B.1 introduces the relevant provisions of Rule 41 and the voluntary dismissal of lawsuits. Then, Part I.B.2 discusses the Federal Rules of Civil Procedure and federal statutes that are exempt from Rule 41, such that lawsuits brought under these rules and statutes cannot be voluntarily dismissed. Finally, Part I.B.3 explains the reasons those rules and statutes are exempt from Rule 41.

#### 1. Voluntary Dismissals

There is a longstanding public policy favoring private settlements of disputes.<sup>72</sup> This policy is embodied in Rule 41, which allows voluntary dismissals of lawsuits.<sup>73</sup> Lawsuits can be dismissed voluntarily either by plaintiffs<sup>74</sup> or court order.<sup>75</sup> One way plaintiffs can dismiss a lawsuit without a court order is by filing “a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.”<sup>76</sup> The other way is by filing “a stipulation of dismissal signed by all parties who have appeared.”<sup>77</sup> The latter option is the subject of this Note.<sup>78</sup> Unless the

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creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers . . .” (first alteration in original)).

70. See Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 156 (1991) (stating that had the 1947 Act applied to FLSA violations before and after the 1947 Act’s passage, the “FLSA would have been virtually repealed” and “[v]iolations of [the] FLSA would then have been reduced to something akin to common-law breaches of contract”).

71. See H.R. REP. NO. 80-326, at 12 (1947) (Conf. Rep.) (“It will be noted that [29 U.S.C. § 253] lays down no rule as to compromises or waivers with respect to causes of action hereafter accruing.”).

72. See Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 36 (1996).

73. FED. R. CIV. P. 41(a).

74. *Id.* 41(a)(1).

75. *Id.* 41(a)(2).

76. *Id.* 41(a)(1)(A)(i).

77. *Id.* 41(a)(1)(A)(ii). A “stipulation” is “[a] voluntary agreement between opposing parties concerning some relevant point.” *Stipulation*, BLACK’S LAW DICTIONARY (10th ed. 2014). “Appearance” is defined as “[a] coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person.” *Appearance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

78. “Stipulation of dismissal” is essentially another term for “settlement.” See generally *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (using the term “settlement” interchangeably with “stipulated dismissal”).

stipulation of dismissal says otherwise, the dismissal is without prejudice.<sup>79</sup> When a case is dismissed without prejudice, “the plaintiff may refile the same suit on the same claim” following dismissal.<sup>80</sup> A stipulation of dismissal can be made with prejudice if so specified.<sup>81</sup> When a case is dismissed with prejudice, “the plaintiff is foreclosed from filing a suit again on the same claim or claims” following dismissal.<sup>82</sup>

Not all plaintiffs have the ability to voluntarily dismiss cases; Rule 41 is “[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute.”<sup>83</sup> These rules and statutes all contain language that explicitly requires court approval of dismissals or settlements.<sup>84</sup>

## 2. Which Rules and Statutes Require Court Approval of Dismissals?

Lawsuits brought pursuant to Federal Rules of Civil Procedure 23, 23.1, 23.2, and 66 cannot be dismissed without court approval. Rule 23 relates to class actions.<sup>85</sup> Class actions are lawsuits in which one or more members of a class represent all members of a class in a lawsuit in which they are suing or being sued.<sup>86</sup> Rule 23.1 relates to derivative actions.<sup>87</sup> Derivative actions are lawsuits in which shareholders or members of a corporation or unincorporated association sue a third party on behalf of the corporation or association.<sup>88</sup> Rule 23.2 applies to actions relating to unincorporated associations.<sup>89</sup> These actions are “brought by or against the members of an unincorporated association as a class by naming certain members as representative parties.”<sup>90</sup> Until 1966, actions brought under Rules 23.1 and 23.2 were housed under Rule 23.<sup>91</sup> Rule 66 relates to actions in which

79. FED. R. CIV. P. 41(a)(1)(B).

80. *Dismissed Without Prejudice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

81. FED. R. CIV. P. 41(a)(1)(B).

82. *Dismissed with prejudice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

83. FED. R. CIV. P. 41(a)(1)(A).

84. See 8 U.S.C. § 1329 (2012) (“No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.”); 31 U.S.C. § 3730(b)(1) (2012) (“The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”); FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”); FED. R. CIV. P. 23.1(c) (“A derivative action may be settled, voluntarily dismissed, or compromised only with the court’s approval.”); FED. R. CIV. P. 23.2 (“[T]he procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).”); FED. R. CIV. P. 66 (“An action in which a receiver has been appointed may be dismissed only by court order.”).

85. FED. R. CIV. P. 23.

86. *Id.* 23(a).

87. *Id.* 23.1.

88. *Id.* 23.1(a).

89. *Id.* 23.2.

90. *Id.* An unincorporated association is an “organization that is not a legal entity separate from the persons who compose it.” *Association*, BLACK’S LAW DICTIONARY (10th ed. 2014).

91. See FED. R. CIV. P. 23.1 advisory committee’s note to 1966 amendment; FED. R. CIV. P. 23.2 advisory committee’s note to 1966 amendment.

receivers are appointed, bring suit, or are sued.<sup>92</sup> A receiver is a disinterested person that is appointed by the court to protect or collect disputed property.<sup>93</sup>

Rule 41 mentions these specific Federal Rules of Civil Procedure before vaguely referring to “any applicable federal statute.”<sup>94</sup> While Rule 41’s text does not clarify what “applicable federal statute” means, the rule drafters’ note to Rule 41 provides examples of such statutes.<sup>95</sup> It notes that “[p]rovisions regarding dismissal in such statutes as” 8 U.S.C. § 1329 and 31 U.S.C. § 3730 would not be affected by Rule 41.<sup>96</sup> No other statutes are listed as examples.<sup>97</sup> Section 1329 is a statute within the Immigration and Nationality Act.<sup>98</sup> It gives district courts jurisdiction over all cases brought by the United States arising under the immigration subchapter of the Act.<sup>99</sup> Section 3730 allows private persons known as relators to bring civil lawsuits on behalf of the federal government against those who have defrauded the federal government.<sup>100</sup> Besides these statutes and the FLSA, the only other statute that has been considered an applicable federal statute by a court is 28 U.S.C. § 1915(g). Under this statute, a federal prisoner cannot bring a civil action or appeal such an action if that prisoner has on three or more prior occasions, while imprisoned, brought a lawsuit that was dismissed for being frivolous, malicious, or failing to state a claim upon which relief can be granted.<sup>101</sup>

### 3. Why These Rules and Statutes Require Court Approval of Dismissals

There are various reasons why lawsuits cannot be dismissed without approval under these rules and statutes. Lawsuits brought under Rules 23, 23.1, and 23.2 involve small groups that are members of, and represent the interests of, larger groups.<sup>102</sup> Problems can arise when members of the large group disagree with how the small group acts in the course of litigation, especially when the small group agrees to settlements on behalf of the whole.<sup>103</sup> As a result, courts must approve these settlements to ensure the larger group’s interests are well represented.<sup>104</sup>

Rule 66 requires settlements to be approved by a court because receivers are appointed by courts and represent an extraordinary investment that a court should employ with the “utmost caution” and grant “only in cases of clear

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92. FED. R. CIV. P. 66.

93. See *Receiver*, BLACK’S LAW DICTIONARY (10th ed. 2014).

94. FED. R. CIV. P. 41(a)(1)(A).

95. See FED. R. CIV. P. 41 advisory committee’s note to 1937 adoption.

96. *Id.*

97. See *id.*

98. 8 U.S.C. § 1329 (2012).

99. See *id.*

100. 31 U.S.C. § 3730(b)(1) (2012); see also *id.* § 3729.

101. 28 U.S.C. § 1915(g) (2012).

102. Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 82–84 (1998).

103. *Id.* at 83–84.

104. *Id.* at 91–92.

necessity.”<sup>105</sup> Allowing voluntary dismissal of these cases would give parties power to render the time and effort invested by the court worthless.<sup>106</sup> Further, because receivers are court appointed, voluntary dismissal of Rule 66 cases would allow parties to unilaterally remove court officers—too great a power for parties to have.<sup>107</sup>

Settlements of lawsuits brought under § 1329 require approval because of the duty U.S. Attorneys have to prosecute every suit brought by the United States under the immigration subchapter of the Immigration and Nationality Act.<sup>108</sup> If the case is going to be settled rather than prosecuted, the court must consent to the settlement given its jurisdiction over the case.<sup>109</sup>

Settlements of lawsuits brought under § 3730 require approval to keep relators from reducing the government’s recovery and unjustly enriching themselves.<sup>110</sup> For example, in one case, a relator bargained away the United States’ ability to bring further claims against the defendant.<sup>111</sup> The relator did this to increase the amount the defendant would pay in the settlement, part of which would be paid to the relator.<sup>112</sup> In another case, a relator, who brought a claim on behalf of himself and a claim on behalf of himself and the United States, negotiated with the defendant to lower the settlement amount that would be paid to him and the United States together.<sup>113</sup> In exchange, the settlement amount that would be paid to him alone was increased.<sup>114</sup> Each relator bargained away something that was not his and which came at little cost to him—the United States’ ability to later sue the defendant or the amount the United States would receive from the settlement of another claim—in exchange for more money. Without an approval requirement, relators would be able to get away with such manipulation.

In cases implicating § 1915(g), some courts have held that plaintiffs cannot voluntarily dismiss a lawsuit merely to circumvent the “three or more prior occasions” bar that would prevent the plaintiff from bringing or appealing another civil lawsuit.<sup>115</sup> The plaintiff is usually able to determine that a lawsuit will be dismissed and seek voluntary dismissal after a magistrate judge recommends dismissal and before a district judge actually dismisses the case.<sup>116</sup> Without an approval requirement, § 1915(g) would be rendered

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105. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2983 (3d ed. 2014).

106. *Id.* § 2981.

107. FED. R. CIV. P. 66 advisory committee’s note to 1946 amendment (“A party should not be permitted to oust the court and its officer without the consent of that court.”).

108. 8 U.S.C. § 1329 (2012). This type of requirement does not appear anywhere else in the U.S. Code.

109. *Id.*

110. *Searcy v. Philips Elec. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997) (citing *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994)).

111. *Id.*

112. *Id.*

113. *Killingsworth*, 25 F.3d at 718.

114. *Id.*

115. *See, e.g., Large v. Beckham Cty. Dist. Court*, 558 F. App’x 827, 828 (10th Cir. 2014); *Ludy v. Nelson*, No. 5:13-CV-353, 2014 WL 468509, at \*1 (M.D. Ga. Feb. 5, 2014); *see also supra* note 101 and accompanying text.

116. *See Large*, 558 F. App’x at 828; *Ludy*, 2014 WL 468509, at \*1.

moot because a plaintiff could easily find ways around it through voluntary dismissal.

*C. The Odd Man Out: Comparing the FLSA's Treatment of Settlements to That of Other Federal Employment Statutes*

Part I.C.1 compares the FLSA to other federal employment statutes in terms of their purposes and whom they seek to protect. Next, Part I.C.2 discusses how the FLSA and the other statutes treat settlements of claims.

1. Other Federal Employment Statutes

The FLSA is a federal employment statute. Thus, it is important to compare it to other federal employment statutes to get a better understanding of its unique aspects. Federal employment statutes that are useful comparators in the approval-of-settlements context include Title VII, the ADEA, and the FMLA.<sup>117</sup> Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>118</sup> The ADEA prohibits employment discrimination on the basis of age.<sup>119</sup> The FMLA requires employers to provide their employees with the ability to take unpaid, job-protected leave for family and medical reasons.<sup>120</sup> Like the FLSA, each of these acts allows lawsuits to be brought either by aggrieved employees or a government body on behalf of those employees.<sup>121</sup>

Title VII<sup>122</sup> and the FMLA<sup>123</sup> are generally applicable statutes; they do not necessarily seek to protect one specific group of people. The ADEA and the FLSA, however, seek to help specific groups of workers. The FLSA seeks to protect the most vulnerable, lowest paid segments of the workforce.<sup>124</sup> The ADEA seeks to protect older workers.<sup>125</sup>

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117. *See Socias v. Vornado Realty L.P.*, 297 F.R.D. 38, 40–41 (E.D.N.Y. 2014) (comparing the FLSA to the ADEA and the FMLA to determine whether Rule 41 voluntary dismissals of FLSA lawsuits require approval); *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 630 (W.D. Tex. 2005) (comparing the FLSA to the ADEA and Title VII to determine whether FLSA settlements that had not been approved by the court or the DOL should be enforceable); Andrew C. Kuettel, *A Call to Congress to Add a "Knowing and Voluntary" Waiver Provision to the Fair Labor Standards Act to Enable Private Resolution of Wage Disputes*, 30 A.B.A. J. LAB. & EMP. L. 409, 419–24 (2015) (comparing the FLSA to Title VII, the ADEA, and the FMLA to determine whether FLSA settlements that had not been approved by the court or the DOL should be enforceable).

118. 42 U.S.C. § 2000e-2 (2012).

119. 29 U.S.C. § 623 (2012).

120. 29 U.S.C. § 2612 (2012).

121. 29 U.S.C. §§ 626(c), 2617(a)–(b); 42 U.S.C. § 2000e-5(f).

122. 42 U.S.C. §§ 2000e(a), (f), 2000e-2 to -3.

123. 29 U.S.C. §§ 2601(b)(2), 2611(3).

124. *See* H.R. Doc. No. 75-255, at 1–2 (1937).

125. *See* 29 U.S.C. § 621(b).

## 2. Treatment of Voluntary Dismissals and Settlements by Other Federal Employment Statutes

The best way to determine whether a statute requires settlements to be approved is to look to its text. The FLSA does not explicitly state that private settlements should be allowed without court approval. But most courts have held that FLSA settlements must be approved to be enforceable.<sup>126</sup> The FMLA and ADEA have been amended to explicitly allow private settlements without court approval. The FMLA and regulations allow FMLA claims to be privately settled and waived based on retrospective, but not prospective, violations.<sup>127</sup> The ADEA, as amended by the Older Workers Benefit Protection Act,<sup>128</sup> is much stricter than the FMLA in terms of when it allows private settlements. It allows workers to settle ADEA causes of action and lawsuits only if their settlement is “knowing and voluntary[,]” a standard based on a very detailed and strict set of statutory requirements.<sup>129</sup> Title VII has no explicit provision regarding settlement. However, Title VII case law generally supports the proposition that private settlements of Title VII claims are allowed without approval only if the settlement is “knowing and voluntary,” although “knowing and voluntary” is not defined as explicitly in Title VII case law as it is in the text of the ADEA.<sup>130</sup>

The ADEA standard is most similar to the majority view that FLSA settlements must be approved. This is because the ADEA’s enforcement mechanisms are modeled after the FLSA’s enforcement mechanisms.<sup>131</sup> Congress recognized that, like the population the FLSA protects, the elderly population the ADEA protects is vulnerable;<sup>132</sup> the elderly can be manipulated or coerced into settlements and often sign settlements without

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126. *See infra* Part II.A.

127. 29 C.F.R. § 825.220(d) (2013).

128. Pub. L. No. 101-433, 104 Stat. 978 (1990).

129. 29 U.S.C. § 626(f). The waiver of one’s rights in the settlement of a lawsuit is “knowing and voluntary” if (1) “the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate,” (2) the waiver clearly refers to ADEA rights, (3) the individual does not waive his prospective rights, (4) “the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled,” (5) “the individual is advised in writing to consult with an attorney prior to executing the agreement,” and (6) the individual has a reasonable amount of time to consider the settlement. *See id.* § 626(f)(2). The ADEA also allows employees to settle causes of action if such settlements meet similar requirements. *See id.* § 626(f)(1).

130. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *see also* Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 74 (2005) (“[T]he courts of appeal agree that a person can waive a Title VII claim if the person’s consent to the release is ‘knowing’ and ‘voluntary’ . . .”).

131. *See* S. REP. NO. 101-79, pt. 2, at 3, 12–13 (1989).

132. *Id.* at 9 (“It is not accidental that Congress incorporated into the ADEA many of the protective procedures of the FLSA. Age discrimination victims typically earn more than the minimum wage, [but not by much]. Moreover, once out of work, these older Americans have less than a 50/50 chance of ever finding new employment. The [sic] often have little or no savings and may not yet be eligible for Social Security . . . . Accordingly, it is reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises.”).



knowing or understanding their rights or claims.<sup>133</sup> In amending the ADEA to implement the knowing and voluntary standard, Congress purposefully did not make this standard as strict as the FLSA standard. Instead, Congress decided to allow private, unapproved settlements of ADEA claims in certain circumstances, despite its understanding that such settlements are disallowed by most courts under the FLSA.<sup>134</sup>

The main reason for this distinction is the difference in the types of facts involved in cases brought under these acts. Suits under the ADEA generally involve complex, nuanced issues of fact, such as whether there was motive and intent to discriminate.<sup>135</sup> By contrast, FLSA suits involve hard facts, such as the number of hours worked or compensation due.<sup>136</sup> Accordingly, determining how much an FLSA plaintiff is owed is easier than determining how much an ADEA plaintiff is owed, and determining an FLSA settlement's fairness is easier than determining an ADEA settlement's fairness.<sup>137</sup> Another reason for the difference in standards is that the FLSA protects a population that is more vulnerable as a whole than the ADEA; the entire FLSA population consists of poorly paid working-class individuals, whereas at least part of the ADEA's population is made up of highly paid workers who have the resources to protect themselves.<sup>138</sup>

## II. WHICH COURTS REQUIRE THE PERMISSION SLIP TO BE SIGNED?: THE CIRCUIT SPLIT OVER WHETHER APPROVAL IS REQUIRED

Parts II.A and II.B discuss the circuit split over whether private settlements of FLSA claims need to be approved by a district court or the DOL to be enforceable. Then, Parts II.C and II.D analyze a Second Circuit decision and an Eastern District of New York decision that the Second Circuit decision abrogated over whether Rule 41 voluntary dismissals of FLSA lawsuits need to be approved by a district court or the DOL to be enforceable.

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133. *Id.* at 9–12.

134. See H.R. REP. NO. 101-221, pt. 3, at 14 (1989) (“Unlike the enforcement provisions of the [FLSA], which provide that employees may not waive their rights without supervision, the instant bill provides for the first time that a valid waiver may occur in limited circumstances.”).

135. See *Waivers Under the Age Discrimination in Employment Act: Hearing on Aging Comm. Pub. No. 101-722 and Education & Labor Comm. Pub. No. 101-31*, 101st Cong. 73 (1989) [hereinafter *ADEA Hearings*] (statement of David A. Cathcart, Attorney at Law, Gibson, Dunn & Crutcher, LLP); S. REP. NO. 101-79, pt. 10, at 32; see also *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 n.8 (6th Cir. 1986).

136. *ADEA Hearings*, *supra* note 135, at 73; S. REP. NO. 101-79, pt. 10, at 32; see also *Runyan*, 787 F.2d at 1044 n.8.

137. *ADEA Hearings*, *supra* note 135, at 73; S. REP. NO. 101-79, pt. 10, at 32; see also *Runyan*, 787 F.2d at 1044 n.8.

138. *ADEA Hearings*, *supra* note 135, at 72 (noting a landmark ADEA case in which the plaintiff was “a well-paid, well-educated, labor lawyer with many years of experience in this area” (quoting *Runyan*, 787 F.2d at 1044)); see also *Runyan*, 787 F.2d at 1043 (noting that the FLSA was meant to protect “the lowest paid segment” of workers, while the ADEA protected “an entirely different segment of employees, many of whom were highly paid and capable of securing legal assistance without difficulty” (first quoting *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946))).

A. *The Eleventh Circuit Leads and (Almost) Everyone Follows:  
The Majority View That FLSA Settlements Require Approval*

In *Lynn's Food Stores, Inc. v. United States*,<sup>139</sup> the Eleventh Circuit held that settlements of FLSA claims require court or DOL approval to be enforceable.<sup>140</sup> Most federal courts have followed suit and adopted *Lynn's Food*, making its holding the majority view.<sup>141</sup>

The Eleventh Circuit held that FLSA settlements must occur in one of two ways to be enforceable: (1) payment supervised by the Secretary of Labor under § 216(c) of the FLSA or (2) a district court's stipulated judgment in lawsuits brought directly by employees under § 216(b) of the FLSA in which the parties have presented the court with a proposed settlement and the court has reviewed the settlement for fairness and determined it is fair and of a bona fide dispute.<sup>142</sup> Under the second option, settlements of causes of action cannot be approved and settlements of lawsuits are not automatically approved but are simply approvable.<sup>143</sup> Given that the settlement at issue did not fit either of these options, the court was not allowed to approve it, and the settlement was not enforceable.<sup>144</sup>

While § 216(b) allows private lawsuits, it says nothing about stipulated judgments or reviewing settlements for fairness. As a result, the court had to rely on case law as opposed to the text of the statute to provide support for the second option.<sup>145</sup> Next, the court dealt with the 1947 Act's provision allowing FLSA causes of action and lawsuits to be privately settled outside of litigation and without court or DOL approval.<sup>146</sup> The court held that this provision applied only to lawsuits which "accrued prior to" the 1947 Act's passage and was not applicable to the case.<sup>147</sup>

In providing the reasoning for its holding, the court described the FLSA's goal of protecting workers from low wages and long hours and the extra protection that workers need due to the unequal bargaining power between them and their employers.<sup>148</sup> The court then focused on some of the glaring

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139. 679 F.2d 1350 (11th Cir. 1982); *see also supra* notes 1–7 and accompanying text.

140. *Id.* at 1352–53.

141. *See* Kuettel, *supra* note 117, at 410 (calling this view the "traditional and majority approach"). Almost all of the circuit courts that have dealt with the issue of settlement approval have come out this way. *See, e.g.,* Seminiano v. Xyris Enter., Inc., 602 F. App'x 682, 683 (9th Cir. 2015); Copeland v. ABB, Inc., 521 F.3d 1010, 1014 (8th Cir. 2008); Taylor v. Progress Energy, Inc., 493 F.3d 454, 460 (4th Cir. 2007), *superseded on other grounds*, Whiting v. Johns Hopkins Hosp., 416 F. App'x 312 (4th Cir. 2011). *But see* Martin v. Spring Break '83 Prods., 688 F.3d 247 (5th Cir. 2012) (holding that FLSA settlements do not need to be approved by a court or the DOL to be enforceable). The Seventh Circuit acknowledged, but did not explicitly adopt, *Lynn's Food*. *See* Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) ("Courts . . . have refused to enforce wholly private settlements [of FLSA claims].").

142. *Lynn's Food*, 679 F.2d at 1352–53, 1355.

143. *Id.* at 1354.

144. *Id.* at 1355.

145. *See id.* at 1353 (citing *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 & n.8 (1946); *Jarrard v. Se. Shipbuilding Corp.*, 163 F.2d 960, 961 (5th Cir. 1947)).

146. *Id.* at 1353 n.7.

147. *Id.* (quoting 29 U.S.C. § 253 (2012)).

148. *Id.* at 1352.

facts of the case.<sup>149</sup> It also noted that a major problem with the settlement agreement was that it was not made in “the adversarial context of a lawsuit.”<sup>150</sup> A lawsuit provides benefits to employees such as the increased likelihood of attorney representation.<sup>151</sup> Given these benefits, had the settlement agreement been made in the context of a lawsuit, it may have been approvable.<sup>152</sup> But the court held that, even though a settlement made in the adversarial context of a lawsuit is “more likely to reflect a reasonable compromise” than one made outside of it, court approval is still required for both.<sup>153</sup> The absence of such a requirement would “be in clear derogation of the letter and spirit of the FLSA.”<sup>154</sup>

*B. The Fifth Circuit Tries to Lead and No One Follows:  
The Minority View That FLSA Settlements  
Do Not Require Approval*

The Fifth Circuit’s decision in *Martin v. Spring Break ’83 Productions, LLC*<sup>155</sup> stands in direct contrast to the Eleventh Circuit’s *Lynn’s Food* decision. It represents the minority view that private settlements of FLSA claims do not need to be approved by a court or the DOL to be enforceable. The case involved unionized technicians who had filed a grievance against their employer alleging that they had not been paid properly under the FLSA.<sup>156</sup> The employees sent their union representative to investigate the issue but, when he concluded that it would be impossible to determine the number of hours the employees had actually worked, he agreed to settle the FLSA claims with the employer on behalf of the employees.<sup>157</sup> The settlement was signed after the workers filed a lawsuit based on the FLSA claims.<sup>158</sup>

The Fifth Circuit held that parties could privately settle FLSA claims without court or DOL approval “where there is a bona fide dispute as to the amount of hours worked or compensation due.”<sup>159</sup> By settling a bona fide dispute, the workers were not waiving their statutory right to compensation; given that the parties disagreed about how much was owed to the employees it was impossible to determine whether the payment was more or less than the amount owed under the FLSA.<sup>160</sup> Even though the workers may have been unhappy with the amount they received from the settlement, their

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149. *Id.* at 1354 (holding that the employer’s actions in negotiating a settlement with its employees constituted a “virtual catalog of the sort of practices which the FLSA was intended to prohibit”).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. 688 F.3d 247 (5th Cir. 2012).

156. *Id.* at 249.

157. *Id.*

158. *Id.* at 249–50.

159. *Id.* at 255 (quoting *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005)).

160. *Id.* at 255–57.

representative agreed to that amount to settle the dispute over the number of hours worked and, therefore, the court did not have a legitimate reason to invalidate the settlement.<sup>161</sup> Thus, the court held that the settlement, though not approved by a court or the DOL, was enforceable.<sup>162</sup>

The *Martin* court sought to distinguish its case from *Lynn's Food* by comparing the facts of the two cases. *Martin* involved knowledgeable workers who were represented in negotiations and had legal counsel before settling the cases.<sup>163</sup> *Lynn's Food*, however, involved uninformed workers who neither had legal counsel nor seemed to know their rights.<sup>164</sup> Further, the *Martin* court held that, because the settlement agreement had been entered into after the workers had initiated a lawsuit against their employer, the *Lynn's Food* court's concerns were not implicated.<sup>165</sup> The problem with this reasoning was that the *Martin* court endorsed<sup>166</sup> a district court case arising within the Fifth Circuit, *Martinez v. Bohls Bearing Equipment Co.*,<sup>167</sup> that involved an unrepresented worker agreeing to a settlement before a lawsuit had been initiated.<sup>168</sup>

*Martinez* involved a worker who sued his employer for unpaid overtime compensation.<sup>169</sup> Before the lawsuit, the plaintiff agreed to a settlement with his employer in which he accepted \$1000 as a "full settlement for all overtime in question."<sup>170</sup> The court held that this settlement was enforceable even though it had not been approved by a court or the DOL.<sup>171</sup> The court essentially applied a two-part test to determine whether the settlement was enforceable. First, the settlement had to be of a bona fide dispute over the number of hours worked or compensation owed.<sup>172</sup> Since the parties disagreed about whether the plaintiff had been paid overtime and what amount of overtime was owed to the plaintiff, a bona fide dispute existed.<sup>173</sup> Second, after a bona fide dispute was shown, the court determined whether the settlement agreement constituted a valid release of the plaintiff's FLSA rights.<sup>174</sup> The court held that for a settlement of a bona fide dispute to act as a valid release of rights, "[t]here must be a final meeting of the minds upon the compromise, with a full understanding of the dispute and the effect of the

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161. *See id.* at 255–56 (holding that there was little danger of employees being disadvantaged where the settlement gave them "everything to which they [were] entitled under the FLSA at the time the agreement [was] reached" (quoting *Thomas v. Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976))).

162. *Id.* at 257.

163. *See id.* at 256 n.10.

164. *Id.*

165. *Id.*

166. *See id.* at 255, 257 (affirming the district court's decision which adopted the holding and logic of *Martinez* and relying on the holding and logic of *Martinez* itself).

167. 361 F. Supp. 2d 608 (W.D. Tex. 2005).

168. *Id.* at 612–13.

169. *Id.* at 613.

170. *Id.* at 612.

171. *Id.* at 632.

172. *Id.* at 631.

173. *Id.* at 631–32.

174. *Id.* at 632.

compromise.”<sup>175</sup> The settlement agreement constituted a valid release of the plaintiff’s FLSA rights because “[t]he remedy sought and settled [was] the precise remedy sought’ in the litigation”;<sup>176</sup> the parties had agreed to settle the overtime compensation owed to the plaintiff and the plaintiff sued for that same overtime compensation.

The *Martinez* court criticized the decisions requiring settlements to be approved for being too reliant on policy concerns such as poor labor conditions and unequal bargaining power.<sup>177</sup> These concerns tempted courts to “promulgate social values which, at best, intrude upon the legislative sphere, and at worst reflect imprecise apprehensions of economics and desirable public policy.”<sup>178</sup>

### C. Another Question Left Open?:

#### *Is the FLSA an Applicable Federal Statute Under Rule 41?*

While *Lynn’s Food* and *Martin* differ over whether private FLSA settlement agreements not approved by a court or the DOL are enforceable, some courts, including the Second Circuit, believe they did not answer whether courts or the DOL are required to evaluate and approve proposed settlement agreements for those settlements to later be enforceable.<sup>179</sup>

In *Cheeks v. Freeport Pancake House, Inc.*,<sup>180</sup> an employee sued his former employer for unpaid overtime compensation.<sup>181</sup> After an initial conference and some discovery, the parties privately settled the case and filed a joint stipulation of dismissal with prejudice under Rule 41.<sup>182</sup> The court refused to accept the stipulation because the settlement had not been approved by the court or the DOL.<sup>183</sup> Such approval was required because

175. *Id.* (alteration in original) (quoting *Strand v. Garden Valley Tel. Co.*, 51 F. Supp. 898, 905 (D. Minn. 1943)).

176. *Id.* (first alteration in original) (quoting *Strozier v. Gen. Motors Corp.*, 635 F.2d 424, 426 (5th Cir. 1981)).

177. *See id.* at 627–29. The court noted that *Lynn’s Food*—the only decision that squarely dealt with the issue of whether FLSA settlements required approval—was largely based on the egregious facts of the case. *Id.* at 628 (citing *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354–55 (11th Cir. 1982)).

178. *Id.* at 627 (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 861 (5th Cir. 1975)).

179. *See, e.g.*, *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 204 (2d Cir. 2015) (“[*Lynn’s Food* and *Martin*] arise in the context of whether a private FLSA settlement is enforceable. The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable.”); *Nyazee v. MBR Mgmt. Corp.*, No. 4:14-CV-01561, 2016 WL 126363, at \*1 (E.D. Mo. Jan. 12, 2016) (“[*Lynn’s Food* does not] inform the Court whether it must evaluate and approve a private FLSA settlement, or whether such approval is a prerequisite for subsequent judicial enforcement of a private settlement.”); *Carrillo v. Dandan Inc.*, 51 F. Supp. 3d 124, 131 (D.D.C. 2014) (“Whether an FLSA settlement is legally enforceable, which [*Lynn’s Food*] addressed, is distinct from whether a court must—or should—evaluate such a proposed settlement *ex ante*.”).

180. 796 F.3d 199 (2d Cir. 2015).

181. *Id.* at 200.

182. *Id.*

183. *Id.* The parties then appealed the case to the Second Circuit, which affirmed the district court’s holding that the settlement had to be approved and remanded the case. *Id.* at

the FLSA qualified as an “applicable federal statute” under Rule 41.<sup>184</sup> Thus, the case could not be dismissed without a court order or DOL approval.<sup>185</sup>

The Second Circuit held that the FLSA qualified as an applicable federal statute under Rule 41 because of the policy underlying the FLSA.<sup>186</sup> The court focused on the Supreme Court’s liberal interpretation of the FLSA as a statute with particularly broad protections<sup>187</sup> and a goal “to extend the frontiers of social progress” by ensuring a living wage to all workers.<sup>188</sup> The court’s concern was that private settlements would allow employers to continue to take advantage of their workers.<sup>189</sup> Without an approval requirement, workers would not get the pay they deserved under the statute and less scrupulous employers would not be incentivized to change their underhanded dealings.<sup>190</sup> This would cause workers as a whole to suffer.<sup>191</sup>

#### D. *The Martin of Rule 41: Picerni*

The *Cheeks* decision abrogated an earlier decision, *Picerni v. Bilingual Seit & Preschool, Inc.*,<sup>192</sup> made two years earlier by the Eastern District of New York. In that case, a teacher brought a collective action against her employer for minimum wage violations.<sup>193</sup> Not long after the lawsuit’s commencement, the parties settled and the plaintiff filed a notice of acceptance of an offer of judgment.<sup>194</sup> After the court declined to enter judgment under Federal Rule of Civil Procedure 68,<sup>195</sup> the parties were directed by a court order to file a motion to approve the settlement.<sup>196</sup> Four months later, the court vacated its own order and allowed the parties to settle without court approval.<sup>197</sup> The court held that the FLSA was not an applicable federal statute under Rule 41, and thus the parties could voluntarily dismiss the case without approval.<sup>198</sup>

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201. The lawsuit was dismissed without prejudice with the parties stipulating that they did not believe their settlement agreement to be binding and enforceable without court approval. *See Cheeks v. Freeport Pancake House, Inc.*, No. 12-CV-04199 (E.D.N.Y. Apr. 5, 2017); Response to September 21, 2016 Order, *Cheeks v. Freeport Pancake House, Inc.*, No. 12-CV-04199 (E.D.N.Y. Oct. 11, 2016).

184. *Cheeks*, 796 F.3d at 206.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

189. *Id.*

190. *Id.*

191. *See id.*

192. 925 F. Supp. 2d 368 (E.D.N.Y. 2013), *abrogated by Cheeks*, 796 F.3d 199.

193. *Id.* at 369.

194. *Id.*

195. FED. R. CIV. P. 68. Federal Rule of Civil Procedure 68 allows a defendant to serve on the plaintiff “an offer to allow judgment on specified terms” that the plaintiff can accept, essentially acting as a settlement. *Id.*

196. *Picerni*, 925 F. Supp. 2d at 369 (holding that because it was an FLSA case, it had to be approved by a court or the DOL and could not be resolved under a Rule 68 offer of judgment).

197. *Id.* at 379.

198. *Id.* at 373.

In coming to the conclusion that the FLSA was not an applicable federal statute, the court focused on the absence of an explicit approval requirement in the FLSA, a feature of all applicable federal statutes and rules under Rule 41.<sup>199</sup> The court also highlighted a practical problem: many FLSA cases are so small that if courts were to deny settlements, then parties would lack incentive to proceed further with litigation.<sup>200</sup> In these types of cases, rejecting a settlement not only fails to accomplish anything, but it harms the parties.<sup>201</sup> The parties have to pay additional litigation expenses they cannot afford and, even if the employee wins, the employer likely will not pay.<sup>202</sup> Further, the court is keeping a plaintiff from a settlement that is small yet acceptable and helpful to him, all in the name of “some Platonic form of the ideal of judicial vindication.”<sup>203</sup> Given these practical consequences, the court reasoned that rejecting a settlement that everyone was happy with did nothing to accomplish the FLSA’s purposes.<sup>204</sup>

The issues brought before the *Cheeks* and *Picerni* courts were whether the FLSA constituted an applicable federal statute under Rule 41 and therefore whether FLSA cases could be voluntarily dismissed without court or DOL approval.<sup>205</sup> But the courts framed these questions differently. The *Cheeks* court addressed whether parties could voluntarily dismiss an FLSA lawsuit under Rule 41 without court or DOL approval and later enforce that settlement.<sup>206</sup> The *Picerni* court addressed only the first half of that question;<sup>207</sup> it did not decide whether a voluntary dismissal would later be enforceable. In fact, the court recognized that parties dismissing FLSA cases under Rule 41 would be “[taking] their chances that their settlement [would] not be effective.”<sup>208</sup> Thus, unlike the *Cheeks* court, the *Picerni* court assumed either that unapproved settlements would be made without prejudice or that it did not necessarily matter for enforceability purposes whether they were made with or without prejudice.<sup>209</sup> The main goal of its holding was to ensure that parties would be given the power under Rule 41 to dismiss FLSA lawsuits when and how they wanted to.<sup>210</sup> The *Cheeks* holding, by contrast, dealt explicitly with dismissals made with prejudice and did not address the

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199. *Id.* at 375; *see also supra* note 84 and accompanying text.

200. *See Picerni*, 925 F. Supp. 2d at 377.

201. *See id.* at 378.

202. *See id.*

203. *Id.* at 377. The court also noted that by rejecting the settlement, the court would be keeping a plaintiff’s attorney, likely satisfied with his fee, and a defendant, who could barely afford to pay the settlement, let alone hire an attorney, from closure. *Id.*

204. *See id.*

205. *See Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 201 (2d Cir. 2015); *Picerni*, 925 F. Supp. 2d at 368–69.

206. *Cheeks*, 796 F.3d at 204.

207. *Picerni*, 925 F. Supp. 2d at 374.

208. *Id.* at 373.

209. *Id.* (“[I]t is one thing to say that . . . a private settlement will not, under certain circumstances, be enforced in subsequent litigation [but] it is quite another to say that even if the parties want to take their chances that their settlement will not be effective, the Court will not permit them to do so.”).

210. *Id.* at 372–73.

issue of how courts should handle dismissals of FLSA lawsuits without prejudice.<sup>211</sup>

### III. SHOULD THE PERMISSION SLIP HAVE TO BE SIGNED?: A SOLUTION TO THE APPROVAL REQUIREMENT

Part III.A argues that, despite some differences, the Fifth-Eleventh Circuit split is very similar to the discrepancy between the Second Circuit and the Eastern District of New York. Part III.B discusses why the FLSA should not be considered an applicable federal statute under Rule 41 and why *Cheeks* should be overturned. Next, Part III.C discusses the implications of that conclusion, namely that settlements and voluntary dismissals of FLSA lawsuits should be allowed without court approval. As a result of this decision, *Lynn's Food* must be overturned. Part III.D then argues that even though FLSA settlements of lawsuits should be allowed without court approval as Rule 41 voluntary dismissals, private settlements of FLSA causes of action should require court or DOL approval to be enforceable. *Martin* and *Martinez* should, therefore, be overturned. Finally, Part III.E suggests the congressional action required to implement the decisions made in Parts III.B to III.D.

#### A. Reconciling the Lynn's Food-Martin Circuit Split and the Cheeks-Picerni Conflict

There are some differences between the *Cheeks* and *Picerni* decisions and the *Lynn's Food* and *Martin* decisions. The holdings in *Lynn's Food* and *Martin* were based on an interpretation of the FLSA.<sup>212</sup> The holdings in *Cheeks* and *Picerni* were based on both an interpretation of the FLSA and of Rule 41.<sup>213</sup> *Lynn's Food* involved a settlement that had been agreed to before a lawsuit.<sup>214</sup> While *Martin* involved a settlement agreed to after a lawsuit had begun, its reasoning was based on a case involving a settlement that had been agreed to before a lawsuit.<sup>215</sup> In *Cheeks* and *Picerni*, the settlement was agreed to after the lawsuit had begun.<sup>216</sup> In *Lynn's Food*, the employer was trying to enforce the settlement agreement.<sup>217</sup> In *Martin*, the employees were

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211. See *Cheeks*, 796 F.3d at 201 n.2 (“As it is not before us, we leave for another day the question of whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.”).

212. See *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) (noting that the route for settling private FLSA settlements is “provided in the context of suits brought . . . under section 216(b) [of the FLSA]”); *Martin v. Spring Break '83 Prods., LLC*, 797 F. Supp. 2d 719, 730 (E.D. La. 2011), *aff'd*, 688 F.3d 247 (5th Cir. 2012) (adopting the holding of a case with reasoning based on a “thorough historical analysis of the FLSA, its amendments, and case law” (citing *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005))).

213. *Cheeks*, 796 F.3d at 201; *Picerni*, 925 F. Supp. 2d at 375.

214. *Lynn's Food*, 679 F.2d at 1352.

215. *Martin*, 688 F.3d at 255.

216. *Cheeks*, 796 F.3d at 200; *Picerni*, 925 F. Supp. 2d at 369.

217. *Lynn's Food*, 679 F.2d at 1351–52.



trying to prevent the enforcement of the settlement agreement.<sup>218</sup> In *Cheeks* and *Picerni*, both parties wanted the settlement agreement to be approved.<sup>219</sup>

Despite these differences, the *Cheeks* and *Lynn's Food* holdings are similar. The main holding in *Lynn's Food* was that unapproved FLSA settlements are not enforceable.<sup>220</sup> Its reasoning for this holding was that private lawsuits can only be settled by the parties proposing a settlement of a lawsuit to the court and having that settlement approved by a stipulated judgment after the court scrutinizes it for fairness.<sup>221</sup> Thus, despite what *Cheeks* and its progeny assert,<sup>222</sup> the court in *Lynn's Food* did not leave open the question of whether courts or the DOL are required to evaluate and approve proposed settlement agreements for those settlements to later be enforceable; it answered this question in the affirmative. For this reason, the settlement in *Lynn's Food* was not enforceable.

This interpretation of *Lynn's Food* is supported by a decision arising in the same circuit. In *Dees v. Hydradry, Inc.*,<sup>223</sup> the court held that parties could not voluntarily dismiss FLSA lawsuits under Rule 41 because the *Lynn's Food* court held that a district court must approve the dismissal of an FLSA lawsuit for that dismissal to be later enforceable.<sup>224</sup> Thus, like *Cheeks*, *Dees* held that the FLSA was an applicable federal statute and that dismissals of FLSA lawsuits required court approval.<sup>225</sup> Unlike *Cheeks*, *Dees* squarely relied on the reasoning in *Lynn's Food* to support that proposition.<sup>226</sup>

Thus, while the fact patterns and language used in *Lynn's Food* and *Cheeks* are different, their holdings are essentially the same: both require FLSA settlements of lawsuits to be either stipulated judgments by the court or approved by the DOL to be enforceable.<sup>227</sup> Both holdings also require courts or the DOL to review settlements for fairness before approving them.<sup>228</sup> One interesting difference between the two decisions is their treatment of bona fide dispute requirements. The *Lynn's Food* decision requires settlements to be of a bona fide dispute to be approved.<sup>229</sup> The *Cheeks* court not only

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218. *Martin*, 688 F.3d at 254.

219. *Cheeks*, 796 F.3d at 200–01; *Picerni*, 925 F. Supp. 2d at 369.

220. *Lynn's Food*, 679 F.2d at 1355.

221. *Id.* at 1353.

222. See *supra* note 179 and accompanying text.

223. 706 F. Supp. 2d 1227 (M.D. Fla. 2010).

224. *Id.* at 1237–38, 1244.

225. See *id.* at 1244; see also *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015).

226. See *Dees*, 706 F. Supp. 2d at 1244.

227. See *Cheeks*, 796 F.3d at 206 (holding that “stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect” (emphasis added)); *Lynn's Food*, 679 F.2d at 1353 (holding that “a proposed settlement” of FLSA claims requires approval by a district court’s “stipulated judgment” or the DOL to take effect (emphasis added)). Approval of a stipulated dismissal is the definition of a stipulated judgment. See *Agreed Judgment*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “agreed judgment” as “[a] settlement that becomes a court judgment when the judge sanctions it” and noting that it is also termed “consent judgment; stipulated judgment; judgment by consent” (emphasis added)); see also *supra* note 78 and accompanying text.

228. *Cheeks*, 796 F.3d at 200–01; *Lynn's Food*, 679 F.2d at 1355.

229. *Lynn's Food*, 679 F.2d at 1355.

refused to decide whether a bona fide dispute existed in its case, but it also refused to rule on whether the settlement had to be of a bona fide dispute to be approved,<sup>230</sup> even though almost all courts recognize this bona fide dispute requirement.<sup>231</sup>

*B. The FLSA Is Not an Applicable  
Federal Statute Under Rule 41*

Part III.B.1 discusses how the FLSA differs from applicable federal statutes and rules under Rule 41 both textually and characteristically. It concludes that these differences should prevent the FLSA from being exempt from Rule 41. Next, Part III.B.2 briefly notes the concept of dismissing cases with prejudice. Because the FLSA is not an applicable federal statute under Rule 41, FLSA lawsuits should be able to be dismissed with or without prejudice. Based on these determinations, *Cheeks* must be overturned given its holding that the FLSA is an applicable federal statute under Rule 41 and that FLSA lawsuits cannot be voluntarily dismissed with prejudice.<sup>232</sup>

1. The FLSA Does Not Fit  
the Applicable Federal Statute Mold

The FLSA is not an applicable federal statute under Rule 41. While the FLSA may be a protective statute, it would be an outcast among the other rules and statutes that are exempt from Rule 41. The most important difference between the FLSA and those rules and statutes is that the FLSA contains no provision explicitly requiring the approval of private settlements.<sup>233</sup> Further, Rule 41's advisory committee specifically pointed to 8 U.S.C. § 1329 and 31 U.S.C. § 3730 as statutes that would qualify as applicable federal statutes in its note to the Rule when the Rule was adopted in 1937.<sup>234</sup> The note states, "Provisions regarding dismissal in such statutes as [these] are preserved by [Rule 41(a)(1)]."<sup>235</sup> The "in such statutes as"<sup>236</sup> language suggests that this was not meant to be an exclusive list. The "[p]rovisions regarding dismissal"<sup>237</sup> language would disqualify the FLSA as an applicable federal statute, however, as it has no such provision to preserve. This language would also disqualify 28 U.S.C. § 1915(g) from being an applicable federal statute since it has no such provision to preserve. Until Congress adopts such a provision for each statute, one should not be read into either 28 U.S.C. § 1915(g) or the FLSA.

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230. *Cheeks*, 796 F.3d at 203 n.3 ("[W]e express no opinion as to whether a bona fide dispute exists here, or what the district court must consider in deciding whether to approve the putative settlement of Cheeks' claims.").

231. *See Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 371 (E.D.N.Y. 2013) ("All courts seem to agree that if an FLSA release is going to be upheld, it must be where there is a bona fide dispute . . ."), *abrogated by Cheeks*, 796 F.3d 199.

232. *See supra* notes 183–86 and accompanying text.

233. *See supra* note 84 and accompanying text.

234. *See* FED. R. CIV. P. 41 advisory committee's note to 1937 adoption.

235. *Id.*

236. *Id.*

237. *Id.*

Congress, however, should not adopt such a provision for the FLSA. Not only does the FLSA lack the explicit requirements of an applicable federal statute or rule but it lacks the characteristics of one that would make approval necessary.

Most FLSA lawsuits—unlike class actions, derivative actions, and actions relating to unincorporated associations—do not involve small groups of plaintiffs representing large groups of uninterested plaintiffs who were added to the lawsuit by operation of law.<sup>238</sup> To be a plaintiff in an FLSA case, an individual must initiate the action or opt in to a collective action.<sup>239</sup> This results in smaller classes of more-engaged plaintiffs.<sup>240</sup> Accordingly, the interests of all plaintiffs are better protected in collective actions than in class actions.

Unlike lawsuits under Rule 66, in which the court appoints a receiver, FLSA lawsuits typically do not involve an extraordinary investment of time or effort on the court's part.<sup>241</sup> In FLSA cases, the court does not have to appoint a special officer, and the parties often work out a settlement on their own.<sup>242</sup>

The FLSA also differs from applicable federal statutes in important ways. Section 1329 requires U.S. Attorneys to prosecute every suit that the United States brings under the relevant statutes.<sup>243</sup> The FLSA has no such requirement. In suits brought under § 3730(b), relators can manipulate settlements by bringing and settling suits on behalf of the United States that the United States does not get involved in to achieve settlements that are beneficial to themselves but not to the United States.<sup>244</sup> There is no such concern with claims brought under the FLSA; plaintiffs still have to either bring the suit or affirmatively opt in to it and are therefore much more likely to be engaged in the suit.<sup>245</sup>

It is possible that settlements in FLSA cases could be manipulated if settlements of private lawsuits did not have to be approved but settlements of causes of action did, as this Note suggests should be the case.<sup>246</sup> If this were the case, unscrupulous employers would be incentivized to construct litigation that skirts the approval requirement for settling causes of action. Further, plaintiffs' attorneys could also be incentivized to work with employers to construct this litigation and maximize the attorneys' fees they would receive in a settlement, which would likely decrease the amount the plaintiff would receive.

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238. *See supra* notes 45–50, 102–04 and accompanying text.

239. *See* 29 U.S.C. § 216(b) (2012); *see also supra* notes 43–47 and accompanying text.

240. *See supra* notes 45–50, 102–04 and accompanying text.

241. *See supra* notes 105–07 and accompanying text.

242. *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 372 (E.D.N.Y. 2013) (noting that in the typical FLSA case the employer does not even make an appearance and plaintiff's counsel informs the judge that the case is over before any proceedings take place), *abrogated by* *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015).

243. *See* 8 U.S.C. § 1329 (2012).

244. *See supra* notes 110–14 and accompanying text.

245. *See* 29 U.S.C. § 216(b) (2012); *see also supra* note 50 and accompanying text.

246. *See infra* Part III.C–E.

Given these perverse incentives, it may be argued that if settlements of causes of action have to be approved, settlements of lawsuits should have to be approved as well. Plaintiffs' attorneys bargaining away their client's award in exchange for more money for themselves parallels the problem of relators bargaining away something belonging to the United States, but there are important differences between the two.<sup>247</sup> In lawsuits brought under § 3730(b), relators are the ones who sue; the United States has the right not to intervene or get involved.<sup>248</sup> This is not the case in private FLSA lawsuits; while plaintiffs' attorneys can construct litigation, plaintiffs themselves still either have to bring the suit or affirmatively opt in to it.<sup>249</sup> Thus, employees would likely be more involved in a settlement than the United States would be. Further, many plaintiffs' attorneys' fees in FLSA cases are contingent on the case's outcome and thus inextricably linked to settlement amounts in FLSA lawsuits;<sup>250</sup> the better an attorney does advocating for his client, the higher the settlement likely will be, resulting in higher contingent fees. But with lawsuits brought under § 3730(b), a relator's award is not necessarily linked with the United States' award. For example, a relator can bargain away a nonmonetary award from the United States<sup>251</sup> or have a separate additional claim.<sup>252</sup> Thus, decreasing the United States' award would not necessarily decrease the relator's award. As a result, relators may have less incentive to work in the United States' best interests than FLSA plaintiffs' attorneys have to work in their clients' best interests. Given these differences, it is not necessary for settlements of private FLSA lawsuits to be approved. Even though an approval requirement is not necessary or appropriate, these perverse incentives—in addition to the vulnerability of the population the FLSA protects and the Act's purpose—make it clear that some protections are required for settlements of FLSA lawsuits. Consequently, this Note suggests implementing rigorous standards short of requiring approval that will seek to protect plaintiffs in FLSA lawsuits from unfair settlements.<sup>253</sup>

Finally, § 1915(g) should not be considered an applicable federal statute, but even if it is, it is distinguishable from the FLSA. Unlike allowing for voluntary dismissals in cases implicating § 1915(g), allowing for voluntary dismissals of FLSA lawsuits would not lead to a procedural loophole. Section 1915(g) would be rendered meaningless if courts were not allowed to deny voluntary dismissals when necessary.<sup>254</sup> In contrast, the FLSA would not be rendered meaningless without an approval requirement. Further, the issue arising under § 1915(g) involves notices of dismissal filed only by the

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247. See *supra* notes 110–14 and accompanying text.

248. See 31 U.S.C. § 3730(b) (2012).

249. See 29 U.S.C. § 216(b).

250. 22A FEDERAL PROCEDURE, LAWYERS EDITION § 52:1779, Westlaw (database updated June 2017).

251. See *supra* note 111 and accompanying text.

252. See *supra* note 113 and accompanying text.

253. See *infra* Part III.C–E.

254. See *supra* notes 115–16 and accompanying text.

plaintiff.<sup>255</sup> The issue arising under the FLSA, however, involves stipulations of dismissals filed by all parties.<sup>256</sup> Thus, settlements are not implicated in issues arising under § 1915(g) as they are in issues arising under the FLSA.

## 2. Prejudice

If the FLSA is not an applicable federal statute under Rule 41, parties should be able to voluntarily dismiss FLSA lawsuits through stipulations of dismissal.<sup>257</sup> Even though dismissal without prejudice is the default rule under Rule 41, parties are also allowed to dismiss their cases with prejudice if so stipulated.<sup>258</sup> The same should apply to parties settling FLSA lawsuits. Despite *Picerni* and *Cheeks*,<sup>259</sup> because the FLSA is not an applicable federal statute, there is nothing special about it that would require FLSA lawsuits to be voluntarily dismissed only without prejudice and not with prejudice.

### *C. Parties Should Be Able to Dismiss FLSA Lawsuits Without Court Approval If the Dismissal Is Knowing and Voluntary and of a Bona Fide Dispute*

Part III.C.1 discusses the benefits the court in *Lynn's Food* believed the adversarial context of lawsuits had on negotiations of FLSA settlements. It also explains how those benefits should preclude the need for settlements of FLSA lawsuits to be approved. Next, Part III.C.2 examines the negative impacts that an approval requirement for FLSA lawsuits may have on the ability to sufficiently enforce the FLSA. Parts III.C.3 and III.C.4 then consider how two amendments to the FLSA, the 1947 Act and the Fair Labor Standards Amendments of 1949, lend themselves to an understanding that Congress did not intend for settlements of FLSA lawsuits to require approval. Based on these arguments, the holdings in *Lynn's Food* and subsequent decisions<sup>260</sup> should be overturned. Finally, Part III.C.5 discusses the middle ground that needs to and can be found between requiring approval of settlements of FLSA lawsuits and allowing the parties to dismiss such lawsuits voluntarily without any restrictions.

#### 1. *Lynn's Food*: The Importance of the Context of a Lawsuit

In holding that settlements of FLSA lawsuits have to be approved to be enforceable, the court in *Lynn's Food* gave convincing reasoning for the opposing proposition: that settlements of FLSA lawsuits should be enforceable even without approval.<sup>261</sup> The court noted that private

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255. See, e.g., *Large v. Beckham Cty. Dist. Court*, 558 Fed. App'x 827, 828 (10th Cir. 2014); *Ludy v. Nelson*, No. 5:13-CV-353, 2014 WL 468509, at \*1 (M.D. Ga. Feb. 5, 2014).

256. See *supra* notes 77–78 and accompanying text.

257. FED. R. CIV. P. 41(a)(1)(A)(ii).

258. See *supra* note 81 and accompanying text.

259. See *supra* notes 209–11 and accompanying text.

260. See *supra* notes 140–44, 227 and accompanying text.

261. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982).

settlements are more likely to be permissible if agreed to in the context of a lawsuit because of the adversarial nature of lawsuits.<sup>262</sup> This adversarial nature helps to level the playing field between employer and employee. In a lawsuit, the employee goes on the offensive, while in a settlement agreed to outside of a lawsuit, a predatory employer is more likely to go on the offensive.<sup>263</sup>

Further, the Eleventh Circuit held that private settlements are more likely to be permissible if agreed to in the context of a lawsuit because employees are more likely to be represented by attorneys who can protect their interests.<sup>264</sup> Employees represented by attorneys generally receive more valuable settlements than unrepresented employees.<sup>265</sup> An attorney also better informs employees of their rights under the FLSA, so they have a clearer sense of what they are entitled to under the Act and what they are agreeing to if they settle.<sup>266</sup>

## 2. Doing Justice to the Parties

The reasons provided in *Lynn's Food* are not the only reasons why settlements of FLSA lawsuits should be enforceable without court approval. Another reason is the longstanding public policy favoring private settlements of lawsuits.<sup>267</sup> Under Rule 41, parties generally have an absolute right to dismiss a lawsuit.<sup>268</sup> As the applicable federal statutes and rules under Rule 41 show, unless there is an explicit provision as well as a very good reason why parties should not be able to privately settle their lawsuits, dismissing lawsuits should be their prerogative.<sup>269</sup> Requiring court approval for settlement FLSA lawsuits takes that prerogative away.

Those in favor of an approval requirement in FLSA cases reason that it is necessary to ensure workers are not taken advantage of in settlements.<sup>270</sup> If employers know violating the FLSA will at worst lead to a slap on the wrist in the form of a cheap settlement, they have little incentive to stop violating the FLSA.<sup>271</sup> Without such incentives, employers will continue to race to the

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262. *Id.*

263. Compare *id.* (involving a settlement agreed to outside of a lawsuit in which the employer went on the offensive), with *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (involving a settlement agreed to during a lawsuit in which the employee went on the offensive).

264. *Lynn's Food*, 679 F.2d at 1354.

265. *See id.*

266. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983).

267. *See supra* notes 72–73 and accompanying text.

268. *See Wolters Kluwer Fin. Serv., Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009); *Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1990).

269. *See supra* notes 84, 102–16 and accompanying text.

270. *See Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015) (“Examining the basis on which district courts recently rejected several proposed FLSA settlements highlights the potential for abuse in such settlements, and underscores why judicial approval in the FLSA setting is necessary.”); *Lynn's Food*, 679 F.2d at 1354.

271. *See Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1237 (M.D. Fla. 2010) (“An employer who pays less than the minimum wage or who pays no overtime has no incremental incentive to comply voluntarily with the FLSA, if, after an employee complains,

bottom and undercut one other on wages, negatively impacting all workers.<sup>272</sup> By trying to protect all workers through an approval requirement, however, courts can hurt individual plaintiffs and disincentivize them from bringing FLSA lawsuits.<sup>273</sup> The FLSA relies on workers to act as private attorneys general in bringing lawsuits.<sup>274</sup> As low wage workers, many of these workers lack the resources to bring a lawsuit or to continue with one if the court rejects their settlement.<sup>275</sup> If court approval requirements become too tedious, many workers may opt to settle privately out of court instead of investing time, money, and effort in a lawsuit that they may not be able to see through to the end. If this happens, the important private attorney general role will cease to be filled as individual plaintiffs will not find it in their interest to bring a lawsuit.

### 3. Implications of the 1947 Act

One argument in support of an approval requirement derives from the 1947 Act. This Act allowed all FLSA causes of action and lawsuits in which the parties had a bona fide dispute over the compensation owed to be settled without court approval as long as those claims and lawsuits were based on FLSA violations prior to the 1947 Act's passage on May 14, 1947.<sup>276</sup> It also allowed liquidated damages to be waived based on violations prior to May 14, 1947, even without a bona fide dispute.<sup>277</sup> But, since the 1947 Act did not provide guidance about how FLSA causes of action and lawsuits based on violations after its passage could be settled, there is no current provision to guide courts in determining whether settlements require court approval to be enforceable.<sup>278</sup>

Those in favor of an approval requirement reason that Congress made the 1947 Act's settlement provision applicable only to pre-1947 Act violations to signal that further legislation would be needed to make post-1947 Act unapproved settlements enforceable.<sup>279</sup> However, the *Martinez* court disagreed; pointing to the 1947 Act's legislative history, the court held that despite the 1947 Act's retrospective application, Congress's goal was not to prohibit private, unapproved settlements but to leave the decision of whether

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the employer privately compromises the claim for . . . an amount less than the full amount owed under the FLSA . . . ”).

272. See *supra* note 29 and accompanying text.

273. See *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 378 (E.D.N.Y. 2013) (“[B]y forcing the plaintiff to proceed when he did not want to, the Court may have inadvertently increased the potential adverse social consequences to the plaintiff of having brought the suit.” (citing *Zhou v. Wang’s Rest.*, No. C 05-0279, 2007 WL 134441 (N.D. Cal. Jan. 16, 2007))), *abrogated by Cheeks*, 796 F.3d 199.

274. See *supra* note 57 and accompanying text.

275. See *supra* notes 18, 200–01 and accompanying text.

276. 29 U.S.C. § 253(a) (2012).

277. *Id.* § 253(b).

278. See *supra* note 71 and accompanying text.

279. See *Zhou v. Wang’s Rest.*, No. C 05-0279, 2007 WL 2298046, at \*1 n.1 (N.D. Cal. Aug. 8, 2007) (“[C]ongress’ failure to make any amendments that would change the non-waivability of FLSA claims (such as by removing the date restriction from 29 U.S.C. § 253) evinces a congressional intent that FLSA claims continue to be non-waivable.”).

to prohibit such settlements to a “determination under *other law*.”<sup>280</sup> Because there is no such provision or “other law” requiring the approval of settlements, the *Martinez* court held that unapproved settlements should be enforceable.<sup>281</sup> Given the explicit approval requirements in applicable federal statutes and rules under Rule 41, the *Martinez* decision presents the better understanding of the implications of the 1947 Act on whether FLSA settlements of lawsuits need to be approved. If such settlements had to be approved under the FLSA, there would be an explicit approval requirement in either § 216(b) or some “other law.”

#### 4. Implications of the Fair Labor Standards Amendments of 1949

Section 216(c) of the FLSA—which was added to the FLSA under the Fair Labor Standards Amendments of 1949—also raises questions about whether private settlements of lawsuits need to be approved to be enforceable. This provision states that the Secretary of Labor “is authorized” to supervise the payment of back wages to employees.<sup>282</sup> Those in favor of an approval requirement note that such a provision signals that all settlements of FLSA lawsuits and causes of action should be supervised or approved by the DOL.<sup>283</sup> But DOL supervision was meant only as an additional option to employees bringing lawsuits.<sup>284</sup> It seems unlikely, therefore, that Congress meant to require court approval of private FLSA lawsuits when it allowed for DOL supervision. Furthermore, since such a provision was included in § 216(c) but not in § 216(b), the provision governing private lawsuits, it seems that Congress did not intend for courts to play the same or similar supervisory role in private lawsuits.

#### 5. Adopting the Knowing and Voluntary and Bona Fide Dispute Provisions

Although an approval requirement is not proper, the FLSA needs safeguards to ensure that the vulnerable population it protects will not be exploited or taken advantage of in settlements. While a lawsuit in and of itself can serve as a safeguard against the exploitation of employees in a settlement given its adversarial context,<sup>285</sup> it is not enough of a safeguard to sufficiently protect the population the FLSA serves. The best safeguards that

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280. *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005) (emphasis added) (quoting H.R. REP. NO. 80-326, at 12 (1947) (Conf. Rep.)). The quote in the original source is “to be determined under law other than this section,” which *Martinez* misquoted.

281. *Id.* (“Congress has not closed the doors to the settlement of disputed questions of the [FLSA] and the Courts should not do so by judicial construction.” (quoting *Atl. Co. v. Broughton*, 146 F.2d 480, 485 (5th Cir. 1944) (Waller, J., dissenting))).

282. 29 U.S.C. § 216(c).

283. *See Martinez*, 361 F. Supp. 2d at 626 (noting the plaintiff’s argument that Congress intended for DOL supervision of the payment of wages to be the only way to settle FLSA claims).

284. *See supra* note 36 and accompanying text.

285. *See supra* notes 150–51 and accompanying text.



can be adopted to provide sufficient protection without impinging on an employee's right to voluntarily dismiss a lawsuit under Rule 41 are a knowing and voluntary standard and a bona fide dispute provision.

Under the knowing and voluntary standard, parties would still be able to voluntarily dismiss an FLSA lawsuit under Rule 41 but only if the dismissal was knowing and voluntary. Such an amendment would recognize that the FLSA is not an applicable federal statute under Rule 41. Thus, it would also recognize that FLSA lawsuits should be allowed to be dismissed and privately settled without court or DOL approval. Despite allowing for voluntary dismissals, such an amendment would still recognize that the FLSA is a highly protective statute. This is especially true given the ADEA's use of a knowing and voluntary standard to protect the elderly.<sup>286</sup> Adopting the standard only for dismissals of lawsuits and not settlements of causes of action—which would still require approval<sup>287</sup>—would recognize Congress's intent that the FLSA be a more protective statute, at least regarding settlements, than the ADEA.<sup>288</sup> This is because the ADEA applies some version of the standard to both settlements of lawsuits and causes of action.<sup>289</sup> In addition, adopting the ADEA's standard would be appropriate because the ADEA's enforcement mechanisms are modeled after the FLSA's enforcement mechanisms.<sup>290</sup>

With a provision requiring a bona fide dispute, parties could dismiss lawsuits only if the dismissal was predicated on a bona fide dispute over the number of hours worked or amount owed. Both sides of the approval debate recognize that settlements of FLSA lawsuits and causes of action must be of a bona fide dispute to be enforceable.<sup>291</sup> Without a bona fide dispute requirement, the parties would be able to settle for less than what employees were owed. Allowing employees to settle for less than what they are owed would violate both the letter and the spirit of the FLSA.<sup>292</sup>

#### D. Enforceability of Private Settlements of FLSA Causes of Action

Part III.D.1 discusses the practical concerns that exist in settlements of causes of action but not in settlements of lawsuits. As a result of these differences, settlements of FLSA causes of action should require approval while settlements of FLSA lawsuits should not. Next, Part III.D.2 explains

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286. See *supra* notes 125, 129 and accompanying text.

287. See *infra* Part III.D–E.

288. See *supra* notes 134–38 and accompanying text.

289. See *supra* note 129 and accompanying text.

290. See *supra* note 131 and accompanying text.

291. See *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 255 (5th Cir. 2012) (finding that parties can privately settle FLSA claims without court or DOL approval “where there is a *bona fide dispute* as to the amount of hours worked or compensation due” (emphasis added) (quoting *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005)); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982) (holding that FLSA settlement requires “a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution [sic] of a *bona fide dispute* over FLSA provisions” (emphasis added)); see also *supra* note 231 and accompanying text.

292. See *supra* notes 52–54, 159–60 and accompanying text.

how the FLSA's enforcement provisions lead to the conclusion that settlements of causes of action require approval. Part III.D.3 then examines how the differences between FLSA's treatment of settlements of causes of action and other federal employment statutes' treatment of settlements of causes of action lead to the conclusion that settlements of FLSA causes of action require approval. Based on these determinations, the holdings in *Martin* and *Martinez* should be overturned.<sup>293</sup> Finally, Part III.D.4 suggests additional measures that should be taken regarding settling FLSA causes of action.

### 1. Practical Concerns Regarding Private Settlements of FLSA Causes of Action

There are practical concerns about private settlements of FLSA causes of action that do not exist for FLSA lawsuits. The biggest concern is predatory employers taking advantage of uninformed, unrepresented employees.<sup>294</sup> In settlements of causes of action, employers usually reach out to employees, while in lawsuits, employees sue employers.<sup>295</sup> As a result, employees are more likely to be passive bystanders in a settlement of a cause of action than in a settlement of a lawsuit. Further, the benefits of a lawsuit's adversarial context that are pivotal to negotiating a fair settlement are lost in the settlement of a cause of action.<sup>296</sup> *Lynn's Food's* facts provide a glaring example of this.<sup>297</sup> Had the employees in that case been able to bring a lawsuit, they would have learned about the DOL's finding of FLSA violations and could have been represented by an attorney. Given the case's egregious facts and the DOL's previous finding, the employees likely would have been paid what they were owed under the FLSA rather than settling for much less. Given these facts, it is clear that in settlements of causes of action, employees are unable to adequately assert their rights against employers in a setting that levels the playing field or have their interests properly represented. Thus, unapproved settlements of causes of action should not be allowed.

One counterargument against differentiating between settlements of lawsuits and settlements of causes of action is that in some settlements of causes of action, employees may be represented either by a union representative or by an attorney.<sup>298</sup> In such cases, having representation arguably helps to achieve the benefits of an adversarial context.

Attorney representation is far from the only benefit a lawsuit confers on plaintiffs. Lawsuits have the ability to put unequal parties on an equal plane.<sup>299</sup> The threat of going to trial and obtaining a judgment in a lawsuit

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293. See *supra* notes 159, 171 and accompanying text.

294. See *supra* note 12 and accompanying text.

295. See *supra* note 263 and accompanying text.

296. See *supra* notes 150–51 and accompanying text.

297. See *supra* notes 1–7 and accompanying text.

298. See, e.g., *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 249 (5th Cir. 2012).

299. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984); see also *supra* note 263 and accompanying text.

from an impartial adjudicator can help to erase the disparities in resources between the parties that can influence a settlement in favor of the employer.<sup>300</sup> Such a threat could make employers more responsive to the facts and merits of a case than their own bargaining power. Further, lawsuits avail plaintiffs of the ability to engage in discovery.<sup>301</sup> Engaging in discovery can give plaintiffs a better sense of the merits of their case and access to more information that can be helpful in negotiating a settlement or deciding whether to go to trial.<sup>302</sup>

Thus, the reason settlements of causes of action, but not lawsuits, should require approval is twofold. First, as a result of the benefits litigation confers on plaintiffs, employees that bring lawsuits need less protection in negotiating settlements than employees who settle causes of action. Second, requiring approval for settlements of causes of action, but not lawsuits, encourages employees to pursue litigation and thereby obtain its benefits. This helps level the playing field with employers and lessen the inequities of bargaining power inherent in the employee-employer relationship.

## 2. Implications of the FLSA's Enforcement Provisions

The FLSA's enforcement provisions provide further reasoning for why settlements of causes of action, but not settlements of lawsuits, should have to be approved. The FLSA gives employees three options to pursue when seeking to recover unpaid wages or compensation: (1) bring a lawsuit against your employer, (2) have the Secretary of Labor bring a lawsuit against your employer on your behalf, or (3) have the Secretary of Labor supervise the payment of unpaid wages or compensation.<sup>303</sup> There is no provision allowing employees to settle their causes of action under the FLSA without supervision. In fact, the supervision option in § 216(c) implies that if employees settle their claims outside of a lawsuit, the settlement must be approved to be enforceable.<sup>304</sup> While there is no explicit provision in § 216(b) that lawsuits can be settled without court approval, the FLSA allows such settlements when read in tandem with Rule 41. Because there is no option under the FLSA for employees to settle their causes of action in an unapproved agreement with their employers, such an agreement should not be enforceable.

## 3. The FLSA Is Different from Other Employment Statutes

The conclusion that settlements of FLSA causes of action must be approved by the court or DOL to be enforceable is further supported by the

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300. See Fiss, *supra* note 299, at 1077, 1080–81.

301. See FED. R. CIV. P. 26–37.

302. See Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 481–82 (1994).

303. See *supra* notes 31–34 and accompanying text.

304. See *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–53 (11th Cir. 1982) (holding that besides settling a lawsuit, the only other way to settle FLSA claims is under 29 U.S.C. § 216(c) through the supervised payment by the DOL of unpaid wages to employees).

FLSA's status as the only federal employment statute considered in this Note for which both Congress and the courts have refused to allow or uphold private settlements of causes of action. The FLSA, unlike the ADEA<sup>305</sup> and FMLA,<sup>306</sup> has no provision regarding the private settlement of causes of action. And unlike Title VII's case law,<sup>307</sup> most of the FLSA's case law does not allow unapproved settlements of causes of action to be enforceable.<sup>308</sup>

The FLSA's characteristics also call for it to be treated differently than other federal employment statutes. The ADEA, FMLA, and Title VII are all employment statutes concerning discrimination. Their cases, therefore, often involve nuanced issues of fact that are more difficult to determine than the issues of fact that arise in FLSA cases.<sup>309</sup> Accordingly, fair settlements of ADEA, FMLA, and Title VII claims are harder to determine than FLSA claims.<sup>310</sup> Further, the ADEA, FMLA, and Title VII do not protect populations as vulnerable to exploitation as the population protected by the FLSA.<sup>311</sup> The FLSA seeks to protect the lowest class of workers who are being paid below a living wage.<sup>312</sup> While those being discriminated against for taking medical leave or on the basis of their race, color, religion, sex, or national origin may also be vulnerable, the FMLA and Title VII apply generally to all employees.<sup>313</sup> The ADEA does target a vulnerable population—the elderly.<sup>314</sup> But because the ADEA protects elderly employees of all incomes, at least some elderly people have better resources to protect themselves against exploitation than the low wage workers protected by the FLSA.<sup>315</sup>

Congress and the courts have had ample opportunity to allow private settlements of FLSA causes of action. They have acknowledged as much when allowing private settlements of causes of action under other federal employment statutes.<sup>316</sup> However, they have continued to differentiate the FLSA from these statutes by requiring settlements of FLSA causes of action be approved. The same can be said about Congress's and the courts' treatment of the approval of settlements of FLSA lawsuits. However, the difference is that if Rule 41 does not explicitly require approval of lawsuit settlements, the assumption is that lawsuits can be voluntarily dismissed without approval. But with federal employment statutes, if there is no explicit provision or case law, then it should be assumed that settlements must be approved to be enforceable. Just as the FLSA's lack of an express approval requirement provision indicates that it is not an applicable federal

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305. *See* 29 U.S.C. § 626(f)(1) (2012).

306. *See* 29 C.F.R. § 825.220(d) (2013).

307. *See* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974).

308. *See supra* note 141 and accompanying text.

309. *See supra* notes 135–37 and accompanying text.

310. *See supra* note 137 and accompanying text.

311. *See supra* notes 122–25 and accompanying text.

312. *See supra* note 124 and accompanying text.

313. *See supra* notes 122–23 and accompanying text.

314. *See supra* notes 132–33 and accompanying text.

315. *See supra* notes 125, 138 and accompanying text.

316. *See supra* notes 134–38 and accompanying text.

statute, the FLSA's lack of a provision or case law supporting the ability to settle causes of action without approval indicates that such a provision was not intended.

Given these differences, the FLSA should not follow the ADEA, FMLA, and Title VII in allowing causes of action to be privately settled without approval.

#### 4. Adopting the Bona Fide Dispute Provision

Settlement of FLSA causes of action should require a bona fide dispute in addition to approval by the DOL or the courts. Both sides of the approval debate agree that settlements of FLSA lawsuits and causes of action must be of a bona fide dispute to be allowed, and without a bona fide dispute requirement, the parties would be able to settle for less than what employees were owed, which would violate both the letter and the spirit of the FLSA.<sup>317</sup>

##### *E. Congress Needs to Take Action*

To implement the decisions mentioned above,<sup>318</sup> Congress needs to amend 29 U.S.C. § 216(b). The following provisions should be added:

- (1) Parties to lawsuits brought under this subsection may dismiss such lawsuits with or without prejudice through stipulated dismissals under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) without the approval of a district court or the Secretary of Labor if such dismissals are knowing and voluntary and a bona fide dispute exists over the number of hours worked or compensation owed. A dismissal may not be considered knowing and voluntary unless, at a minimum—
  - (a) the dismissal is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual or by the average individual eligible to participate;
  - (b) the dismissal specifically refers to rights or claims arising under this chapter;
  - (c) the individual does not waive rights or claims that may arise after the date the waiver is executed;
  - (d) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
  - (e) the individual is advised in writing to consult with an attorney prior to executing the agreement; and

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317. *See supra* Part III.C.5.

318. *See supra* Part III.B–D.

- (f) the individual is given a reasonable period of time within which to consider the settlement agreement.
- (2) Waiver of any cause of action arising under section 206 or 207 shall not be enforceable without the existence of a bona fide dispute over the number of hours worked or compensation owed and the approval of a district court or the Secretary of Labor.

As a result of this new statute, private unapproved settlements of FLSA claims would be allowed only as settlements of lawsuits and not as settlements of causes of action. If an employee sues his employer under the FLSA, the parties should be allowed to settle their lawsuit without approval and with or without prejudice as long as the settlement is entered into knowingly and voluntarily and is of a bona fide dispute. But a private settlement obtained outside the adversarial context of a lawsuit should not be enforceable unless it is of a bona fide dispute and made with court or DOL approval.

#### CONCLUSION

The FLSA is a uniquely protective statute<sup>319</sup> and there are some convincing arguments for why it should be considered an applicable federal statute under Rule 41.<sup>320</sup> However, it is clear that applicable federal statutes must have an explicit approval requirement to be considered exempt from Rule 41's voluntary dismissal provision.<sup>321</sup> Since the FLSA lacks such an explicit approval requirement, it cannot be considered an applicable federal statute under Rule 41.<sup>322</sup> The FLSA should not be amended to include such a provision because an approval requirement is neither necessary nor proper for FLSA lawsuits.<sup>323</sup> Even though the FLSA is not an applicable federal statute under Rule 41, it is a highly protective statute and should be treated as such. Thus, the FLSA should adopt the ADEA's knowing and voluntary standard and a bona fide dispute requirement to apply to the dismissal of lawsuits.<sup>324</sup> Even though FLSA lawsuits should be allowed to be dismissed without court or DOL approval, FLSA causes of action should not be.<sup>325</sup> There are too many dangers involved in allowing parties to settle outside the adversarial context of a lawsuit. These dangers dictate that courts or the DOL must approve settlements of causes of action and that these settlements must be of a bona fide dispute to effectively accomplish the goals of the FLSA.<sup>326</sup> To put these rules into effect, Congress must amend the FLSA.<sup>327</sup>

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319. *See supra* Part I.A.1.

320. *See supra* notes 186–91 and accompanying text.

321. *See supra* note 84 and accompanying text.

322. *See supra* Part III.B.

323. *See supra* Part III.B.1.

324. *See supra* Part III.C, E.

325. *See supra* Part III.D–E.

326. *See supra* Part III.D.

327. *See supra* Part III.E.