Employer Update

Weil

February 2020

Labor Department Clarifies Joint Employment Standard Under the FLSA

By Jeffrey S. Klein, Nicholas J. Pappas and Christopher Dyess

In This Issue

1 Labor Department Clarifies Joint Employment Standard Under the FLSA

4 Second Circuit Holds That Rule 68 Stipulated Judgments in FLSA Cases Do Not Require Judicial Fairness Review Before Being Entered

Companies frequently contract out specific services needed for their businesses in order to improve efficiency or to reduce costs associated with directly employing individual workers. Use of third parties to contract for services such as transportation, food services, cleaning or photocopying has become ubiquitous in today's economy. Staffing companies in particular, have created business based on such contracting arrangements to take on the responsibility for compensating workers performing services for the business, reporting to taxing authorities, and providing health benefits to the workers.

Although companies using contractors undoubtedly have sound business reasons for using such arrangements, such conduct also can unwittingly create legal risks under the Fair Labor Standards Act ("FLSA"). Specifically, under the FLSA, courts and administrative agencies have developed the so-called "joint employer" theory, which provides that two ostensibly separate companies may be treated as "joint employers" of the same workers, and thereby share responsibility for each company's wage and hour law violations.

Historically, whether or not a company would be deemed a joint employer under the FLSA depended upon jurisdiction specific multi-factor tests for which there were few bright line rules. However, on January 12, 2020, the United States Department of Labor ("DOL") issued a final rule (effective March 16, 2020) to clarify the joint employer test for businesses (the "Final Rule"). In doing so, the DOL sought to reduce the risk of joint employment liability for businesses.

In this article, we analyze the Final Rule, consider the extent to which the rule provides clarity to employers and reduces the risk of joint employer liability in certain circumstances, and provide some practical guidance for employers to reduce the risk of joint employer liability under the FLSA.

Background

The Final Rule updates and revises the DOL's prior articulation of the joint employment standard, which is codified in 29 C.F.R. § 791.2. The DOL's changes to the rule are the first meaningful revisions to the regulation in more than 60 years. According to the DOL, the purpose of the new rule is "to promote certainty for employer and employees, reduce litigation, promote greater uniformity among court decisions and encourage innovation in the

economy." *See* Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820 (Jan. 16, 2020). Business advocates have applauded the rule as a welcome policy that provides certainty for employers, while worker-side groups have criticized the rule as making employees vulnerable to abuses by employers.

Pursuant to the FLSA regulation, a joint employment relationship "generally" exists when: (1) the employers have an arrangement to share the employee's services; (2) one employer is acting directly or indirectly in the interest of the other employer; or (3) the employers directly or indirectly "share control of the employee" because one entity controls, is controlled by, or is under common control with the other. *See* Joint Employment, 29 CFR § 791.2 (Aug. 18, 1961).

However, even in the aftermath of the 2016 AI, companies nonetheless were required to wade through an amalgam of judicial interpretations to determine if a joint employer relationship existed. For example, in the Second Circuit potential joint employers were subject to a ten-factor test. *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 71 (2d Cir. 2003). In the Ninth Circuit, courts used a four-factor test, which the DOL ultimately adopted in the Final Rule. *Bonnette v. California Health & Welfare Agency*, 84 FR 14043 (Apr. 9, 2019). By contrast, a 2017 decision by the Fourth Circuit Court of Appeals articulated an entirely different test that criticized the joint employment tests of other circuits because those circuits focused on the relationship between the worker and the potential joint employer, while the Fourth Circuit believed the focus should instead be on the relationship between the alleged joint employers. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).

The existence of so many multi-factor tests created uncertainty for companies, particularly those that conduct business in multiple jurisdictions. The Final Rule seeks to resolve this uncertainty by providing a uniform test for determining joint employer status.

The Final Rule

The Final Rule discusses two joint employer scenarios: (1) where an employee's hours worked for one employer simultaneously benefits another employer; and (2) where the employee works separate sets of hours for different employers in the same workweek.

An example of scenario one is a situation in which an office park hires a janitorial service company for cleaning services. Under the contract, the office park pays the janitorial services a fixed fee for the serves and reserves the right to supervise the janitorial employees. *See* Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820 (Jan. 16, 2020). An example of the second scenario would be a cook who might work several hours a week for one restaurant, and also works additional hours in the same week at a different restaurant where both restaurants are affiliated with the same nationwide franchise. *Id.* However, the restaurants different franchisees locally own and manage each restaurant and do not coordinate with each other regarding the employee. *Id.*

Under the first scenario, the DOL assesses joint employer status based on whether the potential joint employer (the office park) is acting directly or indirectly in the interests of the direct employer (the janitorial services company). *See* Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820 (Jan. 16, 2020). In determining whether a joint employment relationship exists under the first scenario, the DOL asks courts to use the following four-factor test that analyzes whether the alleged joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedules or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. *Id.*

The DOL notes in the Final Rule that a potential joint employer must do more than merely have the *ability* to exercise the powers under the test. *Id.* Rather, the potential joint employer must *actually* exercise such power. *Id.* Further, the weight given to each factor in making a joint employment determination will vary

depending on these facts. *Id.* The DOL also stated that the fourth factor – maintenance of employment records – alone is not sufficient to support a joint employment relationship determination. *Id.*

In applying these factors to the first scenario noted above, where an office park hires a janitorial service, under the Final Rule the office park would not be a joint employer. Even though the office park retained the right to supervise the employee, it does not *actually* hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. *Id.*

With respect to the second scenario, where the employee works separate sets of hours for different employers in the same workweek, the DOL did not make changes to the existing standard under the prior regulation. Under this standard, so long as the potential joint employers are acting "entirely independently of each other" and are "completely dissociated" with respect to workers there is no joint employment relationship. In order to find that two entities are sufficiently associated with each other regarding an employee, the regulation analyzes whether: (1) there is an agreement to share the employee's services; (2) one entity is acting directly or indirectly in the interest of the other; or (3) the employers share direct or indirect control over the worker because one entity controls, is controlled by, or is under common control with the other. *Id.*

Applying these factors to the second scenario noted above, where a cook works for two separate but affiliated restaurants in the same week, the restaurants would not be joint employers under the Final Rule. *Id.* The cook does similar work at both restaurants and the restaurants are part of the same nationwide franchise. *Id.* However, those facts alone do not bear on whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook. *Id.*

The Final Rule provides guidance to employers regarding certain common business relationships that the DOL notes, "do not make joint employer status more or less likely [.]" For example, the Final Rule notes that "[o]perating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely [.]" *Id.* Further, joint employer status is not more or less likely where entities enter into contractual agreements that require the direct employer to meet certain standards to protect the health or safety of the employees or the public. *Id.* Examples of these standards include mandating compliance with the FLSA, performing background checks on employees or instituting sexual harassment policies. *Id.* The Final Rule also notes that a potential joint employer who requires quality control standards to "to ensure the consistent quality of the work product, brand, or business reputation do not make joint employer status more or less likely [.]" *Id.*

Strategies for Employers

The Final Rule likely will benefit a variety of companies particularly those that enter into franchise agreements, use subcontractors or engage with staffing agencies to provide temporary workers. However, employers who enter into these types of business arrangements should use caution before relying exclusively on the Final Rule.

While federal courts must defer to the DOL's regulations under the FLSA, the level of deference depends on whether the regulations are "legislative" or "interpretive." Legislative rules carry the force of law, while interpretive rules are merely persuasive. *See*, *e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (noting that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process"). The DOL itself refers to the Final Rule as interpretive, which may signal to courts that they have discretion over the amount of deference given to the rule, if any. *See* Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820 (Jan. 16, 2020).

Employers should review their contractor arrangements that could result in a joint employment finding with outside employment counsel to ensure compliance with law. In particular, when employers have operations in multiple jurisdictions that impose different judicially created multi-factor joint

employment tests they should consider reviewing such arrangements.

Employers also should considering including indemnification clauses in their agreements with franchisees and other third parties that could implicate the joint employer rule. Such indemnification clauses should clearly state that the direct employer is solely responsible for any liability associated with employment. However, employers should consult with their employment counsel regarding the appropriate scope of indemnification clauses and their enforceability.

Second Circuit Holds That Rule 68 Stipulated Judgments in FLSA Cases Do Not Require Judicial Fairness Review Before Being Entered

By Gary D. Friedman, Ami Zweig and Sarah Legault

In a recent decision that will have a significant impact on employers litigating wage-and-hour disputes, the Second Circuit held in *Yu v. Hasaki Restaurant, Inc.*, No. 17-3388-cv (2nd Cir. Dec. 6, 2019) that employers and employees do not need to obtain judicial or Department of Labor ("DOL") approval of settlement terms when resolving a Fair Labor Standards Act ("FLSA") claim if they settle through the "offer of judgment" process under Rule 68 of the Federal Rules of Civil Procedure. Under the Second Circuit's previous decision in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), employers and employees must obtain judicial or DOL approval of the settlement terms to enter stipulated dismissals in FLSA cases under Rule 41 of the Federal Rules of Civil Procedure. Now, the *Yu* decision presents a mechanism for resolving such cases without the need for a fairness review of the settlement terms. The prospect of an easier settlement option under Rule 68 for FLSA litigation is good news for employers and employees alike.

Background on Rule 68 and Mooting FLSA Collective Actions

Rule 68 "was intended to encourage settlements and avoid protracted litigation."[1] Under Rule 68(a), a defendant may make an offer of judgment on specified terms to the plaintiff at least fourteen days before the date set for trial. If the plaintiff accepts the offer of judgment, Rule 68(a) provides that either party may file the offer and notice of acceptance with the court, and "[t]he clerk *must* then enter judgment" (emphasis added). The U.S. Supreme Court held in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) that in FLSA collective actions, in the absence of any opt-in plaintiffs, if the named plaintiffs' claims are mooted (which may occur, for

example, by accepting Rule 68 offers of judgment), the collective allegations are likewise mooted. On the other hand, if the plaintiff refuses a Rule 68 offer and the final judgment entered in the litigation is equal to or less than the offer refused, then under Rule 68(d), the plaintiff must pay for the defendant's litigation costs incurred after the offer was made. The Supreme Court has held that an unaccepted offer of judgment does not moot a case even if the defendant offers full relief, effectively overruling the part of *Genesis Healthcare* that suggested that an unaccepted offer of judgment will moot putative class claims. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016), *as revised* (Feb. 9, 2016).

In *Campbell-Ewald*, the Supreme Court left open the question of whether depositing full relief in an account payable to the plaintiff and having the court enter judgment in that amount would moot a case. *See id.* at 672. At least one New York federal district court has addressed this issue in a putative collective action under the FLSA: In *Malancea v. MZL Home Care Agency LLC*, 2019 WL 1027926, at *6-8 (E.D.N.Y. Feb. 1, 2019), *report and recommendation adopted*, 2019 WL 1025226 (E.D.N.Y. Mar. 4, 2019), the court denied the defendant's motion to deposit funds with the court pursuant to Rule 67 of the Federal Rules of Civil Procedure because the plaintiff had not yet had an opportunity to argue for certification of the collective action. However, the Second Circuit has not decided whether depositing full relief with the plaintiff and having a court enter judgment moots a putative FLSA collective action.[2] Other courts outside the Second Circuit are split regarding the circumstances in which payment of full relief to the plaintiff moots an action.[3]

Historical Development of Restrictions on Settling FLSA Claims

The FLSA provides employees a private right of action for unpaid wages, including violations of the minimum wage and overtime pay rules, and allows employees to recover liquidated damages equal to unpaid wages in certain circumstances. *See* 29 U.S.C. § 216(b).

Early in the FLSA's history, the Supreme Court expressed its concerns about protecting employees from employer's superior bargaining power in the context of FLSA settlements. In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946), respectively, the Supreme Court held that employees could not waive their rights to liquidated damages "in the absence of a bona fide dispute between the parties as to liability" and that even when parties have agreed to settle bona fide disputes under the FLSA, "neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage."

Since *Brooklyn Savings Bank* and *Gangi*, a general rule prohibiting private settlements in FLSA cases has emerged.[4] The Eleventh Circuit in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982) first concluded that FLSA cases cannot be settled without judicial or DOL approval of the fairness of the settlement terms. Some federal district courts in the Eleventh Circuit have applied *Lynn's Foods Stores, Inc.* to conclude that judicial approval is required for Rule 68 stipulated judgments.[5]

More recently, in *Bodle v. TXL Mortgage Corporation*, 788 F.3d 159, 164-65 (5th Cir. 2015), the Fifth Circuit recognized that although settlements of FLSA claims are prohibited "in the absence of supervision by the Department of Labor or scrutiny from a court," an exception to that general rule exists for "unsupervised settlements that are reached due to a bona fide FLSA dispute over hours worked or compensation owed." That rule emerges from the Fifth Circuit's decision in *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247, 255 (5th Cir. 2012), in which the court held that when an employee and employer dispute the number of hours of work for which the employer owes the employee pay, the parties' settlement agreement is not a compromise of substantive rights guaranteed by the FLSA, but rather, a "bona fide dispute about time worked." In concluding that settlement of such a dispute does not require judicial or DOL approval, the Fifth Circuit relied on the Supreme Court's comment in *Gangi* that the Supreme Court did not "consider

[t]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."[6]

According to the Second Circuit, the general rule prohibiting unsupervised settlements developed in cases addressing "private FLSA settlement[s]" before litigation, rather than "private stipulated dismissal[s] of FLSA claims" after litigation commences.[7] In *Cheeks*, the Second Circuit addressed the narrow context of stipulated dismissals with prejudice under Rule 41 of the Federal Rules of Civil Procedure and concluded, in line with *Lynn's Foods Stores, Inc.*, that parties in FLSA cases must obtain judicial or DOL approval before such a stipulation of dismissal can be entered.[8] Because Rule 41 allows parties to stipulate to dismissal of any action that is "subject to . . . any applicable federal statute" and because the Second Circuit concluded that the FLSA is "an applicable federal statute," the court held that the FLSA's restrictions on settlements apply to Rule 41 stipulated dismissals. The Second Circuit reasoned that "[r]equiring judicial or DOL approval of such settlements is consistent with what both the Supreme Court and our Court have long recognized as the FLSA's underlying purpose: 'to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.'"[9]

Cheeks, however, left open the question of whether another potential mechanism for dismissal of an FLSA action – a stipulated judgment pursuant to a Rule 68 offer of judgment – requires judicial approval before being entered. Following *Cheeks*, district courts within the Second Circuit issued inconsistent decisions on this issue. Some courts reasoned that Rule 68's mandatory language ("[t]he clerk must then enter judgment") compels the clerk of the court to enter judgment regardless of whether the parties have obtained judicial or DOL approval of the settlement terms, while other courts interpreted *Cheeks* as requiring judicial or DOL approval for entering judgment on an FLSA claim even following acceptance of a Rule 68 offer of judgment.[10]

The Second Circuit's Decision in *Yu*

On December 6, 2019, the Second Circuit resolved the district court split by holding in *Yu* that judicial approval of settlement is not required for Rule 68 offers of judgment settling FLSA claims. *See Yu* at 3. The court framed the issue as: "whether acceptance of a Rule 68(a) offer of judgment that disposes of an FLSA claim in litigation needs to be reviewed by a district court or the DOL for fairness before the clerk of the court can enter the judgment." *Id.* at 6. In reaching its conclusion, the Court found dispositive Rule 68(a)'s mandatory language – "[t]he clerk *must* then enter judgment" (emphasis added), because nothing in the FLSA's text exempts FLSA claims from Rule 68(a)'s mandatory language. *See id.* at 19, 25-27. The court viewed *Brooklyn Savings Bank* and *Gangi* as limited, noting that the Supreme Court "expressly reserved the question of whether waiver or compromise of FLSA rights is permissible 'in . . . situations . . . such as a dispute over the number of hours worked or the regular rate of employment'" and, more importantly, *Gangi*'s footnote indicates "that settlements in the context of ongoing FLSA litigation may be permissible." *Id.* at 16 (quoting *Gangi*, 328 U.S. at 114 n.8), 18-19; *see Yu* at 19 n.67. Moreover, according to the court, *Cheeks*' requirement for judicial or DOL approval is limited to dismissals under Rule 41, and other circuits have held "only that purely private settlements of FLSA claims, independent of any litigation, are prohibited without judicial approval or DOL supervision" rather than that judicial approval is required for Rule 68 judgments to be entered in the course of litigation. *See id.* at 19, 26-27.

Judge Calabresi wrote a sharply worded dissent, setting forth his position that entering Rule 68 offers of judgment in FLSA cases still requires judicial approval. Unlike the majority, he viewed *Gangi*'s footnote as indicating that "court-supervised settlements" may be valid but not that all settlements reached during litigation are permissible, and read other courts' decisions as standing for the proposition that entering any settlements in the FLSA context without judicial or DOL approval is impermissible. *Id.* at 10 (Calabresi, dissenting); *see id.* at 19. However, in identifying three means for settling FLSA claims, he

indicated his agreement with the majority that the Supreme Court left open the question of whether settlements of bona fide disputes over hours worked or rate of employment are permissible: "the FLSA . . . – at most – allows three forms of settlement agreements: (1) a settlement supervised by the Department of Labor; (2) a settlement subjected to judicial scrutiny; and (3) perhaps, a settlement negotiated pursuant to a bona fide dispute as to hours worked or the rate of employment." *Id*. at 14.

On January 7, 2020, the Public Citizen Litigation Group ("PCLG") filed a petition for rehearing en banc. The Second Circuit had invited the PCLG to participate as amicus curaie in the *Yu* case to defend the district court's ruling, as both the Plaintiff and the Defendant had taken the same position on appeal in opposing the district court's order requiring them to submit their settlement agreement to the court for a fairness review and judicial approval. *Id*. at 6. The PCLG argues that the Second Circuit's decision in *Yu* conflicts with *Cheeks*, *Brooklyn Savings Bank*, *Gangi*, and other Circuit Courts' decisions, and will enable employers to coerce employees into settlements. On January 17, 2020, Defendant Hasaki Restaurant filed its opposition to the PCLG's petition. As of the date of this article, the PCLG's petition for rehearing en banc remains pending.

Employer Takeaways

Employers and counsel should remember that Rule 68 can be a valuable tool for plaintiffs and defendants alike. In FLSA cases, employers may seek to use Rule 68 as a strategy to "pick off" named plaintiffs, thus preventing collective allegations from proceeding *if* the offers of judgment are accepted. And now, Rule 68 may be particularly useful in the FLSA context within the Second Circuit as a means to avoid the requirement of obtaining judicial or DOL approval of settlement terms' fairness. Accordingly, Rule 68 offers in the FLSA context may provide two cost-saving incentives: an accepted offer may (1) reduce litigation costs and (2) avoid the costs of judicial review of the settlement's terms (to which a voluntary dismissal under Rule 41 is still subject). An unaccepted offer also provides a cost-saving incentive: the possibility of reduced litigation costs, if the final judgment entered in the litigation is equal to or less than the amount of the offer that was refused. Of course, in considering whether to make an offer of judgment, employers should weigh the costs of proceeding with litigation and/or with a judicial review of settlement terms against the price of the offer of judgment. In weighing those factors and assessing a potential offer of judgment, employers should also consider the extent to which plaintiffs may also find savings (through both reduced litigation costs and avoiding the costs associated with judicial review of settlement terms) by resolving FLSA cases through Rule 68 offers of judgment, and thus, might be eager to proceed through that settlement mechanism.[11]

---

[1] *Toar v. Sushi Nomado of Manhattan, Inc.*, 2017 U.S. Dist. LEXIS 55162, at *9 (S.D.N.Y. Mar. 16, 2017) (quoting Wright & Miller, Federal Practice and Procedure § 3001).

[2] In *Leyse v. Lifetime Entertainment Services, LLC*, 679 Fed. App'x 44, 47-48 (2d Cir. 2017), the Second Circuit concluded that depositing the full amount of a plaintiff's individual claim with the court and having the court enter judgment for the plaintiff *after* the court denied class certification moots an individual claim. And in *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 542-43 (2d Cir. 2018), *cert. denied sub nom. ZocDoc, Inc. v. Geismann*, 139 S. Ct. 1605 (2019), the Second Circuit required that "the district court . . . resolve the pending motion for class certification before entering judgment and declaring an action moot based solely on relief provided to a plaintiff on an individual basis" through a deposit with the court pursuant to Rule 67. However, these cases did not address putative FLSA collective actions.

[3] *See*, *e.g.*, *Boger v. Trinity Heating & Air, Inc.*, 2018 WL 6050886, at *3-5 (D. Md. Nov. 16, 2018) (analyzing on the one hand, cases reflecting "that allowing a class action defendant to use Rule 67 or other means of tender to moot a class action claim before the plaintiff has had an opportunity to seek class certification is contrary to the principles underlying *Campbell-Ewald*" and on the other hand, "district court decisions that have permitted a defendant to moot a would-be class representative's claim through a tender of payment"); *Kuntze v. Josh Enterprises, Inc.*, 365 F. Supp. 3d 630, 640-42 (E.D. Va. 2019) (collecting cases and noting "[a]fter the decision in *Campbell-Ewald*, courts have split on whether actual payment of full relief moots an individual's claim, with multiple decisions turning on whether the case was a class action").

[4] *See*, *e.g.*, *Cheeks*, 796 F.3d at 203 n.4 (collecting cases); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir.

2007) ("[U]nder the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims.").

[5] *See*, *e.g.*, *Walker v. Vital Recovery Servs.*, 300 F.R.D. 599, 602 (N.D. Ga. 2014) (collecting cases).

[6] *Martin*, 688 F.3d at 255 (quoting *Gangi*, 328 U.S. at 114-115).

[7] *Cheeks*, 796 F.3d at 204.

[8] *See id.*, 796 F.3d at 201 ("The question of whether judicial approval of, and public access to, FLSA settlements is required is an open one in our Circuit."), 204, 206.

[9] *Id.* at 206 (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493(1945)); *see Cheeks*, 796 F.3d at 201.

[10] *See*, *e.g.*, *Yu v. Hasaki Rest., Inc.*, 319 F.R.D. 111, 116-17 (S.D.N.Y. 2017); *Baba v. Beverly Hills Cemetery Corp.*, 2016 WL 2903597, at *1 (S.D.N.Y. May 9, 2016); *cf. Yu*, 319 F.R.D. at 117 ("And in light of the split among the district courts, resolution by the Second Circuit is plainly desirable, if not necessary.").

[11] Employers and counsel should also keep their eyes out for further developments within the Second Circuit following the decision in *Yu*. The PCLG's motion for reconsideration en banc is pending, and some practitioners have opined that the Second Circuit may be open to reconsideration. Moreover, the comments in both the majority and the dissenting opinions in *Yu* about *Brooklyn Savings Bank*'s and *Gangi*'s limitations suggest that the Second Circuit may be open to the Fifth Circuit's rule that "in the absence of supervision by the Department of Labor or scrutiny from a court, a settlement of an FLSA claim is prohibited" except for "unsupervised settlements that are reached due to a bona fide FLSA dispute over hours worked or compensation owed." *Bodle*, 788 F.3d at 164-65.

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Practice Group Members:

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

London
Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

© 2020 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please click here. If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.