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The Lost Approach to FLSA Settlement Agreements: A Freedom-of-Contract Approach

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THE LOST APPROACH TO FLSA SETTLEMENT AGREEMENTS: A FREEDOM-OF-CONTRACT APPROACH

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In jurisdictions that require judicial oversight of Fair Labor Standards Act settlement agreements, a question lingers: What exactly should judges review? Some judges have begun categorically striking confidentiality provisions from settlement agreements by pointing to the purposes and goals of the FLSA. The academic community lauds these courts' efforts to prevent employers from mandating employees' silence about the terms of their settlement agreements. This Note, however, makes the counterargument: confidentiality provisions should be permitted in FLSA settlements agreements as a bargaining chip for employees who bring individual suits. If higher courts in a given jurisdiction require judicial oversight of these agreements, then the court reviewing the settlement should look at the process that led to the settlement agreement, instead of its substance, when assessing the agreement's fairness. Alongside Department of Labor enforcement actions, a process-based review would address problems that confidentiality provisions create for the national enforcement of labor rights and would allow the suffering employee to maximize their recovery.

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I. INTRODUCTION

Federal courts have long protected individual rights and liberties.[1] Courts most often derive these rights and liberties from the U.S. Constitution,[2] but rights can also come from federal statutes.[3] One federal statute that grants individual rights is the Fair Labor Standards Act of 1938 (FLSA).[4] The FLSA guarantees certain classes of workers minimum wages and premium overtime pay.[5] When employers violate these statutory guarantees, the FLSA affords employees legal remedies.[6]

Like much litigation, these FLSA cases often end in settlement agreements between employers and employees.[7] In circuits that have ruled on the issue, the trend has been to require judicial or Department of Labor supervision of these settlement agreements.[8]

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[1] *See, e.g.*, William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) (finding, as an empirical matter, that the U.S. Supreme Court can have counter-majoritarian tendencies).

[2] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding that the right of same-sex couples to marry is protected by the Fourteenth Amendment's Due Process Clause); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (holding that the right to an abortion was within the scope of the Fourteenth Amendment's Due Process Cause); Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding a fundamental right to marry within the Fourteenth Amendment's Due Process Clause).

[3] *See, e.g.*, 29 U.S.C. §§ 621–634 (2018) (codifying the Age Discrimination in Employment Act of 1967, which prohibits age discrimination in employment); 42 U.S.C. § 1983 (2012) (conferring a right on individuals to sue for damages caused by persons acting under the color of state law in violation of their constitutional rights); 42 U.S.C. § 2000e-2 (2012) (codifying Title VII of the Civil Rights Act of 1964, which prohibits unlawful discrimination in employment).

[4] 29 U.S.C. §§ 201–219 (2018) (the FLSA).

[5] *Id.* § 206 (codifying minimum wage requirements for employers); *id.* § 207 (codifying maximum hour limitations for employees).

[6] *Id.* § 216(b) (giving employees a private right of action against employers who violate the FLSA); *id.* § 216(c) (giving the Secretary of Labor a cause of action against the employer for violations).

[7] *See* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 111 (2013) (noting that "only 1.2 percent of [FLSA] claims are heard on the merits before a jury or judge").

[8] *See* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352–53 (11th Cir. 1982) (requiring oversight of FLSA settlement agreements by either the courts or the Secretary of Labor). *But see* Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 257 (5th Cir. 2012) (requiring judicial oversight only in particular circumstances).

Oversight of settlement agreements has spurred debate among legal scholars and circuit courts about the propriety of judicial intervention.[9]

In jurisdictions where oversight has become normalized, many lower courts have begun looking at the substance of settlement agreements when approving or disapproving them.[10] Many courts now refuse to approve settlement agreements containing confidentiality provisions because these provisions are deemed to be contrary to the policies behind the Fair Labor Standards Act.[11]

Scholarship on this issue has primarily focused on whether judicial or Department of Labor oversight of settlement agreements is necessary and whether it should continue.[12] A few arguments

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[9] *See, e.g.*, Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (requiring judicial oversight of FLSA settlements); *Martin*, 688 F.3d at 257 (requiring judicial oversight only in particular circumstances); *Lynn's Food*, 679 F.2d at 1355 (requiring oversight of settlement agreements); *see also* Keith William Diener, *Judicial Approval of FLSA Back Wages Settlement Agreements*, 35 HOFSTRA LAB. & EMP. L.J. 25, 25 (2017) (analyzing the circuit courts' different approaches to approving FLSA settlement agreements and arguing for a more unified approach); Alex Lau, Note, *The FLSA Permission Slip: Determining Whether FLSA Settlements and Voluntary Dismissals Require Approval*, 86 FORDHAM L. REV. 227, 227 (2017) (assessing whether the voluntary dismissal provision in Rule 41 of the Federal Rules of Civil Procedure should apply to FLSA settlements).

[10] This has included assessing the confidentiality provisions included in settlement agreements. *See, e.g.*, Brown v. TrueBlue, Inc., No. 1:10-cv-00514, 2013 WL 5408575, at *3 (M.D. Pa. Sept. 25, 2013) (finding that "this confidentiality provision frustrates the implementation of the FLSA in the workplace, and therefore [this court] cannot approve it"); Altenbach v. Lube Ctr., Inc., No. 1:08-cv-02178, 2013 WL 74251, at *3 (M.D. Pa. Jan. 4, 2013) ("Such a [confidentiality] provision contravenes the FLSA in that it permits Defendant to retaliate against a Plaintiff and promotes the silencing of an employee who has vindicated a disputed FLSA right."). *But see, e.g.*, Farris v. Nat'l Forensic Consultants Inc., No. 18-3052, 2019 WL 2502267, at *6 (E.D. Pa. Apr. 24, 2019) (finding that a confidentiality provision was "narrowly drawn and thus [did] not frustrate the FLSA's purpose").

[11] *See, e.g.*, Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1242–43 (M.D. Fla. 2010) ("A confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights. . . . The district court should reject as unreasonable a compromise that contains a confidentiality provision, which is unenforceable and operates in contravention of the FLSA."). When evaluating FLSA settlements, courts also consider non-disparagement clauses, releases of claims, and "other . . . external circumstances that might undermine the purposes of the FLSA." Diener, *supra* note 9, at 46.

[12] *See* Diener, *supra* note 9, at 32, 46 (analyzing the federal circuits' "inconsistent" approaches to FLSA settlement agreements); Lau, *supra* note 9, at 227 (assessing whether

about the propriety of confidential settlements in the FLSA context do exist, but they all tell the same story: confidentiality is contrary to the FLSA's public policy.[13] Although some scholars briefly address arguments against judicial voidance of confidentiality provisions, they often quickly dispose of these arguments without much scrutiny.[14]

After assuming that judicial oversight of settlement agreements will continue, this Note argues that categorically striking confidentiality provisions hampers individual employees who have accepted the costs of litigation and brought suit against their employer. In making this argument, it will contribute to the broader academic discussion[15] about whether confidentiality provisions ought to be enforced in FLSA settlements. This Note moves beyond the theoretical arguments for freedom of contract by comparing the FLSA to other federal labor statutes protecting employees—Title VII and the Age Discrimination in Employment Act (ADEA)[16]—to assess whether the FLSA is fundamentally different from other labor statutes by requiring heightened judicial treatment of settlement agreements.

Pointing to freedom of contract principles and to the employee's increased leverage in settlement negotiations when able to use

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the voluntary dismissal provision of Rule 41 of the Federal Rules of Civil Procedure should apply to FLSA cases).

[13] *See* Wilkins, *supra* note 7, at 111 (arguing that confidentiality hurts "thousands of low-wage workers" by "significantly reducing the amount of information available about wage theft"); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927 (2006) (arguing that "[i]nvisibility defeats the intent of the discrimination statutes").

[14] *See* Wilkins, *supra* note 7, at 111 (noting that just over one percent of FLSA claims are heard by a judge or jury); Kotkin, *supra* note 13, at 932 ("Judges overwhelmingly see the negative outcomes [of employment discrimination suits], since the many favorable outcomes are shielded from judicial imprimatur.").

[15] As discussed, the scholarship about these provisions is largely one-sided—both in the FLSA and broader employment law context—where the consensus reflexively assumes that courts must strike confidentiality provisions from settlement agreements because they are contrary to FLSA policy goals. *See supra* note 13. While the anti-confidentiality argument has obvious strengths—and appears to be the majority viewpoint in scholarship, though not in practice—both sides should be represented in the debate. Arguments for confidentiality may not be as harmful to employees and the workplace as one might think. Further, this Note only discusses *judicial* oversight of FLSA settlement agreements, leaving open the question of whether Department of Labor oversight of FLSA settlements are appropriate or recommended.

[16] 29 U.S.C. §§ 621–634 (2018).

confidentiality as a bargaining tool, this Note contends that automatically striking these provisions harms employees who file suit. Additionally, the societal disadvantages of confidentiality provisions may be assuaged by the Department of Labor's ability to bring suit under the FLSA against an employer on behalf of all employees affected by illegal behavior.[17] Further, more nuanced treatment of confidentiality provisions, such as assessing the exact nature of what can or cannot be discussed or who the employee is directly prevented from communicating with about the suit,[18] might better serve *all* the goals of the FLSA—full compensation to employees and protection of the overall marketplace from wage and hour violations. Courts can avoid critics' concerns and give employees greater bargaining power over negotiations by focusing on the *process*, rather than the substance, of a settlement agreement when assessing its fairness.

II. BACKGROUND ON THE FLSA

This Note argues that courts should not categorically strike confidentiality provisions from FLSA settlement agreements. A discussion of the history, purpose, and enforcement of the statute would be useful before reasoning through the argument. Thus, this Section discusses the history, purposes, and enforcement the FLSA in turn.

A. HISTORY OF THE FLSA

Congress passed the FLSA in 1938 in the midst of the Great Depression to stimulate the national economy and help individuals who were struggling financially.[19] Congress enacted the FLSA

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[17] 29 U.S.C. § 216(c) (empowering the Secretary of Labor to sue to enforce FLSA wage and hour laws).

[18] *See, e.g.*, *In re* Chickie's & Pete's Wage & Hour Litig., No. 12-6820, 2014 WL 911718, at *3 (E.D. Pa. Mar. 7, 2014) ("[T]he limited confidentiality provision here does not raise the same issues. The . . . confidentiality provision does not . . . prohibit Plaintiffs from discussing this matter with anyone, but only prohibits Plaintiffs from disparaging Defendants or discussing the substance and negotiations of this matter with the press and media.").

[19] *See* Wilkins, *supra* note 7, at 113 (stating that "concern for a national economy mired in the Great Depression and for workers making below-subsistence wages" were "complimentary policy goals" of the FLSA); Diener, *supra* note 9, at 26 ("The FLSA's

during a period when the judicial temperament toward national legislation was shifting.[20] Whereas the U.S. Supreme Court had previously been a barrier to federal economic legislation, the "switch in time" occurred in 1937[21]—only one year prior to the FLSA's enactment—and made the Court more accommodating to the will of Congress.[22] In fact, after the "switch," the Court in 1941 upheld the FLSA under the Commerce Clause.[23]

Passed during a dramatically low economic point for the United States, the FLSA appeared to be a glimmer of hope for workers and for those concerned with the trajectory of the national economy, thus illustrating that the FLSA had broader goals relating both to individuals and to the national workforce.[24]

B. PURPOSE OF THE FLSA

Congress specified the purpose of the FLSA in the statute itself.[25] Section 202 states that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for

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provisions intended to provide for a living wage, motivate employers to hire more employees, and disperse the work among a broader population of workers.").

[20] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 973–74 (2000) (describing how the U.S. Supreme Court switched from striking down to upholding New Deal legislation).

[21] Scholars now refer to this switch in decision-making in 1937 as the "switch in time that saved Nine" because the Court—supposedly in response to President Roosevelt's threat to pack the Court—stopped striking New Deal programs as unconstitutional exercises of power and began upholding these programs under the Commerce Clause. *See* Friedman, *supra* note 20, at 973–74 ("Prior to the 'switch in time that saved Nine,' the Court invalidated a number of New Deal measures, one after another. After the switch, the Court removed itself as an obstacle to economic legislation . . . ." (footnotes omitted)).

[22] *Compare, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11–12 (1895) (restricting Congress's power to regulate manufacturing under the Commerce Clause), *and* Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (same), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–37 (1937) (upholding the National Labor Relations Act under Congress's Commerce Clause powers), *and* United States v. Darby, 312 U.S. 100, 125–26 (1941) (upholding FLSA's minimum wage provisions under Congress's Commerce Clause powers).

[23] *See Darby*, 312 U.S. at 115, 125 (upholding the FLSA despite freedom-of-contract implications and its paternalistic nature).

[24] *See* Wilkins, *supra* note 7, at 113 ("Congress's intent to bring about fair competition, greater purchasing power for workers – and consequently a healthier economy – is evident in the declared policy of the Act . . . .").

[25] 29 U.S.C. § 202 (2018) (stating the FLSA's policy).

health, efficiency, and general well-being of workers" likewise "burden[] commerce and the free flow of goods," create unfair competition and labor disputes, and interfere with the "fair marketing of goods in commerce."[26]

The statutory language illustrates that the purpose of the FLSA is two-fold: (1) to protect individual workers from unfair labor practices and (2) to protect the overall workforce and national economy from a race to the bottom with wages and with requirements for increased hours.[27] This broader purpose of protecting the national economy perhaps distinguishes the FLSA from other employment statutes, like Title VII and the ADEA,[28] which focus on preventing discrimination against *individuals* rather than on bolstering the national workforce and economy.[29]

C. ENFORCEMENT OF THE FLSA

If an employer violates the FLSA, the statute provides two paths to rectify the violation.[30] First, the employee can bring a private lawsuit against the employer.[31] Second, the Secretary of Labor can bring a lawsuit on behalf of the employee against the employer and supervise the payment of back wages owed by the employer to the employee.[32]

This first mechanism, an employee-initiated suit against an employer, is this Note's primary focus because this context requires judicial or Department of Labor (DOL) oversight of a resulting

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[26] *Id*. § 202(a).

[27] *See* Wilkins, *supra* note 7, at 112–14 (discussing FLSA rights as "quasi-public rights").

[28] *Cf.* Lau, *supra* note 9, at 241 (comparing Title VII and the Family and Medical Leave Act, which are generally applicable statutes that do not solely protect one group of people, with the ADEA and FLSA, which are designed to help specific groups—such as older workers and "the most vulnerable, lowest paid segments of the workforce" respectively).

[29] This point is only true to a certain extent. The manner in which Title VII and the ADEA protect individual employees also affects the national economy and society once the employees are considered in the aggregate.

[30] *See* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352–53 (11th Cir. 1982) (discussing the two routes of enforcement in FLSA's penalties provision).

[31] *See* 29 U.S.C. § 216(b) (2018) (creating a private right of action for employees to recover from their employers).

[32] *See* § 216(c) (permitting the Secretary of Labor to litigate an FLSA claim on behalf of an employee).

settlement agreement in certain circuits or circumstances.[33] Importantly, the availability of other enforcement mechanisms supports a more deferential stance toward settlement agreements between parties. If the Department of Labor can sue on behalf of employees potentially affected by the employer's malfeasance, then depriving an individual employee of the ability to use confidentiality as a bargaining chip to purportedly help other affected employees seems unnecessary.[34]

For many reasons, a wronged employee may prefer to be an individual plaintiff rather than a member of a class of employees on whose behalf the Department of Labor is bringing suit. First, when an individual employee sues, they get the full recovery amount from the settlement or the final adjudication.[35] Additionally, the FLSA permits a successful plaintiff-employee to recover attorney's fees from their FLSA-violating employer.[36] Second, being an individual plaintiff guarantees greater control over the outcome of a case.[37]

There are costs, however, to being an individual plaintiff bringing suit. Costs of litigation are well-known, including attorney's fees, filing fees, and other related costs.[38] There are also

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[33] However, in *Lynn's Food*, 679 F.2d at 1352, the Department of Labor brought a suit for back wages under 29 U.S.C. § 216(c). The employer then approached his employees about settling the case. *Id.* The Eleventh Circuit rejected the settlement. *Id.* at 1355.

[34] *See* 29 U.S.C. § 216(c) (2018) (allowing the Secretary of Labor to bring an FLSA suit on behalf of multiple employees). Notably, however, if the Department of Labor brings an enforcement action against an employer, then the agency action precludes an employee from bringing an individual suit under § 216(b). *Id.* ("The right provided by [§ 216(b)] to bring an action by or on behalf of any employee to recover the liability specified . . . and of any employee to become a party plaintiff to any such action shall terminate upon the filing of [the Department's § 216(c) action].").

[35] *See id.* § 216(b) (indicating the amount recoverable by an employee in an action against their employer).

[36] *See id.* ("The court in such action shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

[37] *See Advantages and Disadvantages of a Class Action Lawsuit*, WILLIG WILLIAMS DAVIDSON, https://www.wwdlaw.com/advantages-and-disadvantages-of-a-class-action-lawsuit/ (last visited Jan. 24, 2021) (noting that individual "plaintiffs relinquish control over the case" when joining a class action).

[38] *See, e.g.*, David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305, 309–10 (2014) (indicating that a "conventional" view of class actions' advantage accounts for various costs incurred in litigation). The attorney's fees provision in 29 U.S.C. § 216(b) (2018) decreases some of the litigation cost. These fees, however, are limited to successful plaintiffs, so a potential plaintiff-

the intangible costs of time and energy associated with bringing suit. Theoretically, these costs already deter many plaintiffs from bringing suit.[39]

III. JUDICIAL REVIEW OF SETTLEMENT AGREEMENTS

Parties involved in lawsuits can generally resolve their disputes without judicial oversight.[40] In some scenarios, however, the judiciary must approve a settlement agreement or the case's termination.[41] Nowhere in the FLSA is judicial oversight expressly required.[42] Nevertheless, some circuits have required some degree of judicial oversight, and a few require oversight in all FLSA settlement agreements.[43] Without the U.S. Supreme Court providing the final word on whether FLSA settlement agreements are subject to judicial oversight, the district or circuit in which an employee files an FLSA claim matters a great deal for a plaintiff's autonomy in determining the outcome of their case.[44]

Before addressing whether courts should be categorically striking confidentiality from FLSA settlements, this Note first discusses the threshold issue of judicial supervision. Discussion of the supervision issue is important for this Note's overall argument

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employee will not know at the time they initiate their suit whether they will recover those litigation costs.

[39] *See* WILLIG WILLIAMS DAVIDSON, *supra* note 37 (noting that a small damages claim of a few hundred dollars "may not be worthwhile" because of "the time and money required to pursue [an] individual action").

[40] *See* FED. R. CIV. P. 41(a)(1)(A) (allowing plaintiffs to voluntarily dismiss their claims within certain parameters).

[41] For example, under the Bankruptcy Code, the bankruptcy court must approve settlement plans for Chapter 13 filers pursuant to particular statutory requirements. *See* 11 U.S.C. §§ 1322(a), 1325 (2018) (outlining certain requirements that a debtor's plan must meet to receive court confirmation); FED. R. BANKR. P. 3015 (requiring a debtor to file a repayment plan within a certain time period after filing a petition).

[42] *See generally* 29 U.S.C. §§ 201–219 (2018) (illustrating that the FLSA does not specifically require court oversight of settlement agreements).

[43] *See* Diener, *supra* note 9, at 55 tbl.1 (outlining the current breakdown of circuit courts' treatment of judicial oversight of FLSA settlement agreements).

[44] As of 2017, the Eleventh and Second Circuits require judicial supervision of FLSA settlements in all cases; the Fifth and Federal Circuits do not always require supervision of settlements; the Fourth, Seventh, Eighth, and Ninth Circuits have acknowledged the issue but have not decided the level of supervision required; and the First, Third, Sixth, Tenth and D.C. Circuits have not spoken on the issue. *Id*.

because judicial supervision is a prerequisite to courts' power to strike confidentiality provisions. In its ultimate argument, this Note assumes that courts will continue supervising FLSA settlement agreements, but it argues that courts should not categorically strike confidentiality provisions.

A. ARGUMENT FOR MANDATORY OVERSIGHT OF SETTLEMENT AGREEMENTS

In 1982, the Eleventh Circuit unconditionally mandated judicial oversight of FLSA settlement agreements in *Lynn's Food*.[45] In *Lynn's Food*, the court rejected an employer-employee negotiated settlement agreement after the Department of Labor brought suits against the employer for violating the employees' FLSA rights.[46] The Eleventh Circuit clearly stated that judicial oversight of settlement agreements would be required moving forward:

> [T]here is only one context in which compromises of FLSA back wage or liquidated damage claims may be allowed: 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 res[o]lution of a bona fide dispute over FLSA provisions.[47]

The Second Circuit followed the Eleventh Circuit's mandatory-oversight rule in 2015.[48] In *Cheeks v. Freeport Pancake House, Inc.*, the circuit court found that, in order for a district court to dismiss a claim under Federal Rule of Civil Procedure 41(a), the district court or the Department of Labor must approve the parties' settlement.[49] The court rested its reasoning for mandatory oversight on the

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[45] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982).

[46] *Id.* at 1354–55 (invalidating the settlement agreement).

[47] *See id.* at 1355.

[48] *See* Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (holding that "dismissals settling FLSA claims with prejudice require the approval of the district court or the [Department of Labor] to take effect").

[49] *Id.* (stating that Rule 41(a) dismissals "require the approval of the district court or the [Department of Labor] to take affect").

FLSA's "unique policy considerations."[50] These goals, according to the Second Circuit, included "'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work"[51] and "remedy[ing] the evil of overwork . . . [and] applying financial pressure on employers to reduce overtime."[52] Because the FLSA seeks to protect workers, the settlement of employees' cases should be afforded the same level of protection that the statute itself guarantees to labor rights.[53]

Scholars latched on to the Eleventh and Second Circuits' reasoning, arguing that anything less than judicial or Department of Labor oversight would result in inequitable settlements for employees.[54] For example, Keith Diener argues for at least minimal oversight using philosophy's harm principle.[55] Derived from a general rule that liberty and autonomy should be prioritized in the private marketplace, the harm principle limits this norm by prohibiting individuals from acting in ways that could injure other people.[56] Though parties independently negotiate FLSA settlement agreements, the harm principle still requires some regulation and oversight of these agreements due to the potential for unequal bargaining sophistication between employers and employees and the potential for a resulting settlement agreement that impacts other employees whose rights have also suffered at their employers' hands.[57] The argument for judicial or Department of Labor supervision of FLSA agreements thus relies on the policies

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[50] *Id.*

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

[52] *Id.* (quoting Chao v. Gotham Registry, Inc., 514 F.3d 280, 285 (2d Cir. 2008)).

[53] *Id.* (noting that "[i]n service of the statute's remedial and humanitarian goals, the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage" (alteration in original) (quoting *Chao*, 514 F.3d at 285)).

[54] *See, e.g.*, Diener, *supra* note 9, at 65 (arguing that Department of Labor oversight of FLSA settlement agreements prevents harm to "vulnerable employees"); Lau, *supra* note 9, at 260 (arguing that the risk of "predatory employers taking advantage of uninformed, unrepresented employees" requires oversight of settlements).

[55] Diener, *supra* note 9, at 65 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." (quoting JOHN STUART MILL, ON LIBERTY 68 (Penguin ed., 1974) (1859))).

[56] *Id.* (explaining that "liberty and autonomy . . . do not provide a blank moral check to do anything one desires").

[57] *Id.* ("The supervision of FLSA settlement agreements for back wages is intended to prevent harm to vulnerable employees who may be taken advantage of by their employers.").

underlying the FLSA and the realistic limits to liberty and autonomy under the harm principle.

B. ARGUMENT AGAINST MANDATORY OVERSIGHT OF SETTLEMENT AGREEMENTS

Despite a few circuits' taking a strong, pro-oversight stance on FLSA settlement agreements,[58] this idea is far from achieving national consensus. As previously noted, nine—that is, *most*—circuits have yet to decide the issue of oversight.[59] Therefore, this Section explores arguments against settlement oversight that may be motivating a majority of circuits.

Diener offers four arguments against settlement agreement oversight.[60] First, the FLSA does not expressly mandate oversight; therefore, reading that requirement into the FLSA is a broad leap.[61] Second, requiring oversight in the FLSA wage context (without explicit textual support) "represents a judicial prioritization" of these wage rights over other rights.[62] Third, oversight increases the case load of the courts and burdens attorneys representing workers in FLSA cases. Fourth, most settlement agreements are not seriously scrutinized and are "routinely approved."[63]

The first and third arguments are the most compelling, given the substantial impact that the oversight requirement imposes on the judiciary and Department of Labor to oversee an incredible number

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[58] The Eleventh and Second Circuits require FLSA settlements to be supervised in all cases; the Fifth and Federal Circuits require supervision of settlements under particular conditions. *See* Diener, *supra* note 9, at 55 tbl.1.

[59] The Fourth, Seventh, Eighth, and Ninth Circuits acknowledge the question of FLSA settlement supervision but have yet to decide what, if any, level of supervision is required. *Id.* The First, Third, Sixth, Tenth and D.C. Circuits have not spoken on the issue. *Id.*

[60] Diener, *supra* note 9, at 65 (providing "four . . . reasons why one might oppose the supervision of FLSA settlement agreements"). Note that Diener's analysis leads him to the opposite conclusion: settlement agreements *should* be overseen by the courts or DOL. *Id*. at 26. He still, however, offers a comprehensive discussion of the arguments against oversight. *Id*. at 27.

[61] *Id*. at 66 ("[T]he policies that were utilized to develop the supervisory requirement are not found in the express language of the FLSA . . . .").

[62] *Id*.

[63] *Id*.

of cases.[64] The vast case load also supports the fourth argument: even if a valid legal and policy basis exists for overseeing the settlement, lack of resources prohibits any real oversight and potentially results in rubber-stamp approval of any settlement that comes before the court. It seems unwise to require federal courts with already heavy caseloads[65] to oversee settlement of FLSA agreements when doing so is not explicitly mandated by Congress.[66]

IV. ALLOWING PARTIES TO NEGOTIATE USING CONFIDENTIALITY PROVISIONS

For better or worse, the legal environment is quickly embracing oversight of FLSA settlements.[67] While debating whether this oversight should exist at all is a necessary inquiry, it is not this Note's primary focus. Rather, this Note assumes that courts will oversee FLSA settlements. Based on a recent trend, courts are

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[64] Over 1800 cases were filed in the first quarter of 2018 alone. *See Fair Labor Standards Act Lawsuits Down From 2015 Peak*, TRACREPORTS (Jan. 24, 2018), https://trac.syr.edu/tracreports/civil/498/.

[65] *See Federal Judicial Caseload Statistics 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (last visited Feb. 16, 2021) (indicating a general growth in federal case filings in 2020).

[66] Of course, Diener reaches an opposite conclusion, arguing that oversight comports with congressional intent under the FLSA to protect vulnerable employees, to ensure a minimum standard of living, to ensure any private rights impacting the public interest are not hindered, and to promote the FLSA's uniform application. Diener, *supra* note 9, at 68. Though one might wonder, if the increase in case load leads to the rubber-stamping of settlement agreements, is oversight truly effective at achieving these goals, and ought it not be Congress that makes the decision about policy effectiveness? *Compare* U.S. CONST. art. I, § 1 ("All *legislative* powers herein granted shall be vested in a Congress of the United States . . . .") (emphasis added), *with id.* art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."). As an aside, the argument concerning judicial efficiency does not apply to Department of Labor oversight of these agreements, though the previously mentioned reasons for not requiring oversight would still be applicable. *See supra* notes 60–65 and accompanying text.

[67] The two primary cases discussed in this area provide evidence for this trend: both require oversight of agreements in at least some contexts. *See* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982) (explaining that compromises of FLSA back-wage or liquidation-damages claims are only permitted if supervised by the Department of Labor or by a court); Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (holding that approval from a district court or the Department of Labor is required for "stipulated dismissals settling FLSA claims with prejudice").

attempting to go even further than this routine oversight by requiring that settlements meet certain qualifications.[68] Namely, as a prerequisite to approval, courts are requiring that agreements exclude confidentiality provisions.[69]

A number of district courts have found that confidentiality provisions hinder the policies and purposes of the FLSA.[70] For example, a court in the Middle District of Florida—which is bound by the Eleventh Circuit's decision in *Lynn's Food*—held that confidentiality provisions could never be permitted in an FLSA settlement because they contravened the intent of the FLSA.[71] Specifically, the court said that the confidentiality provision would stop employees from exercising their rights under the FLSA and would "effect[] a judicial confiscation of the employee's right to be

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[68] *See, e.g.*, Moreno v. Regions Bank, 729 F. Supp. 2d 1346, 1353 (M.D. Fla. 2010) (rejecting an FLSA settlement agreement because the "pervasive and unbounded scope of the release is unfair and precludes a valid evaluation of the compromise"); Guerra v. Flores, 139 F. Supp. 3d 1288, 1293 (N.D. Ala. 2015) (requiring that settlements be made "on public record" pursuant to the reasoning in *Lynn's Food*).

[69] *See, e.g.*, Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1247 (M.D. Fla. 2010) ("An employee's right to a minimum wage and overtime is unconditional, and the district court should countenance the creation of no condition, whether confidentiality or any other construct, that offends the purpose of the FLSA."); Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 177–78 (S.D.N.Y. 2015) (rejecting a confidentiality provision in an FLSA agreement because it would prevent public access to the settlement and would prohibit the plaintiffs from openly discussing their experience with the litigation); Briggins v. Elwood Tri, Inc., 3 F. Supp. 3d 1277, 1290 (N.D. Ala. 2014) (rejecting a confidentiality provision for being unfair because it "f[ell] unequally on the employees compared to the [employer]").

[70] *Dees*, 706 F. Supp. 2d. at 1242 ("[A] confidentiality provision furthers resolution of no bona fide dispute between the parties; rather, compelled silence unreasonably frustrates implementation of the 'private—public' rights granted by the FLSA and thwarts Congress's intent to ensure widespread compliance with the statute." (footnote omitted) (quoting Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704–08 (1945))); Brumley v. Camin Cargo Control, Inc., Nos. 08-1798, 10-2461, 09-6128, 2012 WL 1019337, at *7 (D.N.J. Mar. 26, 2012) ("[D]istrict courts have rejected as unreasonable settlement agreements that contain confidentiality provisions, finding them unenforceable and operating in contravention [of] the FLSA.").

[71] *See Dees*, 706 F. Supp. 2d at 1242–43 ("A confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights. . . . The district court should reject as unreasonable a compromise that contains a confidentiality provision, which is unenforceable and operates in contravention of the FLSA.").

free from retaliation for asserting FLSA rights."[72] In short, "the employer thwarts the informational objective of the notice requirement by silencing the employee who has vindicated a disputed FLSA right."[73] Because "[a]n employee's right to a minimum wage and overtime is unconditional," the court should not approve any "condition, whether confidentiality or any other construct, that offends the purpose of the FLSA."[74]

Courts that strike confidentiality provisions receive much praise from academics.[75] Like some district courts, scholars argue that the private litigant's (employee's) interest and the public interest in disclosing FLSA settlement agreements outweigh the benefits of confidentiality.[76] While a few district courts have upheld the agreement that litigants have negotiated,[77] the trend for courts reviewing these FLSA settlement agreements is to strike confidentiality provisions.

A. PROTECTING THE EMPLOYEE

Admittedly, powerful arguments militate against upholding confidentiality provisions in FLSA settlement agreements. After all, employers likely have more bargaining power than individual employees in settlement negotiations.[78] A similar logic is used to

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[72] *Id.* at 1242; *see also Brumley*, 2012 WL 1019337, at *7 (citing cases from several district courts that struck confidentiality provisions as contrary to the FLSA's public policy).

[73] *Dees*, 706 F. Supp. 2d at 1242, 1247.

[74] *Id.*

[75] *See, e.g.*, Wilkins, *supra* note 7, at 134 (discussing a "handful of cases recognizing the imbalance of power between employer and employee").

[76] *Id.* at 112 ("[T]he rights of the general public and of similarly situated workers to know when employers have violated the FLSA outweigh private litigants' interests in keeping a settlement confidential."); *see also* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 873 (2007) (arguing that "a ban [on confidentiality provisions] might have efficient dynamic effects, such as deterring frivolous lawsuits and improving market decisions").

[77] *See infra* notes 149–150 and accompanying text.

[78] Wilkins, *supra* note 7, at 134 (describing "the imbalance of power between employer and employee," namely "the vulnerable position of low-wage litigants" when compared to employers' "important retaliatory tool . . . of subsequent breach of contract suits" for confidentiality provisions).

justify judicial oversight of FLSA settlement agreements in the first instance.[79]

Even advocates for striking confidentiality provisions, however, acknowledge that these provisions are potential bargaining chips for employees during settlement negotiations.[80] Beyond this practical rationale for permitting confidentiality provisions in FLSA settlements, freedom-of-contract principles ground larger critiques of judicial paternalism in lieu of allowing the private parties to contractually settle their legal disputes.[81]

As the subsequent discussion illustrates, if courts are to oversee these settlements (as this Note assumes) then courts should only evaluate the fair and proper *process* of entering a settlement, rather than assessing the agreement's substance. Such an approach provides a middle ground between giving individual employees broader bargaining power in these settlement negotiations while ensuring that employers do not take advantage of the plaintiff-employee's lack of legal sophistication to harm the plaintiff-employee or other employees implicated by the final agreement.

1. Freedom of Contract Compels Permitting Confidentiality Provisions. Freedom of contract is the "basic right of an individual to enter into agreements that gain or dispose of possessions, services or otherwise alter legal relationships."[82] It has been a fundamental freedom in the United States since the founding, as evidenced by the inclusion of the Contract Clause in the U.S. Constitution.[83] The theory behind freedom of contract is that individual citizens should be free to make contracts between themselves without state

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[79] Diener, *supra* note 9, at 65 ("The supervision of FLSA settlement agreements for back wages is intended to prevent harm to vulnerable employees who may be taken advantage of by their employers."); *see also supra* Section III.A.

[80] Wilkins, *supra* note 7, at 126 (admitting that plaintiffs in FLSA cases might prefer confidentiality when motivated by "need for quick payment of lost wages, litigation fatigue, and a desire to hide the size of the settlement from family and friends to avoid requests for money").

[81] *See* discussion *infra* Section IV.A.*1*.

[82] David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 56–57 (2013).

[83] *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any . . . Law impairing the Obligation of Contracts . . . .").

interference.[84] The rationale is that this freedom will result in both better contracts and a freer marketplace, in turn spurring economic growth.[85]

Beyond marketplace considerations, freedom to enter contractual agreements pursuant to one's wishes also illustrates the government's commitment to the dignity of persons in the form of personal autonomy and free will.[86] It is not only the economic sector that is better off because of private contracts; people also experience more freedom to choose between an array of options when states do not interfere in their agreements.[87]

Of course, this freedom can be abused. At the pinnacle of economic freedom of contract, the *Lochner* Era, the U.S. Supreme Court struck down a state law regulating the number of hours that a baker could work as a violation of the Fourteenth Amendment.[88] The Court held that this law was not a proper exercise of the state's police power[89] because it was singling out an occupation, could lead to uncontrolled regulation, and because the bakers should be the ones protecting their health, not the state.[90] The Court indicated

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[84] *See* Christopher Theodorou, Note, *A Facial Reconstruction of Settlements: Analyzing the* Cheeks *Decision on FLSA Settlements*, 35 HOFSTRA LAB. & EMP. L.J. 209, 237–39 (2017) (detailing the theory behind freedom of contract as expressed by the U.S. Supreme Court during the *Lochner* era).

[85] *See, e.g.*, Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 729 (2010) (arguing that "contracts can be a strategic tool in obtaining a competitive advantage" in the business context).

[86] *Cf., e.g.*, Jessica H. Munyon, Note, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 717–20 (2003) (arguing for female autonomy in choosing to enter into surrogacy contracts as a manifestation of broader women's rights).

[87] *See, e.g.*, *id*. at 720–22 (indicating that women who choose to enter surrogacy contracts are able to do so with great financial benefit for themselves and would not enter the agreements otherwise).

[88] Lochner v. New York, 198 U.S. 45, 64 (1905) ("It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his [employees] . . . . Under such circumstances the freedom of master and [employee] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

[89] Police power is typically thought of as the state's ability to regulate the health, safety, and morals of its citizenry. *Id.* at 53.

[90] *Id*. at 59 (observing that the occupation of baking "is not an unhealthy [occupation] to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employ[ee]").

that a more direct relation between the regulation and the police power was needed for the law to be a proper exercise of state authority.[91]

In striking resemblance to arguments for FLSA settlement agreement oversight, Justice Harlan, in dissent, argued that the majority disregarded unequal bargaining power between bakers and employers.[92] If the bakers could not actually bargain for their rights, then freedom of contract was not being achieved, and *the state*—not the court—had the power to step in on behalf of the weaker bargaining party with legislation.[93]

The United States no longer operates in a *Lochner* world.[94] Courts may interfere with contracts—beyond merely interpreting regulations in light of government powers, as was the case in *West Coast Hotel* and *Carolene Products*[95]—by striking down private contracts for public policy reasons.[96]

Freedom of contract principles, however, have not vanished. Nor should they. The tension felt in *Lochner* is a similar tension courts face when forced to approve or disapprove of FLSA settlement agreements. "[I]t becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as

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[91] *Id.* at 64 ("It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the [employee], as to justify us in regarding the section as really a health law.").

[92] *Id.* at 69 (Harlan, J., dissenting) ("It may be that the statute had its origin, in part, in the belief that employers and employ[ees] in such establishments were not upon an equal footing . . . .").

[93] *Id.* (arguing that whether the law on bakers' maximum working hours is "wise legislation . . . is not the province of the court to inquire").

[94] In the 1930s, the U.S. Supreme Court sounded the death knell of the *Lochner* era with a series of decisions upholding state and federal legislation. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (upholding a *federal* statute prohibiting the shipment of adulterated milk under the Commerce Clause); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding a *state* minimum wage statute for wages of female workers as a proper exercise of state police power).

[95] *Carolene Prods. Co.*, 304 U.S. at 154 (holding that the federal statute in question was "a constitutional exercise of the power to regulate interstate commerce"); *W. Coast Hotel*, 300 U.S. at 400 (upholding a state minimum-wage statute as "a matter for the legislative judgment").

[96] *See, e.g.*, Weber, *supra* note 82, at 65 (listing examples of "contracts void for violating public policy": unconscionability, overreaching restraints on trade, and contracts with illegal purpose).

he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor . . . ."[97]

The government, including the courts, should be hesitant to disregard the long-standing principle of allowing private parties to freely enter agreements.[98] From a pure freedom-of-contract approach, employees whose rights under the FLSA have been violated by employers should be afforded the opportunity to enter freely into settlement agreements with fair terms. The reviewing court should defer to the terms negotiated by the parties and reject only those settlements which are grossly unfair to the employee. Rejecting such a principle, as courts that categorically reject confidentiality provisions do,[99] disregards the history of private agreements in the United States and the autonomy of employees to craft a settlement that redresses the violation of their rights.

Of course, one must address the potential for abuse. This concern would likely be the leading objection to the pure freedom-of-contract approach to FLSA settlement agreements.[100] Critics may argue that because workers historically have had fewer rights and employers generally exercise greater authority and leverage over employees (which is partially why the FLSA mandates a minimum wage and

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[97] *Lochner*, 198 U.S. at 54. This comparison may be attenuated because *Lochner* dealt with a state regulation of labor conditions, whereas the FLSA is a federal statute regulating labor conditions. Whether the regulation is passed under state police power or the Commerce Clause, however, appears to make only a nominal difference, but nonetheless exhibits the tension presented in both scenarios between an individual's right to contract and the government's power to interfere with such a right. One might argue that the rationale for state interference through police powers (as opposed to Commerce Clause power) better comports with the arguments used by proponents of judicial oversight of FLSA settlement agreements and striking the confidentiality provisions of the settlements. As a state police power, regulating settlement of employment claims could be considered part of workers' health and safety. This Note, however, does not delve further into the differences between state police power and federal power under the Commerce Clause.

[98] *See, e.g.*, Weber, *supra* note 82, at 53 (arguing that limiting the right to contract based on the status of the party alone is "an exception to the general rule of the freedom of contract").

[99] *See, e.g.*, Brumley v. Camin Cargo Control, Inc., Nos. 08-1798, 10-2461, 09-6128, 2012 WL 1019337, at *7 (D.N.J. Mar. 26, 2012) (listing a half-dozen examples of courts that agree with categorically rejecting confidentiality provisions in settlement agreements); Dees v. Hydradry, Inc., 706 F. Supp. 2d. 1227, 1243 (M.D. Fla. 2010) (rejecting confidentiality provisions as "unreasonable" and "in contravention of the FLSA").

[100] *See, e.g.*, Wilkins, *supra* note 7, at 132–43 (arguing that confidentiality contributes to unequal bargaining power and leverage between employers and employees).

provides for maximum working hours[101]), the courts must oversee settlement agreements and strike confidentiality provisions. Such supervision is needed either because employees, due to their lesser bargaining power, lack capacity to enter the agreement freely *or* because confidentiality could never be part of a bargained-for exchange between employees and employers.[102]

The problem with the capacity argument for striking confidentiality provisions is that it assumes too little of workers. To have reached a settlement agreement at all, an employee would have had to complete the following: (1) know their rights; (2) identify a violation of their rights by their employer; (3) pursue some legal education (through an attorney or independent research) to comprehend their options for vindicating their rights; (4) initiate a federal lawsuit against their employer; (5) have made a compelling case for vindication to bring the employer to the bargaining table; *and* (6) negotiate an agreement that satisfies both the parties.[103]

This is not an easy process, nor is it without cost. The employee sacrifices time, money, and their potential reputation in choosing to file suit.[104] It is difficult to imagine that an employee, especially one represented by counsel, would be unable to knowledgeably make a decision about entering a confidentiality provision without knowing how it would operate or its implications. There is no obvious reason that an employee is less able to enter a confidentiality provision than to enter the other provisions in the agreement. To assume employee incapacity in entering a confidentiality provision would be to assume the employee's broader incapacity to enter the agreement at all. If this is the case, then the court should not only be overseeing these agreements—the court should be fashioning them, too.

The employer does have a superior bargaining position given its resources, both legal and financial, to extract the best settlement for

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[101] 29 U.S.C. § 206 (2018) (codifying the minimum wage requirements for employers); *id.* § 207 (codifying maximum hour limitations for employers).

[102] Perhaps this Note goes too far in assuming that the objection would rely primarily on a lack of meeting-of-the-minds between the parties or on a lack of capacity. Neverthless, courts need some reason for the agreed-upon exchange to end before categorically striking these agreements. As this Note will address, the FLSA also presents implications for the national economy that might be the stronger argument for striking confidentiality provisions. *See* discussion *infra* Section IV.B.

[103] *See supra* Section II.C.

[104] *See supra* notes 38–39 and accompanying text.

itself.[105] The disparity in bargaining power is why courts oversee the agreements for fairness and reasonableness in jurisdictions that require such oversight.[106] But this concern is assuaged by judicial oversight of the *process* of the settlement (such as whether the negotiations were fair, if the employee was represented by counsel, etc.) and not the resulting settlement itself. This practice would best preserve the employee's personal vindication of their rights under the FLSA and the freedom-of-contract principles foundational to the U.S. political and legal system.

2. Confidentiality Gives Employees More Bargaining Leverage. The next objection to less demanding court oversight of settlement agreements is that confidentiality could never be part of a bargained-for exchange between employers and employees.[107] Supposedly, if employees knew what confidentiality meant for themselves or the national economy of laborers, they would not accept these provisions.

Ironically, the proponents of court oversight—who cite unequal bargaining power between employers and employees as their rationale—want to take away a significant bargaining chip held by employees: confidentiality. Economically, the final settlement will derive from a calculus of each party's probability of victory, the potential amount won by the plaintiff (or to be paid by the

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[105] *See* Wilkins, *supra* note 7, at 129–30 (explaining how courts have approached the power imbalance between employers and employees). Whether excluding confidentiality provisions assists in counteracting this fact, however, is unclear.

[106] *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982) ("[T]here is only one context in which compromises of FLSA . . . claims may be allowed: 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] of a bona fide dispute over FLSA provisions."); Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 200 (2d Cir. 2015) (affirming the district court's holding that "parties cannot enter into private settlements of FLSA claims without either the approval" of the courts or the Department of Labor).

[107] *See, e.g.*, Hogan v. Allstate Beverage Co., 821 F. Supp. 2d 1274, 1283–84 (M.D. Ala. 2011) (concluding that confidentiality provisions unequally benefit the employer); Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010) ("[A] confidentiality provision furthers resolution of *no bona fide dispute* between the parties . . . ." (emphasis added)). It appears that if unequal bargaining power cannot be sufficient for striking agreements, then there would need to be some implicit duress or capacity problem. *See* Weber, *supra* note 82, at 65 (listing examples of when courts may void a contract on public policy grounds: unconscionability, overreaching restraints on trade, and contracts with illegal purposes).

defendant), and the costs of adjudication.[108] Part of the cost of adjudication for the employer is the publicity the case receives moving forward. Perhaps a significant portion, therefore, of the employee's leverage in settlement negotiations is offering the defendant-employer confidentiality about the terms of the agreement. *Courts*—not even the elected legislature in a policy judgment—deciding that this leverage should not be afforded to the plaintiffs hinders plaintiff-employees from fully vindicating their rights under the FLSA and achieving the largest settlement possible.

Beyond the financial incentive of receiving the settlement amount, employees may themselves benefit from a confidentiality provision—it might prevent the employer from discussing unfavorable information about the employee. This idea has not been discussed thoroughly, if at all, in the debate of confidentiality in FLSA settlements. It is possible for confidentiality to run both ways, though: protecting employers from the disclosure of settlement numbers *and* protecting employees from disparagement by employers in the future.[109]

Finally, even if employers are "coercing" employees into confidential settlements by relying on unequal bargaining positions, employees still have the option to *not* settle. Employees might instead choose to go to trial instead of pursuing contract-resolution of their claims. The cost of trial surely is a consideration, but a rational employee—one who is unhappy with the proposed terms or with the employer's demand for confidentiality without adequate

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[108] An example illustrates this broader point: if a lawsuit is worth $50,000 and the costs of adjudication are $10,000, then the lawsuit is valued at $40,000 to the plaintiff and potentially costs the defendant $60,000. Therefore the "bargaining zone" for settlement is between $40,000 and $60,000. This example does assume rational, wealth-maximizing behavior of the litigants. *See* John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1137 (2009).

[109] *See* Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, L.A. LAW., May 2018, at 12, 14–15 (outlining the benefits to employees of confidential harassment settlements in finding future employment and keeping the details of the harassment private). As with any negotiation tool, if an employee asks for reciprocal confidentiality, it may change how the parties value the settlement. But to withhold an option from settlements that might be advantageous to both parties in certain circumstances seems unwise, even assuming that the legislature mandated certain settlement options instead of courts' wholesale imposition of such restrictions.

compensation for such silence—could always decline the settlement. In fact, courts, when assessing these settlements, might rightly assume that the employee has thought about the option of denying the settlement and chosen to proceed with the settlement over the option of trial.[110]

In sum, any concern with employees not truly wanting a confidentiality provision in their settlement would be resolved by judicial oversight the settlement process with a view to ensuring that it is free of coercion and conducted with adequate capacity, rather than categorically striking certain substantive provisions, like confidentiality agreements.

B. PROTECTING THE NATIONAL ECONOMY

The final objection to courts' taking a more hands-off approach towards confidentiality provisions in FLSA settlement agreements is that public settlements are necessary to ensure that other workers, whose rights have been violated, can bring future suits under the FLSA.[111] Congress undeniably passed the FLSA in part to ensure a *national* revitalization of workers' rights.[112] And, as previously discussed,[113] this goal makes sense in the post-Great Depression context during which the FLSA came to existence.[114] So,

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[110] In striking these provisions, courts may, in effect, be forcing the parties into a trial if the employer is unwilling to settle without the promise of silence and is willing to take the risk of a factfinder's finding of a violation. *See* Kotkin, *supra* note 13, at 929 ("Employers regularly assert that no settlement will be reached without confidentiality.").

[111] For example, Wilkins argues that FLSA suits resemble government agency enforcement and public hazard cases: each action protects the public writ large, in addition to those directly affected. *See* Wilkins, *supra* note 7, at 120–24. Therefore, confidential FLSA settlements should be prohibited because invisible settlements stifle other FLSA suits and broader vindication of national labor rights. *See id.* at 124 ("[B]ecause the regulatory scheme is thwarted and other members of the public similarly injured when the company is allowed to cover up wrong-doing, a . . . norm against confidentiality should apply.")..

[112] This intent is evidenced by the statute's language, which states that Congress found "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" to be unfair and harmful to the national workforce. *See* 29 U.S.C. § 202(a) (2018).

[113] *See* discussion *supra* Section II.A.

[114] *See* Wilkins, *supra* note 7, at 113 (discussing how Congress passed the FLSA in order to provide workers with rights by creating "a minimum standard for working conditions" and "to preserve a healthy economy").

even assuming that courts adopt a freedom-of-contract theory of FLSA settlement agreements and believe that workers should be given greater bargaining leverage with confidentiality provisions, the public interest in knowing the outcome of cases and the existence of employers who violate the FLSA may still outweigh an individual plaintiff's interest in confidentiality.[115]

This argument posits that employees will not know of their rights under the FLSA or that their employers' actions are violating those rights if they do not have the requisite information provided by public suits and settlements.[116] One way of ensuring such knowledge is for employees to talk amongst themselves, sharing experiences about potential violations and settlement agreements.[117] By inserting confidentiality provisions into settlement agreements, employers stifle these conversations, halting any exchange of information between employees.[118]

Some scholars have compared confidentiality in the FLSA context to government agency enforcement and hazard litigation in that more information and disclosure of claims is better for the

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[115] As previously noted, this argument better comports with the Commerce Clause constitutional hook under which Congress adopted the FLSA. *See supra* note 97 and accompanying text. The Commerce Clause relates to the overall economic condition of the United States. U.S. CONST. art. I § 8 (giving Congress the power "[t]o regulate Commerce . . . among the several States"). Some arguments about FLSA settlement oversight and confidentiality, however, focus on the *individual's* lack of bargaining power and unequal leverage compared to the employer. Wilkins, *supra* note 7, at 129–30 (discussing unequal bargaining power in FLSA settlement negotiations). For this reason, the "quasi-public" nature of the FLSA is more amenable to the constitutional rationale for the statute itself and, accordingly, should be given due consideration. *Id.* at 112–14.

[116] This asymmetry of information is why there are strenuous posting requirements imposed on employers to ensure that employees know of their statutory rights in the workplace. *See* 29 C.F.R. § 516.4 (2020) (requiring that "[e]very employer employing any employees subject to the [FLSA's] minimum wage provisions shall post and keep posted a notice explaining the [FLSA] . . . in conspicuous places in every establishment where such employees are employed").

[117] Wilkins, *supra* note 7, at 132 ("Similarly situated employees are the people most likely to benefit from information about a previous suit and those who a plaintiff is most likely to want to help after his or her litigation has finished.").

[118] *Id.* ("This is the concrete mechanism by which employers use their leverage in litigation to thwart the purposes of the FLSA—by using their superior bargaining position to prevent the otherwise natural flow of information from one employee to another within a company.").

public writ large.[119] The FLSA, however, is more appropriately compared to other workers' rights statutes, such as the ADEA and Title VII, where confidentiality provisions are not prohibited from settlement agreements as a matter of course. Further, court oversight of FLSA settlement process and procedure—not the actual substance of the agreement—can ease any national economy concerns not present with other workers' rights statutes.

1. Confidentiality and Other Worker-Regulation Statutes. The FLSA is not the only workers' rights statute that Congress passed to protect employees in the workplace.[120] Other relevant worker-protection statutes include Title VII,[121] the Family and Medical Leave Act (FMLA),[122] and the ADEA.[123] Congress passed each statute to make the work environment more amenable to employees, but each law addresses different types of employees and work situations.

Title VII was passed under the Civil Rights Act of 1964 to prohibit discrimination in employment.[124] Under Title VII, employers cannot discriminate on the basis of "race, color, religion, sex, or national origin."[125] Title VII protects covered employees from discrimination in hiring and discharge decisions and in "compensation, terms, conditions, or privileges of employment."[126] Title VII also protects against any discriminatory acts that would tend to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[127] When it

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[119] *Id*. at 121–24 (comparing confidentiality in FLSA settlements with agency enforcement actions and public hazard litigation).

[120] *See, e.g.*, 29 U.S.C. § 621(b) (2018) (codifying the ADEA "to prohibit arbitrary age discrimination in employment"); *id*. § 2601(b)(2) (2018) (codifying the FMLA "to entitle employees to take reasonable leave for medical reasons" or for child care); 42 U.S.C. § 2000e-2(a) (2012) (codifying Title VII to prohibit workplace discrimination).

[121] 42 U.S.C. § 2000e-2 (2018).

[122] *Id*. §§ 2601–54 (2018).

[123] 29 U.S.C. §§ 621–634 (2018).

[124] 42 U.S.C. § 2000e-2(a) (2018) (defining "unlawful employment practice[s]" for employers).

[125] *Id*. § 2000e-2(a)(2).

[126] *Id*. § 2000e-2(a)(1).

[127] *Id*. § 2000e-2(a)(2).

comes to confidentiality, however, "courts are . . . likely to enforce secrecy provisions in [Title VII] settlement agreement[s]."[128]

The FMLA protects employees who are required to leave employment temporarily for family or medical reasons.[129] Particularly, it entitles employees to unpaid leave for up to twelve workweeks per year for various illnesses or family-related obligations.[130] The FMLA previously was subject to the same judicial or Department of Labor oversight of settlement agreements, but this oversight is no longer required.[131]

The ADEA protects employees age forty and older from discrimination based on their age.[132] The ADEA makes it illegal for an employer to hire or fire an employee based on age or to alter "compensation, terms, conditions, or privileges of employment" because of age.[133]

The ADEA, Title VII, and the FMLA are anti-discrimination statutes that specifically apply in the employment context.[134] The fact that these statutes touch on labor relations, however, makes them more apt comparisons for the FLSA than government

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[128] Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 249 (2018). The secrecy of these settlement agreements has also been criticized. *Id*. at 255 (noting that "such settlements are problematic because they impair 'the right of the public to know'" (quoting Kotkin, *supra* note 13, at 947)).

[129] *See* 29 U.S.C. § 2601(b)(2) (2018) (stating that the FMLA's purpose is "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition").

[130] *Id.* § 2612(a)(1) (2018) (entitling "eligible employee[s] . . . to a total of 12 work-weeks of leave" per year for certain reasons).

[131] *See* Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463, 516 n.401 (2018) (noting that FMLA regulations were "revised in 2009 to permit private, confidential FMLA settlements" without court or Department of Labor approval (citing 29 C.F.R. § 825.220(d) (2017))).

[132] 29 U.S.C. § 621(b) (2018) (stating that the ADEA's purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment"); *id*. § 631(a) (2018) (limiting ADEA protections to those over the age of forty).

[133] *Id*. § 623(a)(1).

[134] Lau, *supra* note 9, at 241 (comparing generally applicable employment statutes, Title VII and the Family and Medical Leave Act, with the ADEA and FLSA, statutes designed to help specific types of workers, such as older workers and "the most vulnerable, lowest paid segments of the workforce").

enforcement actions or hazard litigation.[135] In particular, the FMLA presents itself as an important comparator to determine if confidentiality provisions should be permitted in FLSA settlements because, like the FLSA, it deals with employee rights and is enforced by the Department of Labor's Wage and Hour Division.[136]

In all federal labor statutes other than the FLSA, judicial oversight of settlements is not required, and courts do not automatically strike confidentiality provisions in settlement agreements.[137] Compellingly, the Department of Labor used to require judicial or Department of Labor approval of FMLA settlements.[138] A key distinction must be drawn, however, from this previous FMLA requirement and the FLSA's current judicial approval requirement: the Department of Labor passed this regulation, instead of the courts' reading it into a federal statute.[139] This prior FMLA regulation proves that the Department of Labor *can* insert a judicial oversight requirement into worker rights statutes and has chosen, even if implicitly, not to do so for the FLSA. Because controversy exists surrounding whether courts should exercise judicial oversight of settlement agreements in the first place, the argument that courts should use that oversight to categorically strike negotiated provisions from settlement agreements is even more tenuous.[140]

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[135] *See* Wilkins, *supra* note 7, at 121–24.

[136] 29 U.S.C. § 2617(b) (2018) (authorizing the Secretary of Labor to enforce the provisions of the FMLA); *id*. § 216(c) (allowing the DOL to enforce the FLSA).

[137] Gormin v. Brown-Forman Corp., 963 F.2d 323, 327 (11th Cir. 1992) (holding that unsupervised ADEA settlements are not *per se* invalid); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 658 n.209 (1999) (indicating a court's distinction between ADEA charges, which relay information to the Equal Employment Opportunity Commission and cannot be waived, and causes of action, which allow the employee to recover for a violation of rights and can be waived); Nuñez, *supra* note 131, at 516 (stating that "public approval of FMLA settlements is no longer required by DOL regulations"); Tippett, *supra* note 128, at 249 (stating that "courts are more likely to enforce secrecy provisions in a [Title VII] settlement agreement, on the theory that it promotes dispute resolution").

[138] 29 U.S.C. § 2617(b) (2018).

[139] *See* 29 C.F.R. § 825.220(d) (2020) ("Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. . . . This does not prevent the settlement or release of FMLA claims by employees . . . without the approval of the Department of Labor or a court."); *see also* 29 U.S.C. § 2617(b) (2018).

[140] *See supra* Part III.B.

2. Why the FLSA Should Not Be Treated Differently. In the FMLA and ADEA, the legal situations most comparable to the FLSA, much less is required of settlement agreements.[141] Opponents might argue that it is not the FLSA that has taken the wrong approach, but the other labor statutes. However, such a pronounced change to the dynamic of bringing and settling employment claims is not a decision for courts to make, but rather a policy judgment that ought to be left to the legislature or the DOL, the agency tasked with enforcing the FLSA.

Other practical problems arise from relying on courts to usher in this change to settling employment claims. As we have seen in the FLSA context, circuit splits between the level and type of judicial oversight have led to inconsistency and confusion for employers and employees when settling cases.[142] If courts begin to dabble in changing the process of not one, but *four* labor statutes, then more confusion will ensue. This confusion may undermine consistency in a way that affects the national economy—ironically the very thing these laws attempt to stabilize.[143]

A further criticism of a freedom-of-contract approach to FLSA settlements is that the FLSA is more concerned with the national economy—specifically with how wage and hour restrictions might result in a "race to the bottom"—than are the FMLA, Title VII, or the ADEA.[144] However, especially in the discrimination context, the broader discrimination issue is typically framed in a wider national

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[141] *See infra* note 144.

[142] *See infra* Part III.

[143] The value of consistency is often a rationale in commercial law, but it is relevant for the FLSA context because, as a labor and employment statute, it governs commercial relationships. *Cf.* Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2820 (Jan. 16, 2020) (to be codified at 29 C.F.R. pt. 791) (updating the Department of Labor's interpretation of "joint employer status" under the FLSA "to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy").

[144] The FMLA, Title VII, and ADEA are more concerned with an individual employee's rights being violated by discriminatory treatment on account of family necessity, race or sex discrimination, or age discrimination. *See supra* note 120. The FLSA, in contrast, deals less with a characteristic of the employee causing difference in treatment, but rather with the employer's actions having an adverse impact on the employee. *See* Lau, *supra* note 9, at 262 ("The FLSA's characteristics also call for it to be treated differently than other federal employment statutes.").

manner than individual cases.[145] It would be inconsistent and harmful to equality movements to say that individuals are the only ones affected by discrimination in the workplace; there is evidence that more diverse and inclusive employment practices create a better, more productive working environment.[146]

Additionally, even if this criticism is true, a comparison of the FLSA to other employment statutes is more productive and useful for this discussion than a comparison of the FLSA to non-employment contexts, like government enforcement and hazard litigation, where suits sometimes lack distinct, individual plaintiffs.[147] Because the most apt comparators to the FLSA do not limit confidentiality, or even require judicial oversight of settlement agreements, courts should be hesitant to impose such limitations on FLSA employee-plaintiffs seeking to bargain freely and use confidentiality as leverage in negotiations to obtain larger settlements. Further, courts can resolve any concerns about the national economy by assessing whether the settlement agreement's process and procedure ensures fairness to all employees, rather than by categorically excluding confidentiality provisions from these agreements.

C. POTENTIAL LIMITATIONS OF SETTLEMENT AGREEMENTS

Confidentiality is not without flaws.[148] Many of the criticisms of confidentiality in the FLSA context do raise questions about enforcing the broader purposes of the FLSA in a legal environment

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[145] *See, e.g.*, Kotkin, *supra* note 13, at 969–71 (using an example of a confidentiality provision in a prior settlement agreement that affected the outcome of other employees' claims).

[146] *See, e.g.*, Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 61, 67 (2017) (justifying workplace diversity efforts because they "ensur[e] responsiveness," "improv[e] performance," and "signal[] . . . openness of the workplace"); Suman Reddy, *Diversity is the Superhero with an Invisible Cape*, ENTREPRENEUR INDIA (Oct. 12, 2020), https://www.entrepreneur.com/article/340451 (discussing benefits of diversity, including creating competitive business advantage, helping organizations grow globally, and aiding in consumer service).

[147] Wilkins, *supra* note 7, at 121–22 (comparing private and public rights enforcement).

[148] *See id*. at 135–43 (criticizing confidentiality for undermining access to courts); Kotkin, *supra* note 13, at 961–71 (arguing that confidentiality prohibits other plaintiffs from bringing suit and the courts from executing justice).

where confidentiality provisions in settlement agreements abound. This Note concludes with two practical points for handling confidentiality issues with FLSA suits.

First, courts should engage in a nuanced inquiry into the *process* of crafting the settlement and the *nature* of the confidentiality restrictions in settlement agreements to determine if they are permissible. Some federal district courts have already begun doing so.[149] Instead of categorically rejecting confidentiality provisions, courts should weigh the employee's freedom to contract with the potential for employer abuse of unequal bargaining power.[150]

This manner of assessing confidentiality is not perfect and raises theoretical questions about why certain types of confidentiality should be permissible while others should not be. This more nuanced approach may also require more judicial resources and effort than the current categorical rejection of confidentiality provisions. Limiting the inquiry to an assessment of the process, however, would lessen this burden. If courts are going to be the primary party in reviewing FLSA settlements, however, balancing these contradicting interests appears to be the most equitable and logical approach.

Second, even if courts continue to permit confidentiality provisions, and assuming that confidentiality impedes other employees from bringing claims due to a lack of information, the Department of Labor can still bring enforcement actions against employers on behalf of a class of employees.[151] Congress expressly permits Department of Labor enforcement of FLSA violations in the statute.[152] So, even if individual employees are less likely to bring enforcement actions due to the greater prevalence of confidentiality provisions, the Department of Labor—with greater resources and capacity to oversee employers and collect information—can and

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[149] *See, e.g.*, Farris v. Nat'l Forensic Consultants, Inc., No. 18-3052, 2019 WL 2502267, at *6–7 (E.D. Pa. Apr. 23, 2019) (finding that the confidentiality provision need not be stricken because it only limited disclosure concerning the negotiations leading to the settlement and therefore was "narrowly drawn and thus [did] not frustrate the FLSA's purpose").

[150] *Id.* at *3 (describing the court's "two-part fairness inquiry" into proposed settlements, one part of which "ensure[s] that . . . the settlement is fair and reasonable for the employee(s)").

[151] 29 U.S.C. § 216(c) (2018) (explaining the Department of Labor's authority to initiate enforcement actions).

[152] *Id.*

should fill this potential gap. Given that there is a viable alternative for the DOL to bring suit against employers violating the FLSA, it makes no sense to stop an individual employee who is bringing suit from using a confidentiality provision to achieve the greatest settlement value possible.[153] Thus, courts that allow confidentially provisions in some contexts give plaintiff-employees greater bargaining leverage, while potential DOL enforcement counteracts any concerns created by confidentiality provisions.

V. CONCLUSION

This Note illustrates how confidentiality may not be an evil, which prohibits employees from settling claims of FLSA violations, but rather a tool for employees to settle their claims more effectively out of court for the greatest return possible. If courts are to be involved in overseeing these agreements, they should look to whether the settlement agreement's process and procedure were fair and reasonable under the circumstances, instead of categorically excluding particular provisions from these agreements. If courts were to conduct this assessment, then courts would ensure that employees are not taken advantage of and would also give employees the greatest leverage possible when resolving their claims.

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[153] When the Department of Labor brings an FLSA claim on behalf of a group of employees, the employees received proportional compensation. *Id.* ("Any sums thus recovered by the Secretary of Labor on behalf of an employee . . . shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected.").