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Settling an FLSA Collective Action? Not So Fast!

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Once a settlement has been reached in an FLSA collective action, the defendant-employer typically wants that settlement to go into effect and end the case as soon as possible, so that the company can get past the myriad of distractions brought by the suit. However, as litigants increasingly are finding, the parties' agreement to settle an FLSA collective action is nowhere near the end of the road, or the end of the case. There is a "judicial prohibition" against the unsupervised waiver or settlement of claims brought under the FLSA. Settlements must be "supervised" by the Department of Labor or a court, and gone are the days where the court would rubberstamp the parties' FLSA collective action settlement agreement. Instead, courts nowadays are scrutinizing the settlement to ensure the "fairness" of the agreement.

A recent decision by District Judge Deborah K. Chasanow of the United States District Court for the District of Maryland describes the information that courts are requiring parties to provide in their settlement agreements and accompanying motions for approval of the settlement. In *Lane v. Ko-Me, LLC*, Judge Chasanow rejected the parties' motion for approval of their FLSA settlement, finding the parties' joint motion for approval to be "clearly deficient" in setting forth facts or arguments upon which the court could evaluate the fairness of the agreement. The *Lane* decision is helpful in providing a roadmap as to what parties may want to consider including in their submissions to the court seeking approval of an FLSA collective action settlement:

- **Provide a detailed description of the parties' respective positions as to each issue** so the court may assess whether there is, in fact, a bona fide dispute. The *Lane* parties "simply listed the points of disagreement" they had regarding various issues, such as their dispute over whether the plaintiffs were properly classified as independent contractors and their disagreement regarding the amount of hours worked by the plaintiffs. In the court's view, this was not enough to allow the judge to evaluate the disputed issues resolved by the parties' settlement. For example, if an employee's entitlement to overtime is in dispute, the employer should articulate the reasons for disputing the employee's right to overtime, and the plaintiff should articulate the reasons justifying his/her entitlement to the disputed wages.
- **Give the court sufficient data to allow it to assess the fairness of the settlement amount.** In *Lane*, the judge rebuked the parties for only providing conclusory assertions that the proposed settlement fund of \$90,000 represented the full amount due to the plaintiffs for all hours claimed to have been worked plus all liquidated damages, attorney's fees, and costs. Instead, the judge wanted concrete data from the parties to allow her to assess whether the \$90,000 settlement would fairly compensate the plaintiffs – i.e., the number of hours they claimed to have worked, the rates of pay they were owed, and the liquidated damages to which they claimed to be entitled.
- **Remind the plaintiffs' counsel of their duty to prove to the court that their proposed fee award is reasonable.** Courts are charged with independently assessing the reasonableness of the fee award proposed in an FLSA settlement. While the level of detail required may vary by district or judge, Judge Chasanow wanted the plaintiffs' counsel to provide her with sufficient facts to allow her to evaluate the requested award of attorneys' fees under the lodestar method, including declarations establishing the hours counsel had expended on the matter, broken down for each task, and demonstrating that their hourly rate was reasonable. Judge Chasanow also

noted that it was imperative that the parties inform the court how the \$90,000 proposed settlement award was to be apportioned between the plaintiffs and their counsel.

- ***Present the court with a strong argument that any confidentiality provision in the settlement agreement is reasonable.*** The settlement agreement at issue in the *Lane* case contained a “Covenant of Confidentiality”, which compelled the plaintiffs’ silence as to the terms of the agreement and the negotiations leading to the agreement. Expressing doubt about the inclusion of such a provision, Judge Chasanow explained that confidentiality provisions in an FLSA settlement agreement operate in contravention of the FLSA, and, therefore, any agreement that contains such a provision must be rejected if it is unreasonable. The burden is on the parties to present arguments in support of their position that the proposed confidentiality provision is reasonable, enforceable, and should be approved by the court.

Following the steps outlined above when seeking court approval of an FLSA collective action may take more time and effort on the front-end, but may help smooth the way to getting the court’s approval and getting the case closed on the back-end.