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Not So Fast: Parties Cannot Impose Confidentiality Restrictions On Judicially Approved FLSA Settlements

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Most employers are familiar with the procedure for resolving complaints filed by employees: draft a settlement agreement, sign off and then file a notice or stipulation formally dismissing the case with the court. Typically, the settlement agreement includes familiar terms, such as a release of all claims and some kind of promise to keep quiet about the settlement. But, FLSA cases are a different animal. These cases normally require a judge to sign off on settlement terms. Conceptually, this sounds easy enough; all of the thorny issues are worked out before seeking judicial approval. However, having to get court approval adds an obvious layer of uncertainty (what if the court does not approve the terms?) and presents an extra hurdle for employers (who thought they had already worked out all of the thorny issues) –before they can close the books on the case. The federal court in the Southern District of New York recently issued a decision highlighting the complications surrounding court approval. The case, *Camacho v. Ess-A-Bagel, Inc.,* Case No. 1:14-cv-2592, involved a delicatessen employee who accused his employer of violating the FLSA. The parties settled the case and asked the court for its approval. It was rejected. The court said the agreement was defective in several key areas:

- No estimate of the number of hours the employee worked or his applicable wages;
- No sworn statements, affidavits or declarations supporting the request for approval; and
- The settlement agreement included a confidentiality provision that barred the employee from discussing the terms of the settlement outside of his immediate family, his attorneys, and his financial planners.

So, the parties retooled and resubmitted the agreement. Instead of the confidentiality restriction, the new agreement required both parties to respond, if asked, that the lawsuit had been “amicably resolved.” But, this new language (which also frequently appears in settlement agreements), was *still* too broad for the court. Likening it to a “gag order,” the court again refused to approve the settlement and sent the parties back to the drawing board. In the court’s view, the revised language violated public policy because it impermissibly prevented the employee from characterizing the settlement as a “win” to publicize wrongdoing and the possibility of success. Many employers include confidentiality language (like that rejected in

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Camacho) because it reduces the risks of copycat “me too” claims. Unfortunately, this runs counter to the underlying public policy of the FLSA and the requirement for judicial approval – which necessitates that the settlement agreement be filed with the court and made a part of the public record. We saw signs a few years ago, that the rigid adherence to these principles was fading among federal courts. The most prominent of these was *Martin v. Spring Break '83 Productions, L.L.C.,* 688 F.3d 247 (5th Cir. 2012), which appears to be the only federal circuit court so far that enforced a private settlement agreement reached without prior court approval. One court, the Eastern District of New York in *Picerni v. Bilingual Seit & Preschool Inc.,* 925 F.Supp.2d 368, 371–73 (E.D.N.Y. Feb. 22, 2013), even went so far as to say that based on its analysis of the FLSA’s history, private settlements *did not need court approval at all*. Since then, some other courts have signed on to the premise that prior approval of an FLSA settlement is not necessary where the parties are represented by counsel and negotiated the settlement as part of an adversarial proceeding. *See, e.g., Fernandez v. A–1 Duran Roofing, Inc.,* 2013 WL 684736, at *1 (S.D. Fla. Feb. 25, 2013). This view, however, is far from universal – a point the recent *Camacho* case makes clear. Employers who are working out resolutions of FLSA claims should confer with counsel to ensure that the hard-fought terms of their settlement are tailored to the requirements of their respective jurisdiction. As *Camacho* teaches, that may mean having to discard standard settlement provisions (like confidentiality) to secure the Court’s blessing.