Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act

Elizabeth Wilkins†

The Fair Labor Standards Act ("FLSA") sets minimum wages and maximum hours for the nation's workers. Nevertheless, employers steal billions of dollars each year from low-wage workers. This article argues that a faithful reading of the FLSA requires courts to bar confidential settlements of claims brought under the statute. A rule against confidentiality would make public a significant amount of information about wage theft. That information is a prerequisite to encouraging individual workers to enforce their rights and to generating broader public awareness about the epidemic of wage theft that low-wage workers face.

INTRODUCTION ............................................. 110
I. FLSA RIGHTS AS QUASI-PUBLIC RIGHTS .................. 112
   A. Brooklyn Savings and Progeny: The Unwaivability of FLSA Rights .............................................. 114
   B. Protecting the Public Interest: Analogies .......... 120
      1. Government Agency Enforcement .................. 121
      2. Litigation over Public Hazards .................... 122
   C. Counterarguments: The Interests of the Litigants ...... 124
II. JUDGE-APPROVED CONTRACTS IN THE CONTEXT OF UNEQUAL BARGAINING POWER .................. 129
   A. Courts and Bargaining Power in FLSA Litigation .... 130
   B. Protecting Workers' Rights: A Practical View ....... 135

† Yale Law School, J.D. 2013; Yale University, B.A. 2005. My heartfelt gratitude goes to Michael Wishnie for his encouragement and feedback throughout the writing process as well as to Heather Gerken and Judith Resnik for their support. Thanks also to Amy Carroll and Ady Barkan for their inspiration and to David Colodny, Aaron Halegua, and Silas Shawver for being generous with their time and for sharing their experiences. Finally, thanks to Graham Lake for innumerable enlightening conversations and excellent editing.
1. Background: Individual versus collective workplace rights ........................................................................ 136
2. Barriers to workplace rights enforcement .................................................. 137
3. Protecting workers’ ability to enforce their own rights ................................................................. 141

III. PUTTING A BAN ON CONFIDENTIALITY INTO PRACTICE ............ 144
   A. Court Rules and Presumptions .......................................................... 144
   B. The Role of Other Actors ................................................................. 146

IV. CONCLUSION ......................................................................................... 148

INTRODUCTION

Liliana, a young woman who emigrated from Mexico, worked as a clerk in a furniture store for a month before she quit in frustration. She had not been paid the wage promised her; in fact, she had been paid well below the federal minimum wage. To recover her wages, she sought the help of a local community group. After a demand letter to the employer produced no results, the group referred her to the Worker and Immigrant Rights Advocacy Clinic (“WIRAC”) at Yale Law School. The clinic got the employer’s attention by filing a complaint in federal court, and settlement negotiations ensued. The employer agreed to pay not only the $1,500 in unpaid wages, but also another $2,500—a sum just shy of his potential liability under federal and state minimum wage law. The student team was elated until they saw that the proposed agreement contained a provision requiring Liliana to keep its terms and all facts related to the case confidential. She would not be able to talk with the community group organizers about her success collecting the wages owed to her from the employer; encourage her former co-workers, who may have suffered similar wage theft, to understand and exercise their rights; or publicize her successful efforts to deter other employers from breaking the law. If she agreed to these terms and then did any of these things, Liliana would breach settlement contract, risking her $4,000. The furniture store was buying Liliana’s silence, and should the court approve a joint motion to dismiss the action, it would legitimize this silence.

Unfortunately, Liliana’s experience is all too common. A 2008 study found that employers steal $2.9 billion from their low-wage employees each
year. The Fair Labor Standards Act ("FLSA"), written by Congress to protect vulnerable workers from brutally low wages, sets minimum wage and overtime pay requirements for workers at the bottom of the labor market and, in theory, protects against the epidemic of wage theft that is nevertheless evident from these statistics. This article argues that a faithful reading of the FLSA requires barring confidentiality provisions in settlement agreements of suits brought under the statute. Preventing such provisions would be a small but important first step toward shedding light on the wage theft epidemic and ensuring that workers can better vindicate their rights.

Prohibiting confidential settlement of FLSA claims would affect thousands of low-wage workers. The last decade has seen an explosion of FLSA claims filed in federal court, with an increase of more than 350 percent between 2000 and 2010. Because only 1.2 percent of these claims are heard on the merits before a jury or judge, the dynamics of settlement almost always determine the outcome of a FLSA case. In the wage and hour context, defendants have come to expect confidentiality as a part of a settlement agreement. Confidentiality provisions can cover the settlement amount as well as the circumstances surrounding the claim or even the fact of the litigation itself, significantly reducing the amount of information available about wage theft.

Given the scope of the wage theft epidemic and the importance of settlement to the outcome of FLSA litigation, this article seeks to accomplish two objectives that advance the project of barring confidentiality. First, it

6. Telephone Interview with Silas Shawver, Legal Director, Centro de los Derechos del Migrante (Sept. 26, 2011); Telephone Interview with Amy Carroll, Legal Director, Make the Road New York (Oct. 2, 2011).
aggregates the small but growing set of federal district court cases that have barred confidentiality provisions in FLSA settlements. Liliana’s case illustrates the practical effect of this trend. Aided by this research, the Yale WIRAC students persuaded opposing counsel in Liliana’s case that his client’s confidentiality provision would not stand up in court and, as a result, negotiated that he remove the clause without lowering the monetary offer. This collection will likely be similarly useful to other workers’ rights lawyers seeking to negotiate non-confidential settlements for their clients. Second, beyond simply collecting cases for practitioners, this article fleshes out an underlying logic to make a more comprehensive case for why confidential settlements have no place in FLSA litigation. Simply put, the 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.

To make the case that confidential settlements are repugnant to the FLSA, this article proceeds in three parts. Part I argues that the FLSA created not only private rights of action but also a public right to a well-functioning economy, and that the public is therefore entitled to transparency in the enforcement of that right. In part, Congress’s goal in passing the FLSA was to jumpstart the economy during the Great Depression by increasing workers’ purchasing power and eliminating competition based on extremely low wages. Because of the public’s interest in seeing its right faithfully enforced, litigants’ desires for privacy must be weighed against the public’s entitlement to transparency. A canvass of private litigants’ interests in secrecy reveals that such interests do not outweigh the public’s right to know.7 Part II explores how confidentiality undercuts already vulnerable workers’ ability to vindicate their rights by putting them at risk of retaliation, inhibiting them from encouraging others to exercise their rights, and frustrating advocates’ efforts to deter future violations. If workers are to be successful in their statutorily prescribed role as enforcers of the FLSA, courts must judge FLSA suits in a manner that accounts for the power imbalance between workers and employers. In the final balance, such an accounting precludes the approval of confidential settlements. Part III offers concrete recommendations for court rules that could push the law in the right direction, as well as thoughts for helpful supplemental action by lawyers and bar associations.

I. FLSA RIGHTS AS QUASI-PUBLIC RIGHTS

Everyone has a stake in addressing the problem of workplace violations. When impacted workers and their families struggle in poverty and constant economic insecurity, the strength and resiliency of local communities suffer.

7. See infra text accompanying notes 72-88.
When unscrupulous employers violate the law, responsible employers are forced into unfair competition, setting off a race to the bottom that threatens to bring down standards throughout the labor market. And when significant numbers of workers are underpaid, tax revenues are lost.  

The Fair Labor Standards Act, passed in 1938 to set minimum wages and maximum hours for the country’s workers, was the product of numerous complimentary policy goals. Principal among them were a concern for a national economy mired in the Great Depression and for workers making below-subsistence wages. This Part discusses the first concern, how this broad public purpose has affected court interpretations of the statute, and what those interpretations mean for confidential settlements.

In the midst of the Great Depression, facing the ongoing effects of mass industrialization and its attendant low-wage jobs and child labor practices, President Roosevelt believed that Congress had to create a minimum standard for working conditions in order to preserve a healthy economy. According to this view, Congress could best combat price competition by creating a national floor on wages. Higher wages would mean greater purchasing power, which in turn would mean greater demand for industrial and farm products, which would kick start the country’s economy and lead to lower unemployment. The FLSA was a product of this thinking; it created one minimum wage across geography and industries, eliminating companies’ opportunity to undercut each other by paying extremely low wages. 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 (the inclusion of which was fairly new practice in 1938), that “the existence . . . of labor conditions detrimental to the
maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers . . . constitutes an unfair method of competition in commerce . . . and . . . interferes with the orderly, and fair marketing of goods in commerce.” Congress then went on to set a minimum hourly wage of 25 cents and a maximum workweek of 44 hours, after which an employer had to pay time and a half for each hour of overtime worked. The new law covered more than ten million workers, ensuring that hundreds of thousands received immediate increased wages and more than a million would earn overtime pay.

The unfair-competition justification for the FLSA demonstrates Congress’s intent to improve the economy for everyone’s benefit, not just the individual workers on whom Congress bestowed privately enforceable rights. Individual plaintiffs in FLSA suits thus do not merely vindicate their own rights but also act as private attorneys general enforcing a public norm. This public right to a certain economic climate is a key justification for barring confidentiality in FLSA settlements. The public has a right to understand employer wrongdoing and to know that judges are acting effectively to punish that wrongdoing. The first section of this Part examines cases that have treated FLSA rights as quasi-public and therefore unwaivable by the individual plaintiff. It also describes decisions that make the conceptual leap from unwaivability to rejecting confidentiality in the restricted circumstances where settlements are permissible. The second section evaluates cases from other areas of law concerning confidentiality and draws parallels to the concerns identified in FLSA cases. The final section considers counterarguments to barring confidentiality, including litigant autonomy, and ultimately rejects them in the FLSA context.

A. Brooklyn Savings and Progeny: The Unwaivability of FLSA Rights

Beginning with the Supreme Court in Brooklyn Savings Bank v. O’Neil, federal courts have established that employees may not waive their FLSA rights to minimum wage, overtime, or liquidated damages. Federal courts have done so with reference to the original intent of Congress to give rights to vulnerable workers, citing the quasi-public nature of the rights as well as unequal bargaining power between employer and employee as core reasons for a strong role for courts. The first rationale is considered here; the

second will be taken up in Part II. Recently, courts have confronted the tension between this principle of nonwaivability and the increasing prevalence of confidentiality provisions in settlements. Some courts have found that the public nature of the right, coupled with the public’s right to a transparent judiciary, militate against confidentiality in FLSA settlements.17

What are “quasi-public” rights?18 As the descriptions of the cases below illustrate, the idea is ill defined. In this article, the term is used to connote rights conferred by Congress on individuals in order to effectuate some public policy; that is, rights enforced by statutorily anointed “private attorneys general.”19 This conception of quasi-public rights draws upon Andrew Hessick’s description of the traditional dichotomy between public and private rights in English law.20 Private rights were those held by individuals as against other individuals, while public rights were those held in common by the people to public goods such as safety or navigable waters. In between, Hessick identifies quasi-public rights, for which individuals can sue not “only to vindicate their own, private rights but also . . . to vindicate public interests.”21

By designating private attorneys general, Congress can seek to serve the public interest by conferring a right of private action on individual litigants

17. See infra text accompanying notes 44-47.
18. This is a term used for analytical clarity in this article, not one used by the courts themselves.
20. F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 CORNELL L. REV. 275, 279-86 (2008). Note that while Hessick’s focus is on standing, he aptly describes the interests to be vindicated in the exercise of each category of right.
21. Id. at 294. This concept should not be foreign; it simply seeks to name the type of rights vindicated by private attorneys general, a concept well understood and excavated, particularly in the employment discrimination field. It should be noted, however, that the term “quasi-public right” has been used to describe a related but separate category of rights that this article does not mean to invoke. In describing the Supreme Court’s jurisprudence on private versus public rights (public here meaning those rights created by the government and held as against the government, as with public benefits), Ellen Sward lays out an account of quasi-public rights that are also created by the government in furtherance of a regulatory scheme but the vindication of which may not in themselves bring about a public good. Ellen E. Sward, Legislative Courts, Article III, and the Seventh Amendment, 77 N.C. L. Rev. 1037 (1999). For instance, she uses the rights at issue in Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) as an example. 77 N.C. L. REV. at 1068-69. There, Congress, through the Federal Insecticide, Fungicide and Rodenticide Act, had conferred upon the plaintiff a right to sue to settle a price dispute over data provided to the government. See id. The vindication of the right, which was integral to the statutory scheme created by Congress, did not bring about by itself the public good intended by the statute, in this case public health.
and encouraging vindication of these quasi-public rights.\textsuperscript{22} With the FLSA, Congress sought to create greater purchasing power, less unemployment, and more economic growth.\textsuperscript{23} In other words, Congress created a public right to a well-functioning economy. Congress chose to encourage this more robust economy, or to protect this public right, through a dual-enforcement mechanism. It conferred power on the Department of Labor ("DOL") to investigate and prosecute violations and created a private right of action for individuals personally affected by practices that undermined the public good.\textsuperscript{24} Because the private right of action is imbued with a public character, some courts consider FLSA litigation as different from other litigation between two private parties.\textsuperscript{25}

Seven years after Congress passed the FLSA, the Supreme Court in \textit{Brooklyn Savings} considered whether a building service worker – who had accepted a check for unpaid overtime wages in return for releasing his FLSA claims – was barred from subsequently bringing suit in federal court to recover liquidated damages. The Court reasoned that the payment was not a settlement for a bona fide dispute as to whether building service workers were covered by the law, because that issue had been settled in a previous Supreme Court case.\textsuperscript{26} The Court found that a covered employee could not waive his FLSA right to liquidated damages and was therefore not barred from bringing suit. While Congress had not spoken specifically to the question of whether an employee’s rights were waivable, it had expressed a clear intent to protect vulnerable workers in service of interstate commerce, thus imbuing FLSA rights with a public character. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."\textsuperscript{27} As evidence, the court looked to the enforcement provision of the Act that contemplated a joint effort between the Department of Labor and private parties to deter employer behavior that would endanger the national economy.\textsuperscript{28} The employee-plaintiff assumes some of the responsibilities of a public agency in helping

\textsuperscript{22} See Rubenstein, supra note 19, at 2146-47 (identifying the "supplemental law enforcer" model as one of the core types of private attorneys general, the "clearest and narrowest form" being "the private attorney general who earns her post through a specific delegation by Congress or a state legislature").

\textsuperscript{23} See supra text accompanying notes 9-12.


\textsuperscript{25} In a recent article, Maria Glover lays out a comprehensive view of private rights of action as a part of our overall regulatory scheme. For more on private FLSA actions as a regulatory tool. See J. Maria Glover, \textit{The Structural Role of Private Enforcement Mechanisms in Public Law}, 53 WM. & MARY L. REV. 1137, 1150, 1183-83 (2012).

\textsuperscript{26} D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 110, 121 (1946).


\textsuperscript{28} Id. at 709; see 29 U.S.C. § 216.
to effectuate the legislative policy. In this capacity as agent of the public, the plaintiff had no authority to waive his right to liquidated damages. 29

Subsequent case law has established that an employee may waive her rights pursuant to a bona fide controversy stipulated to in a court judgment. 30 In Lynn's Food Stores; 31 the Eleventh Circuit considered a court's responsibilities in approving such a settlement and announced a rule that has been widely, though not universally, adopted. 32 The case involved an employer who, after failing to reach an agreement with the DOL over FLSA violations, offered its workers one tenth of the settlement amount proposed by DOL to release their claims. After fourteen workers agreed, the employer brought suit for declaratory judgment, seeking judicial approval of the settlement. Relying in part on the enacting Congress's concern for the vulnerable position of employees, the Eleventh Circuit declared the agreement invalid, concluding that courts must engage in a "fair and reasonable" inquiry before approving a release of FLSA rights. 33 While the Lynn's Food court did not elaborate what that inquiry would entail (fair and reasonable to whom? to what end?), it did insert the court into the process of settlement as guardians against abuse of employer power.

The answer to these questions - what is fair, what is reasonable, and what role courts should play in guarding those values in the context of a FLSA settlement - has preoccupied various district courts confronting not only increased pressure to promote settlement across substantive areas of law, 34 but also the growing expectation on the part of employers that FLSA claims be settled confidentially. 35 Brooklyn Savings, along with the legislative history upon which it relies, suggests that the quasi-public nature

29. In considering the weight of the reasoning in Brooklyn Savings and D.A. Schulte, Inc. v. Gangi (discussed in Part II) it bears noting that Justice Black joined the majorities in both cases. See Brooklyn Savings, 324 U.S. 697; Gangi, 328 U.S. 108. Then-Senator Black was the sponsor of the original bill that, after much congressional wrangling, would become the FLSA.


32. While the fairness test imposed by Lynn's Food applies only in the Eleventh Circuit, a number of other circuits have explicitly recognized the judicial approval requirement. See id.; Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1236 n.8 (M.D. Fla. 2010) (listing cases in the Fourth, Seventh, and Federal Circuits as well as a District Court case in the DC Circuit); see also Copeland v. ABB, Inc., 521 F.3d 1010, 1014 (8th Cir. 2008). In addition, 85 District Court cases outside the Eleventh Circuit (including 25 in New York) cite to the Lynn's Food "fair and reasonable" test.

33. The Lynn's Food court also relied on Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) for the proposition that FLSA rights cannot be abridged by contract. Lynn's Food, 679 F.2d at 1352. The court found in favor of the plaintiffs in a decision that has since been thrown into doubt given the Supreme Court's interpretations of the Federal Arbitration Act. Id.


35. See Interview with Silas Shawver supra note 6.
of FLSA rights should play a role in this inquiry. While the vast majority of FLSA cases terminate with some court action before trial, with most courts giving little thought to these issues, some courts have combined the public enforcement component of these lawsuits with the common law right of the public to access court documents to justify denying confidentiality.

The common law right of the public to access judicial documents is well established in American jurisprudence. However, case law fails to define the precise contours of the right. Generally, the public has an interest in understanding how its government performs, including its judiciary. A healthy democracy requires that its citizenry be able to evaluate its government, so transparency in judicial proceedings is key. The judge, as representative of the absent public, carries the responsibility of vindicating the public’s right to access judicial documents. The right is not absolute, however, and the court can balance this presumption of access against other


37. It bears noting that courts face similar questions when considering motions to compel arbitration of FLSA claims where the litigants have signed a contract to arbitrate employment disputes. Arbitration, like confidential settlement, can frustrate public access to judicial decision making on important matters of public concern. See, e.g., Summers, supra note 19, at 704-05 (“The practical effectiveness of the statute is hidden in unpublished and opinionless awards. The public may thus be kept ignorant of what arbitrators are doing in the name of the statute. Whether justice is being done is kept secret. This may be tolerable when only the parties’ contractual issues are implicated, but it is intolerable when the stakes involve both an individual’s civil and statutory rights as well as the public interest”). Courts considering motions to compel arbitration must weigh the legislative intent behind the FLSA against Congress’s mandate in the Federal Arbitration Act (“FAA”) that they respect arbitration clauses, coupled with federal common law articulated by the Supreme Court making clear that the FAA applies to employment contracts. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Many have argued that judicial interpretations of the FAA that broaden the reach of the statute are wrong. See, e.g., Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 HARV. L. REV. 78, 113-34 (2011) (tracing the development of FAA federal common law). And some have argued that even if the FAA’s reach is broad, the unique history of the FLSA described here distinguishes it from other statutory rights and requires access to a judicial forum. See Robert N. Covington, Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?, 15 HOFSTRA LAB. & EMP. L.J. 345, 357 (1998). Regardless of who has the best of this argument about competing legislative intent, courts considering confidential settlements do not face the same conflicting congressional mandate from the FAA and so must be loyal only to the FLSA. Therefore, while some arguments in this article parallel those made about why employment rights broadly or FLSA rights specifically cannot be arbitrated, and though the author is in agreement with the opponents of arbitration of FLSA rights, the two claims do not rise or fall together.


39. See id. at 598-99.

40. See id. at 597-98.

considerations, a practice that has produced a trend toward secrecy in judicial proceedings.

Some courts have found that the quasi-public nature of FLSA rights is a consideration that weighs heavily in favor of access. For example, a federal district court in Alabama found that because of the public right of access, courts should never seal FLSA settlements. In rejecting the parties’ joint motion to approve their settlement under seal, the court in Stalnaker v. Novar Corporation reasoned that the public’s right of access is strongest where the case at issue involves a quasi-public right meant to effectuate some larger public policy. “Absent some compelling reason, the sealing from public scrutiny of FLSA agreements ... would thwart the public’s independent interest in assuring that employees’ wages are fair and thus do not endanger ‘the national health and well-being.’” In other words, the values inherent in the common law right of access – transparency and accountability of the judiciary to the public – are particularly weighty when judges are charged with overseeing the adjudication of rights implicating the public interest. In the absence of a government entity charged with enforcing a matter of public concern, the judge is the representative of the public and must make his or her actions available for judgment by the public.

Although a handful of other district courts have similarly refused to seal FLSA settlements in order to protect the quasi-public right and the presumption of openness, many have missed the nuance of the Stalnaker

42. Nixon, 435 U.S. at 597.


44. Stalnaker, 293 F. Supp. 2d at 1263-64.


46. See also Boone v. City of Suffolk, 79 F. Supp. 2d 603, 609-70 (E.D. Va. 1999), in which the court considered the right of a newspaper to intervene and unseal a confidential FLSA settlement. The court reasoned that the common law right of access to court documents coupled with the Lynn’s Food requirement that courts scrutinize FLSA settlements for fairness weighed conclusively in favor of granting permissive intervention. Id. (citing Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (1982)).

court's reasoning. These courts describe the common law public right of access and the quasi-public nature of the rights enforced as two independent reasons for denying confidentiality. Rather, they are intertwined, mutually reinforcing justifications. The public has a general interest that its judiciary functions properly, and this is especially true when the rights being adjudicated belong at least in part to the public. The combination, as the Stalnaker court recognized, moves the confidentiality analysis from one of court discretion to a mandate.

B. Protecting the Public Interest: Analogies

Opinions such as those cited above evincing skepticism for confidential FLSA settlements remain in the minority. But their reasoning is compelling, not only because of the unique legislative history and precedent of the FLSA, but also because there are strong parallels between the public interests at stake in FLSA cases and other areas of law that involve public rights or interests. In particular, the treatment of government enforcement of public rights and other private rights of action in the consumer protection and malpractice realms—both of which have strongly analogous characteristics to FLSA litigation—support the notion that the traditional common law right of access to judicial action is at its height when quasi-public rights are at stake. Litigants, legislatures, and courts alike have come to a greater consensus in these areas of law that confidentiality is inappropriate. An exploration of these analogous areas of law will show that confidentiality has no place in FLSA litigation.48


48. While this section focuses on court and legislative action in other arenas of the law to support barring confidentiality in FLSA claims, there is also a theoretical literature on statutory employment rights supporting the same point. The literature opposing arbitration of employment claims in particular is replete with arguments against secrecy premised on the public nature of statutory rights. See, e.g., Summers, supra note 19, at 704 ("When statutory rights are at stake, the public needs to know how these statutes are, in practice, being interpreted and applied. This is essential for the public to make any sensible political judgments as to whether, and how, the statute should be amended."); Adriaan Lanni, Protecting Public Rights in Private Arbitration, 107 YALE L. J. 1157, 1161 (1998) ("Legislatures must be able to monitor the enforcement of public law and to amend legislation when judicial decisions go awry."); Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 DENV. U. L. REV. 1017, 1043 (1996) ("Such a requirement [to arbitrate] would make it difficult, if not impossible, for Congress to monitor the effectiveness of its legislative efforts, or to revise legislation to better address pressing social problems. . . . In addition, by removing labor cases to private arbitral tribunals, courts are taking employment concerns out of the public arena, away from public scrutiny and political accountability.").
1. Government Agency Enforcement

First, a comparison between private and public rights enforcement reveals the inconsistency of allowing confidential private settlements in FLSA actions. As *Brooklyn Savings* noted, either the DOL or a private party can bring an action against the employer.\textsuperscript{49} Workers benefit from a DOL enforcement action, but DOL’s primary aim is to act in the public interest. When DOL does so, it is beholden to taxpayers. The agency makes data on all its wage and hour enforcement actions available to the public\textsuperscript{50} as part of the agency’s “commitment to open, transparent enforcement” that “[h]elp[s] to ensure a level playing field for employers who follow the law.”\textsuperscript{51} While the DOL’s initiative is at least in part a response to a recent presidential initiative on open government,\textsuperscript{52} some states have gone farther to mandate by statute that government agencies may not settle enforcement actions confidentially.\textsuperscript{53} And even where the government is not as forthcoming, some courts have applied heightened scrutiny to settlements reached by administrative agencies because of the public interest at stake.\textsuperscript{54}

\textsuperscript{49} *Brooklyn Savings*, 324 U.S. at 709-10; see 29 U.S.C. §216.

\textsuperscript{50} DOL publicizes a data set of all its wage and hour enforcement actions, including employer name, address, number of violations found, and total amount of damages the employer has agreed to pay. U.S. DEP’T OF LABOR, WAGE AND HOUR COMPLIANCE ACTION DATA, http://ogesdw.dol.gov/data_summary.php (last visited Oct. 6, 2012).


\textsuperscript{53} *See* N.C. GEN. STAT. ANN. § 132-1.3(b) (West 2012) (prohibiting courts from sealing settlements where a government agency is a party except where there is an “overriding interest” in privacy); OR. REV. STAT. ANN. § 17.095 (West 2012) (prohibiting public body from entering confidential settlement except in special circumstances); FLA. STAT. ANN. § 69.081(9) (West 2012) (requiring public notice of any settlement of a tortious claim above $5,000 where a government entity is a party).

\textsuperscript{54} The Sedona Guidelines suggest that “[a]bsent exceptional circumstances, settlements with public entities should not be confidential.” *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access In Civil Cases*, 8 SEDONA CONF. J. 141, 177 (2007). Some courts include the fact that one litigant is a government entity as a factor in the balancing test used to determine the strength of the common law right of access. See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 316 n.134 (1999). In addition, in a recent case brought by the Securities and Exchange Commission the district court judge found that involvement of a public agency in the action weighed in favor of scrutinizing the proposed settlement for whether it was in the public interest, a position which led him to order the parties to trial. SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011); see also SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (same judge applying the same test); FTC v. Circa Direct LLC, Civil No. 11-2172 RMB/AMD, 2012 WL 3987610, at *6-7 (D.N.J. Sept. 11, 2012) (applying same test in a case involving the Fair Trade Commission and approving settlement only under court-imposed conditions ensuring publicity).
In government enforcement actions, court-enforced norms of access to settlements are not uniform. Theoretical concerns about government openness also occur in the literature, in particular the worry that openness will lead to less flexibility and actually hamper government enforcement activities. However, where the government regulator does in fact act openly and publicly, the above examples serve to set a standard for private enforcement of quasi-public rights. In a statutory scheme such as the FLSA—where enforcement may be had either by an agency or a private party—the private party takes on some of this heightened duty to the public. The public has an equivalent right to know that its public right is being faithfully enforced regardless of the mechanism. Courts should scrutinize private FLSA settlements to ensure that they are faithful not only to the interests of the parties but also to the public.

2. Litigation over Public Hazards

Court and legislative treatment of private litigation in other arenas that implicate public rights demonstrates a similar skepticism of confidentiality. In cases concerning public hazards, like doctor malpractice or product defects, confidentiality in one suit might harm others affected by the same defendant. Companies routinely try to settle such cases confidentially in order to limit follow-on liability on faulty products like car gas tanks, car tires, and breast implants. Confidential settlements also limit the ability of government regulators to police and correct industry practices. In these types of cases, courts and legislatures have privileged the public’s right to access over litigant desires for confidentiality.

57. See, e.g., supra notes 44-46 and accompanying text.
58. See Goldstein, supra note 43, at 402 (comparing the U.S. practice of using private attorneys general to enforce public laws to Europe’s greater dependence on administrative agencies, with the result that discovery in private litigation becomes the most important information forcing mechanism in enforcing public rights).
60. Id. at 259-60.
61. Id. at 260-61. Another hazard commonly cited as having been exacerbated by secrecy is sex scandals in the Catholic church. See id. at 261-62; Goldstein, supra note 43, at 377; Elizabeth E. Spainhour, Unsealing Settlements: Recent Efforts to Expose Settlement Agreements that Conceal Public Hazards, 82 N.C. L. REV. 2155, 2172 (2004).
When the fact that public hazards have been kept secret is revealed, it is often accompanied by wide public outrage.\textsuperscript{63} For example, reports of sexual abuse covered up by the Catholic Church and revelations of deadly defects in car tires garnered national media attention.\textsuperscript{64} The outrage at such harms suggests not only that the wrongdoing should not have happened, but also that it should have been publicized before the perpetrator – the priest, the company, the doctor, etc. – could hurt more people.\textsuperscript{65} The public expects protection from wrongdoers that courts or regulators reasonably expect to reoffend.

As a result, courts and legislatures have stepped in to private public hazard litigation to prevent confidentiality, privileging public rights over litigant interests in privacy. Regarding malpractice, for example, New Jersey has a law requiring settlements above a certain amount to be made public in an effort to warn other patients and deter future offenders.\textsuperscript{66} As for products liability and other public hazards, the Florida Sunshine Act\textsuperscript{67} has a provision making unenforceable any contract to keep secret any such public hazard. Courts have also stepped in to regulate public hazard litigation. For example, Texas Rule of Civil Procedure 76(a) provides for public notice and opportunity for intervention whenever parties seek to seal a settlement that implicates public health or safety.\textsuperscript{68}

The common thread with all of these interventions is that they occur where more than the individual plaintiff’s rights and interests are at stake.\textsuperscript{69} The above examples do not represent a uniform rule against confidentiality in such situations. However, they do demonstrate a fairness norm supporting disclosure. The public outrage against secret public hazards and the accompanying legislative and court-based provisions aimed at preventing them suggest that where public harm is implicated, confidentiality is inappropriate.

\textsuperscript{63} See Smith, supra note 59, at 257 ("Protective orders and confidentiality clauses have been highly criticized by the media in a wide variety of scandals."). See, e.g., The Public’s Right To Know—Ending Secret Settlements To Protect Public Safety, SEATTLE TIMES, Feb. 5, 1992, available at http://community.seattletimes.nwsource.com/archive/?date=19920205&slug-1474080.

\textsuperscript{64} Goldstein, supra note 43, at 377 (citing "[n]ews reports describing how the Catholic archdioceses had secretly settled dozens of lawsuits in cases involving priests who allegedly molested children and how Firestone and Ford were able to hide the Ford Explorer’s rollover problems by settling scores of lawsuits with strict confidentiality clauses"). See also id. at 377 n.15-16.

\textsuperscript{65} See Smith, supra note 59, at 257.

\textsuperscript{66} See N.J. STAT. ANN. §45:9-22.22(a), 23(a)(10) (West 2012).

\textsuperscript{67} FLA. STAT. ANN. § 69.081 (West 2012).

\textsuperscript{68} Goldstein, supra note 43, at 394-400 (describing the rule as a response to public outrage over concealment of public hazards).

\textsuperscript{69} See Smith, supra note 59, at 257 (intervention is warranted where there is a danger to the public).
The repeat offender employer is similar to the doctor or company who might use confidentiality to cover up wrongdoings and thereby avoid liability to third parties. Like minimum wage law, these are areas in which public entities are charged with regulating the conduct of the defendant, but rely as well on private rights of action to ensure greater compliance and deterrence across the industry. Because the government regulator relies on information forcing by private actions, and because the regulatory scheme is thwarted and other members of the public similarly injured when the company is allowed to cover up wrong-doing, a similar norm against confidentiality should apply.

C. Counterarguments: The Interests of the Litigants

The counterargument to these considerations is that private litigants may have a strong interest in confidentiality. Even in its most robust form, the common law public access doctrine rarely results in an automatic bar to secrecy. Rather, the public's right of access is weighed against the private interests of the litigants in each individual case. A canvass of the reasons most typically put forth by both employers and employees reveals why the public interest should consistently win out.

It is important to note that procedurally decisions to approve or reject FLSA settlements come about when parties file joint motions to dismiss after filing their settlement with the court. Yet in the lion's share of these opinions, the court responds to the defendants' arguments as to why settlements should be approved despite a strong presumption against confidentiality. This anomaly suggests that the provision is generally the employer's idea. The concerns most often put forward by defendants include: "(1) confidentiality is a material condition of the settlement agreement without which settlement will not be feasible, (2) public disclosure of the terms of the settlement may harm Defendant by encouraging other lawsuits, and (3) sealing will minimize the possibility of manipulation of the settlement process."

70. The study cited at the beginning of this article finding nearly $3 billion in wages stolen from low-wage workers per year illustrates the severity of the problem for which there is little to no public awareness. See Bernhardt, Broken Laws, supra note 2 and accompanying text.

71. For a fuller discussion of different balancing tests, see Goldstein, supra note 43.


73. Hens, 2010 WL 4304919, at *3. Other justifications put forward in particular factual situations have included that the defendant had already substantially performed relying upon confidentiality and that
The first point suggests that if the court refuses to approve confidentiality, the parties will likely have to go to trial and expend extra resources. Courts that have weighed this justification against the public right to access have rejected it. These courts reason that the necessity of confidentiality to reaching a meeting of the minds cannot overcome the public right of access in a FLSA case because of the unique public concerns at issue. It is also likely this argument is self-fulfilling. If negotiations happened in a world where confidentiality was not an option, employer expectations and negotiating positions would shift accordingly and different agreements would be possible.

The second justification is even more readily dismissed. An employer’s desire to limit future litigation through confidentiality is actively contrary to the purpose of the statute, as it inhibits other workers from learning about and vindicating their FLSA rights. Employers might argue that follow-on suits are overwhelmingly frivolous and might needlessly overburden courts as well as unfairly prosecute employers. This difference in viewpoint might be solved by an empirical look at the merits of such suits, but it might also simply reflect a different judgment about the error costs of each rule. In the case of the FLSA, the statutory purpose to protect workers along with the notice provision of the statute entitling workers to knowledge of their rights should override any concern about the frivolity or volume of increased litigation.

Only the third justification – that disclosure might lead to manipulation in other, future settlement negotiations – has been considered and accepted by a court weighing the public right of access in FLSA cases. In a unique situation in which 800 individuals filed separate suits against Dollar General following the decertification of a collective action, a district court in the Western District of Virginia reluctantly found that sealing the company’s settlement with one of those individuals was temporarily warranted. The court explained that the terms of the individual settlement, which reflected the presence of lawyers obviates fear of coercion. See Beaumont, 2011 WL 5403071, at *1. This second concern is discussed in Part II.

74. See Martinez, 2011 WL 5508972.
75. See Joo, 763 F. Supp. 2d at 645 (noting that cases that allow settlements to be sealed do so without addressing the common law right).
76. See, e.g., Knutsen, supra note 56, at 964-65 (viewing skeptically the merit of increased litigation that would result from barring confidential settlements).
77. Opponents of arbitration voice similar concerns that employers not be allowed to use secret arbitration proceedings to limit the development of precedent or maintain their public image as a law abiding company. See, e.g., Summers, supra note 19, at 704; Lanni, supra note 48, at 1161.
the unique facts of that case, might bias settlement negotiations in the other individual cases. But the court limited the seal to two years, after which other suits would likely be concluded and the reason for secrecy would evaporate. It is notable that this consideration does nothing to rebut the reasons not to seal an ordinary agreement. In this situation, all other individuals had already decided to sue so confidentiality would not inhibit others’ knowledge of their rights or inhibit enforcement against the defendant. And after the two-year window, Dollar General’s payouts would be publicly available. This one narrow exception, then, does not undermine the idea that public and third party interests should prevail at least eventually. Moreover, not all courts that have considered even this exception have accepted it.

The defendant is, of course, not the only relevant party. FLSA cases do frequently cite plaintiffs’ 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. All of these are legitimate concerns, but do they amount to considerations of greater weight than public access? As to the first concern, the liquidated damages provision of the FLSA is in theory meant to compensate the minimum-wage worker for the extra pain of time without rightful wages. As for litigation fatigue, a similar argument is made by employers — that they wish to avoid further follow on litigation — and rejected by courts. Plaintiffs might be less well-resourced and ongoing litigation might therefore be more daunting, but the justification still would not overcome the public’s right to access court documents. And again, if confidentiality as a rule were taken off the bargaining table, many employers would likely still settle on different terms. In terms of privacy, receipt of a significant windfall for a low-wage worker can be a real concern. But

79. Murphy, 2010 WL 4261310 at *1.
80. Id.
81. See Baker v. Dolgencorp, Inc., 818 F. Supp. 2d 940, 944 (E.D. Va. 2011) (“Simply keeping these eleven (11) settlement agreements confidential from other plaintiffs would not prevent a similar individualized settlement process from occurring. The Joint Motion to Seal fails to address exactly how sealing the present settlements would facilitate other negotiations. The instant settlements were negotiated according to the unique facts of each plaintiff’s case and disclosure of these individual settlements should not impede settlement agreements that are similarly based on other plaintiffs’ specific circumstances.”) (emphasis in original); see also Webb v. CVS Caremark Corp., No. 5:11-CV-106 (CAR), 2011 WL 6743284, at *2 (M.D. Ga. Dec. 23, 2011) (rejecting defendants’ argument that a public settlement would distort negotiations in twenty other lawsuits brought by employees with the same job title).
83. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945) (indicating that liquidated damages are also compensation in lieu of prejudgment interest, which may be too cumbersome to prove).
whether the judicial system, a public resource serving a public function, should consider protection from relatives as a legitimate goal is another question. As Chief Judge of the District of South Carolina, Joseph Anderson, points out, we do not protect analogous individuals who win the lottery, in part because transparency is critical to public confidence in the system. So why should we do so when the institution implicated is so much more important to the public and to the enforcement of its rights?

All of these justifications related to workers’ interests seem somewhat unsatisfying. It continues to seem harsh to saddle the employee who decides to exercise her statutory right to minimum wages and overtime with the extra responsibility of sacrificing her individual desire for privacy. The issue will be revisited in Part II as a part of the discussion of the importance of third party worker centers and collective action by workers.

The truth, however, is that many plaintiffs are indifferent about confidentiality. Knowing that the term is important to employers means that plaintiffs might extract benefits from the employer in exchange for silence. Under the theory that the FLSA private right of action is an enforcement mechanism for a policy enacted in the public interest, we should be wary that the employers meant to be regulated are “buying” silence about their wrongdoing and, correspondingly, that the individuals given statutory rights meant to effectuate a public good are “selling” the public’s right to know in exchange for a private benefit. We might think that the plaintiff deserves extra compensation for being the individual to stand up and challenge the employer in court. We may even believe that vulnerable parties like low-wage workers ought to be given every bargaining advantage possible. But that extra bounty or bargaining chip should not come at the expense of the public’s right to know. The site of the bargaining – under the auspices of the


85. See Christina Feege, James Boudreau & Allan King, The Stealth Class Action: Demand Letters Often Serve as Opening Salvo for Discrimination or Wage and Hour Claims, N.Y. L.J., Dec. 20, 2004, at 24 (“experienced plaintiffs’ counsel know that confidentiality and closure is the product they are selling”); Bauer, supra note 82, at 499 (describing how some plaintiffs’ attorneys use desire for confidentiality as leverage to extract more recovery for clients).


87. See Knutsen, supra note 56, at 972 (arguing that removing confidentiality as a bargaining chip for vulnerable plaintiffs may increase rather than decrease the danger of their being taken advantage of by more powerful, better resourced defendants).
court, rather than at a private negotiating table – makes a crucial difference here. While private parties might strike a deal however they choose, judges have a responsibility not just to the litigants before them but also to the public, particularly where public rights are at stake.88

For another important counterargument, one need look no further than other areas of employment law. Settlements of Title VII claims, for instance, face no analogous presumption against confidentiality, let alone a prohibition. While Title VII does not enjoy the same legislative history or case law, surely there is a public interest in ridding private enterprise of employment discrimination.89 And yet this article does not suggest that these rights, or many other similar ones, be treated this way. Would the acceptance of this argument necessarily lead to a much broader rejection of confidential settlements and potentially undermine settlement as a tool to conserve judicial resources? Possibly, and there might be some who would see this as a good thing.90 However, the unique nature of the FLSA case law regarding non-waivability of FLSA rights and the requirement that a court or the DOL supervise settlements makes the case for public FLSA settlements one significant step stronger than for other employment rights. In addition, the quasi-public nature of the right is not the only factor in favor of rejecting confidentiality in this context. The public interest in an economy where employers did not compete by slashing wages was only one of Congress’s purposes in passing the FLSA. As the next Part explores, Congress – and the contemporaneous Supreme Court interpreting the FLSA – also recognized the uniquely unequal bargaining power between low-wage employee and employer. This recurring inequality in minimum wage cases further justifies preventing confidentiality, and the combination of the two arguments makes banning confidentiality specifically for FLSA claims imperative.

88. See generally Resnik, Procedure, supra note 34 (arguing that because court-based contracts have third party effects, procedural rules of settlement should be adhered to in order to ensure fairness).


II. JUDGE-APPROVED CONTRACTS IN THE CONTEXT OF UNEQUAL BARGAINING POWER

The FLSA, passed almost seventy years ago, and contoured to an economy that has undergone profound transformation, is still the signature statute on which the hopes of millions rest.91

In addition to responding to the Great Depression, the Fair Labor Standards Act was the culmination of a decades-long movement to alleviate inhumane working conditions at the bottom of the labor market.92 Those same conditions, and the powerlessness they implied, meant that the men, women, and children working for poverty wages could not raise their working conditions on their own. The congressional record from the many floor debates on the FLSA shows a sensitivity to the vulnerable position low-wage workers found themselves in vis-à-vis their employers.93 Unable to organize themselves and unprotected by labor unions, these extremely low-wage workers would need the intervention of government in order to better their working conditions.

Despite formal equality before the law, the degree to which some courts interpreting the FLSA recognize the real world inequality of position between employer and employee is remarkable. Courts have long recognized that the concern Congress showed for this imbalance compelled its consideration in judicial opinions. This unique history of the FLSA provides an important opportunity to consider seriously the nature of low-wage workers'94

92. For an account of the history of the living wage movement leading up to the passage of the FLSA, see generally Seth D. Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 HOFSTRA LAB. & EMP. L.J. 19, 39-69 (2000).
93. 81 CONG. REC. S7652 (daily ed. July 27, 1937) (statement of Sen. Walsh) (drawing attention to workers “who are subject to the tyranny and oppression of sweatshops and chiselers”); 81 CONG. REC. S7672 (daily ed. July 27, 1937) (statement of Sen. Walsh) (fundamental aim of the bill is to help “the poorest-wage workers, who are not organized, who have no means of asserting their rights to a living wage . . . and to have the Federal arm of protection extended to them. . . . It is the first time any attempt has been made to give the unorganized, unprotected, forgotten men and women receiving low wages and working long hours an opportunity to have some agency other than a labor union to see that they get a living wage”); 81 CONG. REC. S7885-86 (daily ed. July 30, 1937) (statement of Sen. Walsh) (“The bill is on the theory that such workers cannot organize, cannot enjoy collective bargaining, cannot enjoy the large units of employees who can organize and bring the pressure of a great labor organization to bear against the employer to obtain decent wages and reasonable hours of employment”); 82 CONG. REC. H1395 (daily ed. Dec. 13, 1937) (statement of Rep. Randolph) (“[The bill] is concerned with those millions in industry who are unprotected and unorganized”); 81 CONG. REP. H1491 (daily ed. Dec. 13, 1937) (statement of Rep. Voorhis) (“the bill is intended to give a certain degree of protection to a group of people who cannot speak for themselves, who are unorganized and politically and economically powerless”); 83 CONG. REP. H9260 (daily ed. June 14, 1938) (statement of Rep. Schneider) (“the helpless, unorganized, and submerged one-third of the population are being exploited mercilessly and ruthlessly . . . [this measure] will go a long way to end the exploitation of the poorest paid, the hardest worked, and the most defenseless toilers.”).
vulnerability and build into the doctrine the publicity necessary to effectively empower them.

Like Part I, this Part begins with a section describing Supreme Court cases from the era in which FLSA was passed to understand how the notion of unequal bargaining power justified barring workers’ waivers of their statutory rights. The section goes on to examine the minority of district court opinions that rely on similar justifications to bar confidentiality, noting concerns about coercion in the bargaining process and retaliation afterwards. The second section examines some of the conditions faced by low-wage workers in the modern economy that continue to prevent them from effectively enforcing their rights. It goes on to consider advocacy organizations effecting change at the bottom of the labor market, the effect of confidentiality on their work, and the way in which the collective nature of workplace rights justifies placing publicity ahead of privacy concerns of individual litigants.94

A. Courts and Bargaining Power in FLSA Litigation

The history of court recognition of the power imbalance between FLSA litigants begins again with the Supreme Court’s decision in Brooklyn Savings Bank v. O’Neil. In addition to identifying a public purpose that imbibed FLSA rights with a quasi-public nature, the Court recognized that those rights could not be vindicated without robust intervention from courts. The legislative history of the Act, wrote the Court, demonstrated “that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.”95 Low-wage workers did not have the power by themselves to negotiate minimum wage contracts in the first place, hence the legislation. When suing for relief, then, how could those same workers negotiate fair deals at the settlement table? The Brooklyn Savings Court recognized that “[t]o permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect” of the FLSA and would “approximate[] situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.”96 Given this possibility of abuse by employers, the mere passage of

94. The arguments in this section should not be read to negate, by implication, the unequal bargaining power between employers and employees in other areas of employment law. The Fair Labor Standards Act is unique in that its minimum wage provisions are focused on low-income workers and its legislative history so demonstrates, but other employment rights are also exercised by such workers with similar challenges.


96. Id. at 709-10.
the law and creation of the private right of action would not be sufficient to ensure compliance. The courts would have to bar employers and employees from entering into settlement contracts that thwarted the law.

A year later, the Court in *D.A. Schulte, Inc. v. Gangi* built on the ruling in *Brooklyn Savings* to find that waivers of the right to liquidated damages under the FLSA were impermissible even in the presence of a bona fide dispute over coverage. The employees in *D.A. Schulte*, like those in *Brooklyn Savings*, were building service workers who belatedly were paid full overtime in exchange for the release of their claim to liquidated damages, this time *before* the Supreme Court had made clear that such workers were covered by the FLSA. The employer argued that because the workers were not clearly employees within the meaning of the FLSA at the time they signed the release, the compromise was fair and ought to be honored. In rejecting this argument, the Court reiterated concerns about unequal bargaining power between the parties that, if allowed to determine recovery, would frustrate the congressional purpose behind the FLSA. The Court brushed aside arguments raised by the dissent below that “employees, competently advised as to their rights” ought to be afforded “the option of bring [sic] suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal.” Taking the option to compromise off the table, argued the dissent below, forced employees into “an all or nothing gamble.”

Writing for the Supreme Court majority, Justice Reed responded that this reasoning led to the improbable conclusion that Congress meant to leave vulnerable workers at the settlement bargaining table rather than using the force of law to ensure the minimums that it had set. Understanding that knowledge of their rights was insufficient to overcome workers’ power deficit, the Court mandated judicial intervention. In addition, according to the Court, what was at stake in the bargain was not simply that one worker’s right to his or her pay, but the enforcement of a legislative policy that affected all workers.

After the 1940s more courts have considered the public right of access described in Part I than the inequality of bargaining power in their attempt to understand how the policy considerations behind the FLSA impact the

---

98. *Id.* at 111.
99. *Id.*
100. *Id.* at 115-16.
101. *Gangi v. D.A. Schulte, Inc.*, 150 F.2d 694, 697 (2d Cir. 1945) (internal citation omitted).
102. *Id.* at 697-98.
104. *Id.*
105. *Id.*
decision to approve confidential settlements.\textsuperscript{106} The few courts that have addressed bargaining power, however, have barred confidentiality as contrary to the statutory aim of protecting vulnerable workers.\textsuperscript{107}

For example, the same court that decided \textit{Stalnaker} eight years later decided \textit{Hogan v. Allstate Beverage Co., Inc.},\textsuperscript{108} an overtime case in which the defendants claimed the suit must be thrown out because plaintiff’s counsel had already (without his consent, the plaintiff argued) entered into a confidential agreement to release all FLSA claims in exchange for a negotiated sum. The court noted that in addition to undermining the statute, confidential settlements can “prove costly to the employee himself, for they prevent the employee from alerting other workers to potential FLSA violations on pain of personal liability. . . . [the plaintiff] could become liable for breach of contract for cooperating in the planned class action against the company. Moreover . . . Allstate Beverage could sue him to recover damages claimed by the other workers.”\textsuperscript{109}

The \textit{Hogan} decision is notable for two reasons: it focuses on concrete third-party interests, and it describes how employers can use confidentiality to augment their power over workers. First, in addition to identifying a broad general public interest in the enforcement of FLSA, the court makes third-party interests in the litigation concrete by describing the relationship between the litigation before it and the specific rights of other similarly situated employees in the plaintiff’s workplace.\textsuperscript{110} 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.\textsuperscript{111} 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. Second and more squarely to the point of unequal bargaining power, the court recognizes how an employer might use the confidentiality provision to threaten the employee with breach of contract and financial loss in the future.\textsuperscript{112} The court’s concern here is not idle; employers have been known to sue employees for breach of contract pursuant to real or fabricated

\textsuperscript{106} While a number of district courts have considered the public’s right of access, see for example the cases cited in \textit{supra} note 47, at time of writing the author found only the few cases discussed below that focused primarily on unequal bargaining power.

\textsuperscript{107} See \textit{infra} notes 108-123 and accompanying text.

\textsuperscript{108} 821 F. Supp. 2d 1274, 1279 (M.D. Ala. 2011).

\textsuperscript{109} \textit{Id.} at 1283.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} See, e.g., Bauer, \textit{supra} note 82, at 485 (describing the generic client’s desire to help her co-workers).

\textsuperscript{112} \textit{Hogan}, 821 F. Supp. 2d at 1283-84.
violations of confidentiality provisions. Given the anti-retaliation provision of the FLSA, a settlement that hands the employer this kind of a tool undermines the law.

A recent district court opinion in the Eleventh Circuit both elucidates the concerns described in Hogan and breathes life into the judicial role for protecting workers by giving teeth to the fair and reasonableness test for FLSA settlements proposed in Lynn’s Food. In Dees v. Hydradry, Inc., employer and employee announced that they had reached a settlement agreement and filed a joint stipulation for dismissal with prejudice. In rejecting the motion, Judge Merryday proposed a two-pronged inquiry into the fairness of a settlement. In doing so, he began with a recitation of the fairness inquiry for Rule 23 class actions, a test that is geared toward safeguarding the interests of absent class members. That the judge starts with this test gives credence to the idea that the interests of workers not present in the litigation should be considered in its settlement. He then went on to describe the two prongs of his proposed test.

First, a court should examine whether the agreement is fair to the employee. The one-sided nature of this first prong itself suggests an inequality between the parties. Prominent among the factors considered under this first prong is a categorical rejection of all confidentiality provisions, in part because of the danger of retaliation described above.

“A confidentiality agreement, if enforced, (1) empowers an employer to retaliate against an employee for exercising FLSA rights, (2) effects a judicial confiscation of the employee’s right to be free from retaliation for asserting FLSA rights, and (3) transfers to the wronged employee a duty to pay his fellow employees for the FLSA wages unlawfully withheld by the employer.”

113. Interview with David Colodny, Supervising Attorney, Urban Justice Center, in New York, N.Y. (Oct. 28, 2011). For example, in the highly publicized case against Ollie’s Noodle Shop in New York the employer, laboring under payments for settlements with both the Department of Labor with workers, filed for bankruptcy. See Complaint, 2875 Restaurant, Inc. v. Gui Ming Li, No. 10-001310 (N.Y. Sup. Ct. filed Jan. 20, 2010); Brief for Defendants at 12-15, 2875 Rest., Inc. v. Gui Ming Li, No. 10-001310 (N.Y. Sup. Ct. filed Feb. 1, 2010) (on file with the author); Sewell Chan & Margaret W. Ho, Asian Restaurant Workers to Get Back Pay, N.Y. TIMES, March 19, 2009, at A29. The employer then sued the workers in court for, inter alia, breach of contract for talking to Chinese press and “bragging” about their win to other employees. The employer hoped to use these allegations to relieve himself of his financial obligations under the private settlement agreement. See id.


115. 706 F. Supp. 2d 1227 (M.D. Fla. 2010).

116. Id. at 1241.

117. Id.

118. Id.

119. Id. at 1242; see also Brumley v. Camin Cargo Control, Inc., Civ. A. Nos. 08-1798 (JLL), 10-2461 (JLL), 09-6128 (JLL), 2012 WL 1019337, at *7 (D.N.J. Mar. 26, 2012); Glass v. Krishna Krupa,
Additionally, Judge Merryday recognized the same concern for the rights of similarly situated employees to learn about their FLSA rights. Confidentiality contravenes the notice provision of the FLSA, illegally undermining not only the employee's right to be free of retaliation but also other employee's right to know what they ought to be paid.

Second, even if the agreement is fair to the employee a court must determine whether it undermines the purposes of the FLSA. Considerations militating against judicial approval of a compromise include "the presence of other employees situated similarly to the claimant" and "a likelihood that the claimant's circumstance will recur." Again, these considerations go to the heart of the way in which an employer might exploit his negotiating position in one lawsuit to thwart effective future enforcement. According to the Dees court, the FLSA charges courts to prevent this eventuality.

This handful of cases recognizing the imbalance of power between employer and employee articulates a key set of dynamics at play in negotiations to settle FLSA litigation. First, the vulnerable position of low-wage litigants does not align well with the congressional purpose behind full enforcement of the law. Second, advice of a lawyer and knowledge of one's rights does not overcome that vulnerability. Third, confidentiality hands employers an important retaliatory tool in the form of subsequent breach of contract suits. And fourth, the vulnerability of one plaintiff cannot be separated from the tenuous ability of other, similarly situated employees to vindicate their rights. All of these considerations require a court to take a firm role in protecting the rights of the employee, even in the face of apparent agreement of the parties in the form of a settlement. The conversation between the Supreme Court and the court below in Gangi in particular counsels skepticism toward honoring out-of-court FLSA agreements out of respect for employee autonomy. Rather, Gangi privileges enforcement of the substantive rights in the FLSA over a hollow notion of employee choice. The
analysis in these opinions exemplifies a crucial component of how courts should consider the dynamics at play in FLSA litigation: In order for FLSA rights to be effectively enforced, they cannot be understood in the abstract. To remain true to the original intent of Congress to limit the influence of superior employer power, courts must understand FLSA rights enforcement in the strategic and economic context in which employees seek to bring litigation.  

B. Protecting Workers' Rights: A Practical View

Exploring the actual dynamics between low-wage workers and employers in wage and hour suits in today's economy will build the foundation for a more robust case against confidentiality. Those dynamics buttress judicial decisions to deny confidentiality, even in the face of litigant agreement to the contrary. Key to this analysis are the particular barriers faced by low-wage workers in vindicating their rights due to the changing demographics of low-wage workers, the nature of the industries in which they work, and the lack of collective bargaining power in those industries. Such workers are vulnerable in precisely the ways the enacting Congress imagined; they are less likely to be unionized and more likely to face illegal workplace conditions. The experience of lawyers, organizers, and regulatory actors charged with protecting the rights of these workers suggests that advocacy organizations and collective action are crucial to enabling low-wage workers to vindicate their workplace rights. Judges should interpret the law's requirements in light of what conditions are most conducive to workers' exercise of their private right of action. Baring confidentiality would increase flow of information and encourage collective action between workers as well as facilitate the work of third parties such as worker centers to effectively enforce FLSA rights.

124. Critical Legal Studies has made important contributions to the study of judicial intervention in court-sanctioned bargaining. Though applied in a different context, Duncan Kennedy’s foundational conception of paternalism is useful here. See generally Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982). Kennedy argues that intervention for the sake of one party’s best interest, even when that party may not agree, can be coherent and justified. Id. Note that this argument does not rest on a stronger party coercing a weaker one into an unfavorable deal; contracts may be impermissible even if both parties want them because the decision-maker knows that the weaker party is wrong about his or her own interests.

125. See supra note 93.

1. Background: Individual versus collective workplace rights

Before discussing these dynamics, it should be noted that there exists a long-running disagreement in employment and labor law concerning whether individual or collective rights present the best hope for protecting workers in interactions with employers. The National Labor Relations Act, another New Deal invention, was meant to protect the collective bargaining rights of workers. Rather than spelling out substantive rights to specific workplace conditions such as minimum wage, the NLR Act protects procedural rights that allow workers to combine and bargain with their employer. NLRA supporters thought such procedural rights could level the playing field between employer and employee, creating a mechanism for workers to amass sufficient power to develop and enforce their own workplace standards. By contrast, the individual rights revolution of the 1960s and 70s saw a proliferation of laws creating private rights of action to enforce civil rights in the workplace. Proponents of these laws thought that individual rights would put power back in the hands of individual workers rather than collective intermediaries and ensure better enforcement of workplace rights.

Much ink has been spilled debating the merits of each approach. While this article describes collective action on the part of workers as an important part of workplace rights enforcement, it does not presuppose a normative commitment to collective rights as a superior means of raising workplace standards. Rather, this article suggests that courts should be cognizant of power imbalances between workers and employers and the pragmatic solutions to those imbalances in deciding how best to give effect to private rights of action under the FLSA. This is a crucial distinction; the arguments in this Part, as with the arguments in Part I, are intended to show what a faithful understanding of FLSA entails rather than to advance a particular vision of how worker rights should be understood more broadly.

The cases detailed above in Section A take a step away from a pure individual rights perspective in two ways. First, by delineating a more active role for the court in policing agreements, these cases evince a healthy skepticism for individual plaintiffs' ability to vindicate their rights on their
own. Second, these cases explicitly consider the notice rights of other employees in evaluating the validity of the settlement reached by the litigants before the court. This consideration implicitly recognizes that similarly situated workers’ rights are inextricably linked. The next important step requires bringing that implicit recognition to the forefront so as to explore the best way to give effect to the congressional intent to protect minimum wage and overtime rights for vulnerable workers. Proper consideration of FLSA litigation for low-wage workers requires occupying a middle space in which the rights protected are individual ones, but where courts recognize and safeguard the role that individual litigation plays in the opportunities for the broader group to succeed in protecting their rights. This harkens back to Part I’s understanding of quasi-public rights and analogies to consumer litigation. The key difference is that employees for one employer or in one industry are more tightly bound together by their shared circumstances, the importance of their shared information, and their opportunities for collective action.

2. Barriers to workplace rights enforcement

The modern economy creates a low-wage workforce with a number of characteristics that make workers susceptible to employer manipulation in settlement negotiations. There are some obvious factors faced by all workers but exacerbated by lower wages, such as the need for workers to keep their jobs and to receive back wages sooner rather than later. Other factors pertain to a greater degree or exclusively to workers earning very low wages. First, shifting demographics create new challenges for workers seeking to vindicate their rights. New immigrants, some undocumented, fill low-wage service jobs, and their unfamiliarity with the language and legal system, as well as fear of deportation, create acute vulnerabilities.131 Second, the decentralization of many of the industries that create low-wage work makes enforcement of employment laws difficult, leaves many workers isolated from other workers, and decreases access to information about their rights.132 Finally, the decades-long decline in union membership in the American economy has not only swept up low-wage industries; it has been in part fueled by the rise of the low-wage service sector.133 Congress’s concern that whole sectors of the economy would be left untouched by rising standards won through union organizing134 is a concrete reality.

131. See infra text accompanying notes 135-150.
132. See infra text accompanying notes 154-155.
133. See infra text accompanying notes 154-158.
134. See, e.g., supra text accompanying note 93.
The biggest wave of immigration in the country’s history in terms of absolute numbers is currently helping to meet the demand for a growing number of low-paid service jobs in the American economy. Foreign-born workers make up over 20% of the workers earning poverty wages. A quarter of new immigrants are undocumented, and they face unique challenges in asserting their rights. Some believe that without immigration status they have no right to minimum wage or overtime. Those who do know their rights fear retaliation, as all workers do, but their immigration status makes them particularly susceptible to intimidation. Some employers threaten to call immigration enforcement as a response to demands for better pay or working conditions. While many never follow through, advocates frequently tell tales of employer “self-audits” in which employers drag out hiring paperwork filed years earlier to run checks on social security numbers and other documentation. As a consequence, studies show greater reluctance to file complaints, worse working conditions, and wage penalties for undocumented workers. Even the federal government has

135. FINE, supra note 91, at 28.
140. Williams, supra note 126, at 5-6. The Immigration Reform and Control Act of 1986 ("IRCA") created sanctions for employers who hire undocumented workers. PL 99-603, 100 Stat 3359 (November 6, 1986). The I-9 form implements those requirements by soliciting identification information at the hiring stage. See Williams, supra, at 6. While IRCA did not create sanctions for employed undocumented immigrants, employers can use previously filed fraudulent hire paperwork as a retaliatory tool in the manner described above.
recognized that fear of retaliation through resort to the immigration authorities can hamper efforts to enforce workplace rights.\textsuperscript{144}

Moreover, any lawyer advising an undocumented worker about the possibility of legal action would have to explain that the worker has fewer remedies. Under \textit{Hoffman Plastics, Inc. v. N.L.R.B.},\textsuperscript{145} undocumented immigrants cannot receive back pay for violations of the National Labor Relations Act. The decision suggests that reinstatement, an important remedy for retaliatory firing, is also not available.\textsuperscript{146} While courts have come to varying conclusions about the implications of \textit{Hoffman Plastics} for other employment rights,\textsuperscript{147} it is clear that undocumented workers enjoy diminished remedies for retaliation, yet another reason they may hesitate to exercise their rights.

If undocumented workers do get to the litigation stage, they face further employer intimidation tactics. While numerous courts have found that immigration status is irrelevant to FLSA litigation,\textsuperscript{148} employers nevertheless seek to discover it either directly or through subtler means, such as inquiring into tax records.\textsuperscript{149} Some courts, seeing these discovery requests as means to intimidate workers who want to enforce their rights, have granted protective orders to plaintiffs concerned about coercive discovery requests.\textsuperscript{150} These are additional important ways in which courts see FLSA litigation through the lens of a real world imbalance of power between litigants and seek to deprive employers of otherwise legal tactics used to thwart enforcement.

\begin{itemize}
\item \textsuperscript{145} 535 U.S. 137, 151 (2002).
\item \textsuperscript{146} The decision explains that awards of back pay contravene the purposes of the Immigration Reform and Control Act, which prohibits companies from hiring undocumented immigrants. The National Labor Relations Board cannot award back pay for work that would have been illegal if it had been performed. \textit{Id.} at 148-52. By this same reasoning, a reinstatement order would require what IRCA prohibits: the hiring of an undocumented immigrant.
\item \textsuperscript{147} For implications in FLSA and Title VII suits, see Williams, \textit{supra} note 126, at 3-4.
\item \textsuperscript{148} \textit{HAEYOUNG YOON, NAT'L EMP'T LAW CTR., ISSUES AND REMEDIES IN REPRESENTING IMMIGRANT WORKERS UNDER THE FAIR LABOR STANDARDS ACT} 5-6 (2011) (collecting cases holding that immigration status is irrelevant to FLSA claims or would unduly chill plaintiffs) (on file with the author).
\item \textsuperscript{149} \textit{Id.} at 12-15.
\item \textsuperscript{150} \textit{See generally id.; cf.} Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (limiting discovery into plaintiff's immigration status under the Alien Torts Act).
\end{itemize}
Unfortunately, this handful of cases is not enough to deter some employers, who persist in exploiting workers' vulnerabilities. Even if undocumented immigrants know that employers are breaking the law, their reluctance to come forward about labor infractions remains.

Industrial decentralization is another important aspect of the low-wage labor market. Many of the industries in which low-wage service workers find themselves—restaurants, landscaping, domestic work, and the like—tend to have diffuse ownership characterized by many small businesses rather than a few large ones. When profit margins are thin and competition is fierce, wages become an important source of business savings. This competition creates a strong incentive to keep wages extremely, sometimes illegally low. It was precisely this competition based on a race to the bottom for wages that Congress intended the FLSA to prevent. In addition, many of these jobs are "unskilled;" that is, they require relatively little training and therefore little investment in human capital. An oversupply of unskilled labor allows employers to fire workers rather than meet a demand for unpaid wages. Workers know they are interchangeable and are therefore more reluctant to engage in conduct that might jeopardize their job.

At the extreme end of decentralization, some workers are the only ones in their workplace. Domestic workers, for example, may be the only worker in a household that is both their workplace and their lodging. With little outside interaction, domestic workers are particularly susceptible both to lack of knowledge about their rights and to intimidation. Day laborers are another particularly decentralized group. Men and women wait on corners to be hired for the day on landscaping or construction jobs. The composition of those waiting on the corner changes daily, and the group of workers hired by any given employer provides no continuity. These and other employment conditions that particularly characterize the bottom of the labor market create conditions ripe for exploitation.

Finally, as the Congress that enacted the FLSA feared, these workers are likely unprotected by a union contract. Overall union density has declined rapidly since the 1970s, from over 26% in 1973 to about 13% in 2011. The typical low-wage worker finds him or herself in sectors traditionally less organized, even at the peak of the labor movement, and workers making

\[151.\text{ Fine, supra note 91, at 31, 102.}\]  
\[152.\text{ See Harris, supra note 9.}\]  
\[153.\text{ See supra note 93.}\]  
\[155.\text{ Fine, supra note 126, at 430.}\]
poverty wages today continue to be less likely to have a union contract. Legal barriers explain some of this phenomenon. As a compromise between progressives who advocated passage of the NLRA and southerners concerned about maintaining their low-cost African American workforce, the final bill left out whole categories of workers. The lack of consolidated ownership and isolated workplaces that characterize some low-wage industries also contribute to this low rate of unionization by depriving organized labor of shop floors with large groups of workers and a single boss with whom to bargain.

All of these circumstances – language barriers, lack of knowledge about legal rights and duties, intimidation based on immigration status, isolation in the workplace, and lack of union representation – tend to exacerbate the unequal bargaining power that Congress recognized when passing the FLSA. This is how the lack of knowledge and fear of retaliation referenced in Hogan, Dees, and other opinions discussed above manifest themselves. Understanding these circumstances and the solutions now emerging should inform the judicial interpretation of the law.

3. Protecting workers' ability to enforce their own rights

Being alone, intimidated, and unaware of one's rights makes enforcement of the FLSA at the bottom of the labor market extremely difficult. However, advocates and regulators alike have found that workers supported by third party intermediaries are more likely to come forward to report abuses. One self-evident reason for this aligns well with the reasoning of courts trending toward denying confidential settlements: Third party advocacy organizations can disseminate information better than employer postings alone. However, advocacy organizations can do more than disseminate information. They demonstrate to workers that they can successfully press their claims, and then help those workers actually effectuate change. Both the empowerment and organizing functions that third party organizations play are as or more important than their role as purveyors of information, and the hurdles they face in those capacities strengthen the justification for barring confidentiality.

156. See Econ. Policy Inst., supra note 136.
Required postings giving workers notice of their rights, if actually posted, are no substitute for know-your-rights trainings by third parties. Nonprofits dedicated to workers' rights can explain legal provisions, assuage fears, and assess complaints. These intermediaries are much more effective at carrying out the spirit of the FLSA notice requirement, an issue that the Hogan and Dees courts both worried about in their opinions. Unlike other employees, low-wage workers do not have access to consultation with private attorneys. Pragmatically speaking, third party advocacy organizations make the FLSA's notice promise real by educating workers about the pay they are owed and the mechanisms available for them to recover their wages.

However, given the myriad challenges low-wage workers face in order to vindicate their rights, knowledge is not enough to enable most workers to take advantage of their FLSA rights. The Gangi court recognized that information was not enough when it rejected the idea that workers, informed by an attorney, ought to be free to bargain away their liquidated damages. As Dees, Hogan, and the other recent cases note, and as the FLSA's anti-retaliation provision implicitly recognizes, workers need to know that they can exercise their rights effectively without adverse employment or other consequences. One step beyond knowledge is active encouragement through proof that remedies can be effective. Third party organizations with a record of success in litigating claims can demonstrate that even seemingly vulnerable workers can enforce those rights. They can do so, that is, if they can publicize those successes.

Finally, beyond information and context-specific encouragement lies acquiring the tools to effectively enforce rights. Effective advocates recognize that purely legal remedies are ineffective for low-wage workers whose small claims do not attract plaintiff-side lawyers looking to make money off of their cases, and the threat of small and unlikely individual litigation is not enough to deter many employers. Worker centers have stepped into the void left by unions unwilling to organize difficult industries and lawyers unwilling to take money-losing cases. These organizations use a mix of community organizing, litigation, political mobilization, and policy advocacy to enforce existing labor protections and create new, more effective ones. Absent a stable workforce to organize, they use the threat of

159. See supra notes 101-105 and accompanying text.

160. Interview with Silas Shawver, supra note 6 ("Poking holes in the boss's impermeability does matter.").

161. Cynthia Estlund suggests that such organizations may actually be better at faithfully enforcing the FLSA because their lack of profit motivation allows them to push for legal resolutions that avoid some of the pitfalls discussed in this article, including confidentiality in settlements. Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 392-93 (2005).
litigation and nontraditional protest methods to incentivize employers to pay back wages and improve working conditions. Many of them bring or support individual litigation, like Liliana's case described at the beginning of this article, and collective actions.\textsuperscript{162}

Time and again provisions for confidentiality at settlement get in the way of efforts by workers' advocates to inform, encourage, and empower low-wage workers. Confidentiality prevents both worker and advocacy organization from using a win to publicize both the wrongdoing of the employer and the possibility of success more generally. It also creates a conflict between the organization's goals of representing an individual worker or group of workers in litigation and empowering a broader group of FLSA rights holders. The interests of workers who would rather take a confidential settlement become adverse to the notice rights of their colleagues. For organizations seeking to use both litigation and nontraditional organizing strategies to empower workers, months of organizing work can falter on the rocks of a secret settlement that lawyers, given current procedural and ethical rules, are bound to accept.\textsuperscript{163}

Publicity of wage and hour settlements is also a necessary condition for worker centers to develop a reputation among employers sufficient to proactively ensure compliance. With limited resources, worker centers cannot litigate or negotiate every case. But as their reputations build, a simple demand letter on their letterhead can bring an employer to the table to settle the matter. Just as an employer knows what it means to get a letter from the Department of Labor, in order for the private right of action to be an effective enforcement tool the employer must have similar regard for the plaintiff's representative.\textsuperscript{164}

Without worker centers, many low-wage workers would not have the opportunity to enforce their rights in the first place. Non-confidentiality is in some ways the price of hiring a free lawyer, for otherwise that free lawyer would not be able to perform his or her work. Thus the ways in which confidentiality undermines the work of worker centers provide further support for banning confidentiality in FLSA settlements, even over plaintiff objections.

\textsuperscript{162} See generally Fine, supra note 91, for a fuller description of worker centers.


\textsuperscript{164} See Interview with Amy Carroll, supra note 6; Interview with Silas Shawver, supra note 6.
III. PUTTING A BAN ON CONFIDENTIALITY INTO PRACTICE

Parts I and II provided arguments for banning confidential FLSA settlements and responded to some recurring concerns about litigant autonomy. This Part explores what an effective ban on confidential FLSA settlements might look like and what the consequences might be.

Courts have a central role to play in placing an effective ban on confidential FLSA settlements. Already some district courts refuse to approve or enforce confidential settlements through application of the fair and reasonable test from *Lynn's Food*

5 or by balancing litigants' interests with the public's right of access. Courts can apply the fair and reasonable test either on a case-by-case basis or, as with the *Dees* decision, by finding that the test proscribes confidentiality across the board. District courts might also make court rules barring confidential settlements. In the absence of court action, state bar associations and other professional groups might rethink the duty of lawyers to their clients where agreeing to silence is not in the interest of broader justice. States might also consider procedural rules that facilitate publication of settlement agreements in state courts.

A. Court Rules and Presumptions

District courts are already using one mechanism for preventing confidential settlements on a case-by-case basis. Procedurally, in order to settle, parties file a motion to dismiss the action with prejudice. Courts that take seriously the Supreme Court's admonishment that workers may not compromise their FLSA rights, particularly courts that look to implement the *Lynn's Food* fair and reasonable test, use this opportunity to scrutinize the proposed settlement. If the court finds the settlement to be unfair, it can deny the motion to dismiss and require the parties to rewrite the settlement in accordance with fairness. Courts get a second bite at the apple if an employer tries to enforce a confidential settlement against his workers. At that juncture courts can refuse to enforce such settlements.66

An advantage to evaluating settlements on a case-by-case basis is that district courts retain flexibility. Absent an appellate court decision either creating or fleshing out the contours of a fair and reasonableness test, district courts can tailor decisions to the case before them. This allows courts to reject justifications for confidentiality that clearly undermine the FLSA while


166. For example, in *Cortes v. Skytop Restaurants, Inc.*, No. 09 CIV. 10252 (CM) (KNF), 2010 WL 4910242 (S.D.N.Y. Nov. 17, 2010), workers tried to enforce a settlement against an employer who used their alleged breach of confidentiality as a reason not to comply. The court refused because the settlement had never been scrutinized for fairness in the original proceeding. A settlement that was never scrutinized "cannot be enforced because it does not exist as a matter of law." *Id.* at *1.
preserving it as an option in cases where extraordinary circumstances make it advisable. Many district courts in the Second Circuit have adopted a presumption against confidentiality that can be overcome. These courts routinely dismiss justifications based on employer concerns like discouraging follow-on lawsuits or the mere fact that the confidentiality provision was a key part of the negotiation. Some also reject plaintiffs' desire for privacy when they want to keep the settlement from friends and family. But some cases might require special consideration. The case against Dollar General described in Part I might constitute such a circumstance. In a fairly unique situation where publicity might hamper fair resolution of FLSA claims, a flexible rule would allow the judge to temporarily seal settlements.

Flexibility may have its price, however. First, many courts still approve settlements without any concern for the issues outlined in this article. Without a clear rule, a number of courts would allow confidential settlements either without consideration or by concluding that these concerns are outweighed by litigant autonomy. Even judges who appreciate the arguments against confidential settlements may feel pressure to approve them when both parties are in agreement. This is particularly true when judges' dockets are overflowing and there are procedural rules written to facilitate settlement. To alleviate this pressure, district courts can bind themselves. One district court took the novel approach of reading into Federal Rule of

167. See supra notes 73-75 and accompanying text.
168. See supra note 84.
169. See supra notes 78-81 and accompanying text.
170. The National Labor Relations Board has also implemented a case-by-case test for whether a confidential settlement is warranted in an NLRA case. In a memorandum to its regional staff the Board declared that for private settlements of NLRA claims, "any prohibition that goes beyond the disclosure of the financial terms [of a settlement] should not be approved, absent compelling circumstances." Richard A. Siegel, Associate General Counsel, Nat’l Labor Relations Bd., Memorandum OM 07-27 to All Regional Directors, Officers-in-Charge, and Resident Officers 5 (Dec. 27, 2006) (on file with the author). This is because settlements "that limit a discriminatee’s ability to engage in discussions with other employees that include non-defamatory statements about the employer severely limits an employee’s right to engage in concerted protected speech. Such a restriction on the Section 7 rights of an employee is repugnant to the purposes and policies of the Act." Id.
171. See, e.g., Jarvis v. City Elec. Supply Co., No. 6:11-CV-1590-ORL-22-DAB, 2012 WL 933057, at *6 (M.D. Fla. Mar. 5, 2012) ("Generally speaking, a plaintiff has a full right to prosecute his claim to completion, by jury verdict or otherwise. If a plaintiff, advised and counseled by his attorney, chooses to forego his absolute right to continue the litigation and accept a non-cash condition in addition to all wages and damages due, it necessarily follows that the plaintiff has determined that the concession is of little or no value to him. As long as a plaintiff is receiving all that the statute provides, what interest is being safeguarded by overriding the express wishes of the plaintiff in the matter and finding that the full compensation offered is, in fact, not enough?") report and recommendation adopted by No. 6:11-CV-1590-ORL-22DAB, 2012 WL 933023 (M.D. Fla. Mar. 20, 2012).
172. See Resnik, Procedure, supra note 34; Anderson, supra note 84, at 727-31 (describing pressure on judges to approve settlements).
Civil Procedure 41(a), which allows a plaintiff to dismiss an action "[s]ubject to any applicable federal statute" a requirement under the FLSA that he retain jurisdiction over the case until satisfied that the confidentiality provision in the parties' settlement was stricken.\textsuperscript{173} District courts can also promulgate procedural rules concerning secrecy of judicial documents. The District of South Carolina, for example, wrote a local rule banning sealed settlements in all litigation.\textsuperscript{174} These rules take the pressure off of judges and give appropriate notice to parties that confidentiality is off the table if they choose to go to court.

A significant drawback of both case-by-case and bright line court rules is their limited reach. Dismissal with prejudice gives employers the assurance of an enforceable release of claims against them. While court rules ensure that litigants who want that finality can only settle publicly, it does nothing for parties who decide to settle privately, either by never filing in court or by choosing dismissal without prejudice and striking a private deal. Private agreements are equally detrimental to the public's interest in enforcement of the law and equally subject to the unequal bargaining power between employer and employee; indeed, perhaps more so absent the protective presence of a judge. There exists a real possibility that, faced with a rule against confidential settlements in court, employers interested in confidentiality would choose private agreements and use informal mechanisms for creating finality. Employers can structure their payments to be made over a long period of time or write in liquidated damages provisions such that plaintiffs have significant incentives to abide by confidentiality agreements without the coercive power of judicial enforcement.\textsuperscript{175} Though important, regardless of the strength of a judicial prohibition it cannot prevent confidentiality in the resolution of all FLSA disputes.

\section*{B. The Role of Other Actors}

Because court interventions are insufficient, lawyers and professional associations must also play a role in preventing confidential settlements. First, lawyers can develop negotiating tools to avoid or limit confidentiality provisions in settlement negotiations. To that end, there is an interaction

\begin{thebibliography}{9}
\bibitem{D.S.C.-Civ.-R.-5.03(E)} D.S.C. Civ. R. 5.03(E); see generally Anderson, supra note 84, for a description of its passage and purpose.
\bibitem{Interviews} Interview with David Colodny, supra note 91; Interview with Aaron Halegua, Staff Attorney, Legal Aid Society Employment Law Unit, in New York, N.Y. (Oct. 11, 2011); Bauer, supra note 82, at 495 ("The agreement can be structured to give the plaintiff ample incentive to comply by making future payments contingent on continued silence, or by creating the risk that if a court does find the agreement valid, the plaintiff who breached will be liable for liquidated damages or attorney's fees").
\end{thebibliography}
between court rules and the tools available to lawyers helping their clients bargain. For clients who are willing to fight confidential settlements, lawyers even in private settlement negotiations can use court rules to their advantage. Knowing that the final recourse of either party unhappy with negotiations is to go to court, workers’ lawyers can use case law to show employers that a court would not approve confidentiality. In Liliana’s case, the clinical students did just this. Armed with binding precedent, the students convinced opposing counsel that a judge would not allow a confidential settlement and he quickly dropped the provision from the proposed agreement.

Another tool some public interest lawyering organizations use is a retainer that requires clients to pledge to reject any confidential settlements offered. At the moment of signing on the client, these retainers provide an opportunity for the lawyers to express their organization’s belief in publicized enforcement and law articulation. This means lawyers and clients will be on the same page well before the moment where a client is faced with the hard choice of giving up a monetary premium or failing to reach a settlement all together. This is only a partial solution, however. Ethical rules are clear that such retainer provisions are unenforceable if at the end of the day the client wants to take a confidential settlement.

If lawyers have to accept a confidentiality provision, they can negotiate to limit its scope. Employers often write in a blanket provision requiring secrecy about not only the outcome of the litigation but also the underlying facts surrounding the case or even the fact of the lawsuit itself. Lawyers can ensure that even if the amount of the settlement is off limits, workers can talk about the illegal violations they experienced, the fact that they decided to take legal action, and that they are happy with the result and consider it a victory. While the dollar amount settled for may be important for a worker center trying to build a reputation as an enforcer of workers’ rights, the number may be less important than these other pieces of information for the purposes of encouraging other workers to come forward.

Reimagined ethical rules might also support lawyers in their efforts to limit the detrimental effects of confidential settlements. Currently, settling claims confidentially is a generally accepted ethical practice among

---

176. See Interview with Silas Shawver, supra note 6; Bauer, supra note 82, at 500; GORDON, supra note 163, at 208.


178. Interview with Silas Shawver, supra note 6.
lawyers. However, Jon Bauer makes a compelling argument that the ABA’s Model Rules that protect third parties and the operation of the justice system more generally should be read to prevent workers’ lawyers from accepting confidentiality provisions. Specifically, he argues that Model Rule 3.4(f), which bars lawyers from requesting that anyone besides their own client decline to provide information to third parties, is violated every time a defense attorney requests that a plaintiff sign a confidential settlement. Further, he argues that Model Rule 8.4(d), which prohibits lawyers from engaging in “conduct that is prejudicial to the administration of justice,” should be read to bar confidentiality. Commentary to rules 3.4(f) and 8.4(d), as well as ethical opinions, could clarify that these rules should dissuade lawyers from counseling in favor of confidential settlements. In addition, the American Association for Justice (formerly the Association of Trial Lawyers of America) already has a resolution against secrecy surrounding the underlying facts of a dispute. Resolutions like this could be expanded and adopted by other professional organizations to further support lawyers as they negotiate against secrecy.

None of these solutions, whether driven by courts, lawyers, or professional associations, could ensure that no FLSA claims were ever settled secretly. But a combination of these strategies could ensure that judges and plaintiffs’ lawyers looking to protect the public interest, the workers involved in the lawsuit and those who are similarly situated would have sufficient tools to prevent confidential settlements.

IV. CONCLUSION

When Liliana first settled her claim, she was relieved that the legal battle was over and balked at the prospect of publicizing her winnings, worried that family and friends would want some of the money. But after speaking with organizers about the importance of empowering others, she chose to speak out. Because her settlement lacked a confidentiality provision, she has been

179. See, e.g., Jennifer M. Trulock, Ensuring Ethical Conduct When Litigating And Settling Employment Discrimination Claims, 801 PLI/Lit 335, 493-94 (2009) (“Often, settlement agreements contain confidentiality clauses . . . Generally, such clauses are not prohibited by the ethics rules, and a prohibition against negotiation of such clauses is inappropriate”); N.C. Bar 2003 Formal Ethics Op. No. 9 (2004) (“[A] lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer’s ability to represent future claimants.”); D.C. Bar Ethics Op. No. 335 (2006) (“A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential”).

180. See Bauer, supra note 82.

able to speak at rallies for other workers and has participated in the organization’s drive to expose industry-wide illegal wage practices.

For the millions of workers like Liliana whose wages are stolen every year in the United States, the FLSA is indeed “the signature statute on which [their] hopes. . . rest.” In an era of increasing income inequality, decreasing worker protections, and rampant wage theft courts must do their job to faithfully enforce the FLSA to the extent of their powers. Congress’s intent to protect both the public’s interest in a well-functioning economy and the vulnerable worker subject to unequal bargaining dynamics militates against secret settlements. Scrutinizing FLSA settlements and rejecting confidentiality provisions is a small but important and achievable step in the right direction.

182. See Bernhardt, Broken Laws, supra note 2, at 6 (estimating that over 1.1 million workers in New York, Chicago, and LA alone experience at least one wage violation each week).
183. FINE, supra note 91, at 158.