No. 12-5319

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARGARET BOAZ,

Plaintiff-Appellant,

v.

FEDEX CUSTOMER INFORMATION SERVICES, INC.;
FEDERAL EXPRESS, D/B/A FEDEX,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Tennessee

# BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

P. DAVID LOPEZ
General Counsel

LORRAINE C. DAVIS
Acting Associate General Counsel

DANIEL T. VAIL
Acting Assistant General Counsel

PAUL D. RAMSHAW
Attorney

Equal Employment Opportunity Commission
Office of General Counsel
131 M Street, NE, 5th Floor
Washington, DC 20507
(202) 663-4737

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MARY E. MCDONALD
Attorney

U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Ave., NW
Washington, DC 20210
(202) 693-5555

TABLE OF CONTENTS

Page

TABLE OF CONTENTS .... i

TABLE OF AUTHORITIES .... iii

STATEMENT OF INTEREST .... 2

STATEMENT OF THE ISSUE .... 3

STATEMENT OF THE CASE .... 3

A. Statement of Facts and Course of Proceedings .... 3

B. The District Court's Decision .... 6

SUMMARY OF ARGUMENT .... 8

ARGUMENT .... 8

A CONTRACTUAL WAIVER OF THE FLSA LIMITATIONS PERIOD IS UNENFORCEABLE BECAUSE IT CONFLICTS WITH PUBLIC POLICIES EXPRESSED IN THE ACT .... 8

A. Background of the FLSA's Statute of Limitations .... 8

B. While Statutes of Limitations Generally May Be Shortened by Contract, Such Contractual Provisions Are Unenforceable When They Conflict with Public Policies .... 11

C. The FLSA Has Clearly Expressed Public Policies Providing Unwaivable Employee Rights to a Minimum Wage and Overtime Compensation .... 14

D. An Agreement Conditioning Employment on a Waiver of the FLSA Limitations Period is Unenforceable Because it Conflicts with Public Policies Expressed in the FLSA .... 22

CONCLUSION .... 31

Page

CERTIFICATE OF COMPLIANCE........................................ 32

CERTIFICATE OF SERVICE........................................... 33

ADDENDUM

TABLE OF AUTHORITIES

Page

Cases:

*14 Penn Plaza LLC v. Pyett*,
556 U.S. 247 (2009).................................. 6

*Adams v. Philip Morris, Inc.*,
67 F.3d 580 (6th Cir. 1995)......................... 19

*Alexander v. Gardner-Denver Co.*,
415 U.S. 36 (1974).............................. 18-19

*Am. Pipe & Constr. Co. v. Utah*,
414 U.S. 538 (1974)................................. 25

*Barrentine v. Arkansas-Best Freight Sys., Inc.*,
450 U.S. 728 (1981).......................... 5,6,16,17

*Bates v. 84 Lumber Co.*,
205 F. App'x 317 (6th Cir. 2006)................. 12,13

*Belfi v. Prendergast*,
191 F.3d 129 (2d Cir. 1999)......................... 15

*Boaz v. Fed. Express Corp.*,
742 F. Supp. 2d 925 (W.D. Tenn. 2010)....... 3 & passim

*Bormann v. AT&T Commc'ns, Inc.*,
875 F.2d 399 (2d Cir.),
*cert. denied*, 493 U.S. 924 (1989).................. 21

*Bright v. Hobbs*,
56 F. Supp. 723 (D. Md. 1944)...................... 8,9

*Brooklyn Sav. Bank v. O'Neil*,
324 U.S. 697 (1945)....................... 13,16,17,18

*Caldwell v. Ala. Dry Dock & Shipbuilding Co.*,
161 F.2d 83 (5th Cir. 1947).......................... 9

*Chao v. Gotham Registry, Inc.*,
514 F.3d 280 (2d Cir. 2008)......................... 15

*Chasteen v. Rock Fin.*,
No. 07-cv-10558
(E.D. Mich. Jan. 31, 2012)................ 13 & passim

Page

Cases--continued:

*Conway v. Stryker Med. Div.*,
No. 4:05-CV-40, 2006 WL 1008670
(W.D. Mich. Apr. 18, 2006)........................... 13

*Corning Glass Works v. Brennan*,
417 U.S. 188 (1974)................................. 15

*Coventry v. U.S. Steel Corp.*,
856 F.2d 514 (3d Cir. 1988)......................... 21

*D.A. Schulte, Inc. v. Gangi*,
328 U.S. 108 (1946).......................... 15,16,20

*D'Antuono v. Serv. Rd. Corp.*,
789 F. Supp. 2d 308 (D. Conn. 2011)................. 24

*Dunlop v. Carriage Carpet Co.*,
548 F.2d 139 (6th Cir. 1977)........................ 14

*Fegley v. Higgins*,
19 F.3d 1126 (6th Cir. 1994)........................ 14

*Floss v. Ryan's Family Steak Houses, Inc.*,
211 F.3d 306 (6th Cir. 2000)........................ 28

*Gandy v. Sullivan Cnty.*,
24 F.3d 861 (6th Cir. 1994)......................... 26

*Gilmer v. Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991).................................. 28

*Henegar v. Daimler-Chrysler Corp.*,
280 F. Supp. 2d 680 (E.D. Mich. 2003)............... 13

*Hughes v. Region VII Area Agency on Aging*,
542 F.3d 169 (6th Cir. 2008)........................ 25

*Hurd v. Hodge*,
334 U.S. 24 (1948).................................. 14

*Jewell Ridge Coal Corp. v. Local No. 6167,
United Mine Workers*,
325 U.S. 161 (1945)................................. 17

Page

Cases--continued:

*Klotz v. Ippolito*,
40 F. Supp. 422 (S.D. Tex. 1941).................... 9

*LaCourse v. GRS III LLC*,
No. 05-73613, 2006 WL 3694623
(E.D. Mich. Dec. 13, 2006).......................... 13

*Lewis v. Harper Hosp.*,
241 F. Supp. 2d 769 (E.D. Mich. 2002)............... 13

*Lorenzetti v. Am. Trust Co.*,
45 F. Supp. 128 (N.D. Cal. 1942).................... 8

*Lynn's Food Stores, Inc. v. United States*,
679 F.2d 1350 (11th Cir. 1982)...................... 19

*Madry v. Gibraltor Nat'l Corp.*,
No. 10-13886, 2011 WL 1565807
(E.D. Mich. Apr. 25, 2011)....................... 13,14

*McLaughlin v. Richland Shoe Co.*,
486 U.S. 128 (1988).......................... 11,24,30

*Mo., Kan. & Tex. R.R. Co. v. Harriman Bros.*,
227 U.S. 657 (1913).............................. 11-12

*Morrison v. Marsh & McLennan Cos.*,
439 F.3d 295 (6th Cir. 2006)........................ 13

*Myers v. W.-S. Life Ins. Co.*,
849 F.2d 259 (6th Cir. 1988).................... 6-7,14

*Order of United Commercial Travelers of Am. v. Wolfe*,
331 U.S. 586 (1947)............................... 6,12

*Oswald v. BAE Indus., Inc.*,
No. 11-1119, 2012 WL 1700704
(6th Cir. May 16, 2012).......................... 12,23

*Ott v. Midland-Ross Corp.*,
523 F.2d 1367 (6th Cir. 1975)....................... 23

*Overnight Motor Transp. Co. v. Missel*,
316 U.S. 572 (1942)................................. 15

Page

Cases--continued:


*Phelps v. McClellan*,
30 F.3d 658 (6th Cir. 1994)...................... 22-23

*Pruiett v. West End Rests., LLC*,
No. 3:11-00747, 2011 WL 5520969
(M.D. Tenn. Nov. 14, 2011)................. 13,22,26,27

*Ray v. FedEx Corp. Servs., Inc.*,
668 F. Supp. 2d 1063 (W.D. Tenn. 2009)............... 7

*Republic Pictures Corp. v. Kappler*,
151 F.2d 543 (8th Cir. 1945),
*aff'd per curiam*, 327 U.S. 757 (1946)................ 9

*Rice v. Jefferson Pilot Fin. Ins. Co.*,
578 F.3d 450 (6th Cir. 2009)......................... 12

*Runyan v. Nat'l Cash Register Corp.*,
787 F.2d 1039 (6th Cir.) (en banc),
*cert. denied*, 479 U.S. 850 (1986)................ 20,21

*Shaheen v. B.F. Goodrich Co.*,
873 F.2d 105 (6th Cir. 1989)......................... 19

*Sun Oil Co. v. Wortman*,
486 U.S. 717 (1988)................................... 22

*Thurman v. DaimlerChrysler, Inc.*,
397 F.3d 352 (6th Cir. 2004)......................... 12

*Tony & Susan Alamo Found. v. Sec'y of Labor*,
471 U.S. 290 (1985)....................... 16,18,29-30

*Town of Newton v. Rumery*,
480 U.S. 386 (1987)................................... 13

*Walton v. United Consumers Club, Inc.*,
786 F.2d 303 (7th Cir. 1986)......................... 19

*Wineman v. Durkee Lakes Hunting &*
*Fishing Club, Inc.*,
352 F. Supp. 2d 815 (E.D. Mich. 2005)....... 5 & passim

Page

Cases--continued:

*Wysocki v. Int'l Bus. Mach. Corp.*,
607 F.3d 1102 (6th Cir. 2010),
*cert. denied*, 131 S. Ct. 945 (2011)................ 19

Federal Statutes:

Age Discrimination in Employment Act of 1967,
29 U.S.C. 621 *et seq*............................. 7,19

29 U.S.C. 626(f).................................... 20
29 U.S.C. 626(f)(1)................................. 20

Civil Rights Act of 1964, Tit. VII,
42 U.S.C. 2000e *et seq*.......................... 4,7,19

Employee Retirement Income Security Act of 1974,
29 U.S.C. 1001 *et seq*.............................. 12

Equal Pay Act of 1963,
29 U.S.C. 206(d).................................... 2

Fair Labor Standards Act,
29 U.S.C. 201 *et seq*....................... 1 & passim

29 U.S.C. 202....................................... 14
29 U.S.C. 204........................................ 2
29 U.S.C. 206(a).................................... 14
29 U.S.C. 207....................................... 15
29 U.S.C. 211(a)..................................... 2
29 U.S.C. 216(b)................................. 15,16
29 U.S.C. 216(c).................................... 16
29 U.S.C. 217........................................ 2

Fair Labor Standards Act Amendments of 1966,
Pub. L. No. 89-601, 80 Stat. 830................. 10-11

Family and Medical Leave Act of 1993,
29 U.S.C. 2601 *et seq*.............................. 13

Older Workers Benefit Protection Act,
Pub. L. No. 101-433, 104 Stat. 978 (1990)........... 20

Page

Federal Statutes--continued:

Portal-to-Portal Act of 1947,
Pub. L. No. 80-49, 61 Stat. 84 .... 10

29 U.S.C. 251(a) .... 10,29
29 U.S.C. 255(a) .... 3 & passim
29 U.S.C. 255(b) .... 10
29 U.S.C. 255(c) .... 10
29 U.S.C. 260 .... 15

Uniformed Services Employment and
Reemployment Rights Act of 1994,
38 U.S.C. 4301 *et seq* .... 12,19,23

42 U.S.C. 1981 .... 12,19

State Statute:

Tennessee Human Rights Act:

Tenn. Code Ann. § 4-21-101 *et seq* .... 4,7

Regulation:

29 C.F.R. 790.21(b) .... 25

Rules:

Federal Rule of Appellate Procedure:
Rule 29 .... 1
Rule 29(c)(5) .... 32
Rule 29(d) .... 32
Rule 32(a)(7)(C) .... 32
Rule 32(a)(7)(B)(iii) .... 32

Sixth Circuit Rule 32(a) .... 32

Other Authorities:

2 EEOC Compliance Manual, Section 2: Threshold
Issues, § 2-IV(A)(2) (Aug. 6, 2009), *available at*
*http://www.eeoc.gov/policy/docs/threshold.html* .... 24

93 Cong. Rec. 2273-77 (1947) .... 10,29

H.R. Rep. No. 101-664 (1990) .... 20

No. 12-5319

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

MARGARET BOAZ,

Plaintiff-Appellant,

v.

FEDEX CUSTOMER INFORMATION SERVICES, INC.;
FEDERAL EXPRESS, D/B/A FEDEX,

Defendants-Appellees.

---

On Appeal from the United States District Court
for the Western District of Tennessee

---

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLANT

---

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of the Plaintiff-Appellant. For the reasons set forth below, the district court erred by concluding that a contractual provision purporting to shorten the statute of limitations set forth in the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.*, is valid and enforceable.

## STATEMENT OF INTEREST

The Secretary has a statutory mandate to administer and enforce the FLSA. *See* 29 U.S.C. 204, 211(a), 216(c), 217. The EEOC is responsible for enforcing the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. 206(d), which is codified in the FLSA.[1] The Secretary and the EEOC have compelling reasons to participate as *amici curiae* in this appeal in support of the plaintiff-employee because the ability of employees to vindicate their rights and to recover the full panoply of remedies to which they are statutorily entitled is crucial to achieving compliance under the Act. Specifically, the Secretary has a strong interest in protecting an employee's ability to enforce his or her substantive rights to the minimum wage, overtime compensation, and liquidated damages under the FLSA. The EEOC similarly has a substantial interest in protecting an employee's ability to obtain back wages and liquidated damages for violations of the EPA. Both the Secretary and the EEOC have compelling interests in broadly rejecting employer attempts to waive or limit such rights in a contractual agreement.

A decision allowing for the contractual waiver or abridgment of the FLSA's statute of limitations could result in

[1] The EPA is part of the FLSA and shares the same statute of limitations and other enforcement provisions. Accordingly, this brief's references to the FLSA include the EPA and the arguments set forth herein regarding the FLSA apply equally to the EPA.

broad attempts by employers in this Circuit to shorten the FLSA's limitations period in employment agreements, thereby reducing employer liability for back wages and liquidated damages and increasing the number of employees who are not compensated for minimum wage and overtime violations. Moreover, a contractual provision subjecting all FLSA claims to a six-month limitations period will eliminate the extended statutory period of liability applicable to willful violations of the Act, thus eviscerating an important enforcement mechanism utilized by employees to combat particularly egregious conduct under the Act.

## STATEMENT OF THE ISSUE

Whether the district court erred in concluding that the plaintiff's FLSA claims were time-barred based on an employment application signed by the plaintiff stating that all claims against her employer must be filed within six months of their accrual, thereby truncating the statute of limitations set forth in 29 U.S.C. 255(a).

## STATEMENT OF THE CASE

### A. Statement of Facts and Course of Proceedings

1. On April 17, 2009, Plaintiff Margaret Boaz ("Boaz") sued Defendants Federal Express Corporation and FedEx Customer Information Services, Inc. (collectively, "FedEx") for several violations of the FLSA. *See Boaz v. Fed. Express Corp.*, 742 F.

Supp. 2d 925, 927 (W.D. Tenn. 2010).[2] Boaz asserted that FedEx had violated the FLSA by discriminating against her on the basis of her sex in violation of the EPA, failing to pay her overtime compensation, failing to maintain accurate records, and misclassifying her job position. *Id.* Boaz also brought claims against FedEx for alleged violations of the Tennessee Human Rights Act ("THRA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). *Id.*

2. On May 8, 2010, FedEx filed a motion for summary judgment on all of Boaz's claims. *See Boaz*, 742 F. Supp. 2d at 927. In its motion, FedEx asserted that Boaz's FLSA claims were time-barred because they were subject to a six-month contractual limitations provision. *Id.* at 932. In February 1997, as part of her employment application, Boaz had signed an Employment Agreement ("Agreement"). *Id.* Paragraph 15 of the Agreement stated: "To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first." *Id.* In its summary judgment motion,

[2] The parties consented to the jurisdiction of a magistrate judge, who entered the decision at issue on appeal. For purposes of clarity, however, the Secretary will refer to the magistrate judge as the "district court." Unless otherwise noted, the facts recited here are taken from the district court's ruling on the parties' cross motions for summary judgment. *See Boaz*, 742 F. Supp. 2d 925.

FedEx thus argued that all of Boaz's FLSA claims were time-barred because they were subject to the contractual limitations period and filed more than six months after accrual. *Id.*

In response, Boaz asserted that the FLSA's three-year statute of limitations set forth in 29 U.S.C. 255(a) should apply to her FLSA claims because FedEx's violations of the statute were willful. *See Boaz*, 742 F. Supp. 2d at 932. Boaz argued that the FLSA's limitations period cannot be curtailed by a contractual provision and that the six-month limitations period set forth in the Employment Agreement was unreasonable. *Id.* In support of this argument, she relied upon *Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815, 823 (E.D. Mich. 2005), in which the district court held that FLSA rights cannot be abridged by private contract and declined to enforce a six-month contractual limitations period because it violated public policy. *Id.* at 933.

In reply, FedEx acknowledged that substantive rights under the FLSA cannot be contractually waived. *See Boaz*, 742 F. Supp. 2d at 933. FedEx argued, however, that procedural rights under the FLSA, including its statute of limitations, may be waived. *Id.* FedEx asserted that the *Wineman* court relied on the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981), for the proposition that FLSA procedural rights cannot be waived. *Id.* FedEx argued that,

because the *Barrentine* decision has since been limited in scope to its unique facts by *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263-72 (2009), the *Wineman* decision did not accurately reflect the law regarding the contractual limitation of FLSA rights. *Id.* FedEx also cited to several court decisions upholding contractual limitations provisions under other federal statutes. *Id.*

B. The District Court's Decision

On September 24, 2010, the district court granted FedEx's motion for summary judgment on Boaz's FLSA claims, concluding that all of the claims were time-barred under the controlling six-month contractual limitations period. *See Boaz*, 742 F. Supp. 2d at 932-37, 941.[3] The court observed that "[i]t is well settled that parties may agree to shorten applicable statute of limitations through contractual limitations provisions, as long as the shorter period is reasonable." *Id.* at 932-33 (citing *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947)). It then stated that this Court has upheld six-month contractual limitations periods in other cases and has determined that such provisions are not necessarily unreasonable. *Id.* at 933 (citing *Myers v. W.-S. Life Ins. Co.*,

[3] Assuming that the court properly determined the accrual dates, all of Boaz's FLSA claims, with the possible exception of her recordkeeping claim, would have been timely under the FLSA's three-year statute of limitations for willful violations.

849 F.2d 259, 262 (6th Cir. 1988)). The district court noted that another judge in the district had recently concluded that the six-month limitations provision set forth in FedEx's Employment Agreement was valid and enforceable, thus barring a claim brought under the Age Discrimination in Employment Act ("ADEA"). *Id.* (citing *Ray v. FedEx Corp. Servs., Inc.*, 668 F. Supp. 2d 1063 (W.D. Tenn. 2009)). The court further declined to follow the *Wineman* decision prohibiting waiver of the FLSA's limitations period, concluding that the decision was not controlling and that, in light of the *Penn Plaza* decision in which the Supreme Court concluded that federal statutory claims may be arbitrated pursuant to a collective bargaining agreement, its holding was of limited value. *Id.*

The district court concluded that statutes of limitations are procedural, not substantive, rights and that procedural rights under the FLSA can be abridged by contractual agreement. *See Boaz*, 742 F. Supp. 2d at 933.[4] It thus granted FedEx's motion for summary judgment as to all of Boaz's FLSA claims, as well as her THRA and Title VII retaliation claims. *Id.* at 941.[5]

---

[4] The court further determined that the contractual limitations provision was reasonable. *See Boaz*, 742 F. Supp. 2d at 933-34.

[5] The district court denied FedEx's motion for summary judgment with respect to Boaz's Title VII discrimination claim. *See Boaz*, 742 F. Supp. 2d at 938-40. Boaz subsequently dismissed this claim, however, and the court then entered final judgment on March 20, 2012.

## SUMMARY OF ARGUMENT

The district court erred by concluding that a contractual provision purporting to shorten the FLSA's limitations period is valid and enforceable. An agreement conditioning employment on a waiver of the FLSA's limitations period is unenforceable because it conflicts with public policies expressed in the Act by effectively preventing employees from exercising their unwaivable substantive rights to a minimum wage and overtime compensation, subjecting employers to unfair methods of competition, and eliminating an important congressionally-dictated distinction between willful and nonwillful violations of the Act.

## ARGUMENT

### A CONTRACTUAL WAIVER OF THE FLSA LIMITATIONS PERIOD IS UNENFORCEABLE BECAUSE IT CONFLICTS WITH PUBLIC POLICIES EXPRESSED IN THE ACT

### A. Background of the FLSA's Statute of Limitations

1. The Fair Labor Standards Act, as enacted in 1938, did not contain a statute of limitations. Consequently, courts applied a wide range of limitations periods set forth under similar state laws to determine the timeliness of FLSA claims. *See, e.g.*, *Bright v. Hobbs*, 56 F. Supp. 723, 728 (D. Md. 1944) (applying 12-year statute of limitations under Maryland law); *Lorenzetti v. Am. Trust Co.*, 45 F. Supp. 128, 140 (N.D. Cal. 1942) (applying three-year statute of limitations under

California law); *Klotz v. Ippolito*, 40 F. Supp. 422, 426 (S.D. Tex. 1941) (applying two-year limitations period under Texas law). Some states also enacted limitations periods specifically intended to prevent employees from exercising their FLSA rights.[6] Courts recognized that the lack of a uniform limitations period for FLSA claims and the resulting imposition of significantly different state-law limitations periods created a confusing and unpredictable legal landscape for FLSA claims. *See Bright*, 56 F. Supp. at 727-28 (observing that it was "unfortunate" that Congress left the provision of a limitations period for FLSA claims to the states "because uniformity in a matter of this kind, especially where the state statutes vary so greatly, is highly desirable").

[6] These attempts to undermine the FLSA through narrow limitations periods were generally struck down as unconstitutional. *See, e.g.*, *Caldwell v. Ala. Dry Dock & Shipbuilding Co.*, 161 F.2d 83, 85-86 (5th Cir. 1947) (Alabama's effort to impose a one-year limitations period for FLSA claims where state wage law claims had a three- or six-year limitations period was "manifestly hostile" to the exercise of FLSA rights, constituted "an unwarranted attempt . . . to discriminate against and abridge those rights," and thus was unconstitutional); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546 (8th Cir. 1945) (Iowa's attempt to apply a six-month limitations period to the FLSA where a five- or ten-year statute of limitations would otherwise apply under state law was unenforceable because it constituted "discriminatory treatment of a claim arising under a federal statute" that "in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme"), *aff'd per curiam*, 327 U.S. 757 (1946).

2. In 1947, Congress explicitly recognized that "the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. 251(a). Congress therefore amended the FLSA to include a two-year statute of limitations for all claims brought under the Act. *See* Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87-88.[7]

The Portal-to-Portal Act's legislative history reflects a strong congressional intent to provide a uniform statute of limitations for all FLSA claims across industries and states. In fact, the Senate considered a proposed amendment that would have allowed states with applicable one-year statutes of limitations to retain their truncated limitations periods. *See* 93 Cong. Rec. 2273-77 (1947). This proposed amendment, however, was roundly rejected. *Id.* at 2277.

3. In 1966, Congress amended the FLSA to lengthen the statute of limitations to three years for willful FLSA violations. *See* Fair Labor Standards Act Amendments of 1966,

---

[7] The Portal-to-Portal Act also established a separate limitations period for claims that accrued prior to the date of its enactment. *See* 29 U.S.C. 255(b), (c).

Pub. L. No. 89-601, 80 Stat. 830, 844. The FLSA therefore currently provides in relevant part:

> Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the [FLSA] . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. 255(a). The Supreme Court has observed that, although Congress's decision to impose a three-year statute of limitations for willful FLSA violations was enacted "for reasons that are not explained in the legislative history," the fact that "Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988).

B. While Statutes of Limitations Generally May Be Shortened by Contract, Such Contractual Provisions Are Unenforceable When They Conflict with Public Policies.

1. Courts have generally recognized that parties may contractually abridge the time in which claims may be filed provided that the contractual limitations period is reasonable. *See, e.g.*, *Mo., Kan. & Tex. R.R. Co. v. Harriman Bros.*, 227 U.S.

657, 672 (1913) ("The policy of statutes of limitation is to encourage promptness in the bringing of actions. . . . [T]here is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short."); *cf. Wolfe*, 331 U.S. at 608 (stating that "in the absence of a controlling statute to the contrary," a contractual provision may limit the applicable period set forth in a general statute of limitations for filing an action so long as the shorter limitations period is reasonable). This Court has affirmed the "general principle that parties may contract for shorter limitations periods" than that provided by state and federal law. *Bates v. 84 Lumber Co., L.P.*, 205 F. App'x 317, 322-23 (6th Cir. 2006).

This Court has applied contractual limitations periods to Uniformed Services Employment and Reemployment Rights Act ("USERRA") claims, *Oswald v. BAE Indus., Inc.*, No. 11-1119, 2012 WL 1700704 (6th Cir. May 16, 2012); Employee Retirement Income Security Act ("ERISA") claims, *Rice v. Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450, 454 (6th Cir. 2009); and race discrimination claims brought under 42 U.S.C. 1981, *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 357-59 (6th Cir. 2004).[8] This Court has considered but ultimately declined to decide whether claims

[8] Unlike the FLSA, none of these statutes contained an internal limitations period that was applicable to the claims presented.

brought under the Family and Medical Leave Act ("FMLA") can be abridged by a contractual limitations period. *See Bates*, 205 F. App'x at 322-24 (observing that both parties "have arguments that could potentially be meritorious" on the issue).[9] Neither the Supreme Court nor any Circuit Court of Appeals, however, has addressed the issue whether the FLSA's statute of limitations can be contractually waived or abridged.[10]

2. It is well established that a contractual provision is unenforceable if the interest in its enforcement is outweighed by a public policy against its enforcement. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Morrison v. Marsh & McLennan Cos.*, 439 F.3d 295, 301 n.2 (6th Cir. 2006); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (concluding that "a statutory right conferred on a private

---

[9] District courts in this Circuit have uniformly concluded that parties cannot truncate the FMLA limitations period by private agreement. *See Madry v. Gibraltor Nat'l Corp.*, No. 10-13886, 2011 WL 1565807, at *2-4 (E.D. Mich. Apr. 25, 2011); *Conway v. Stryker Med. Div.*, No. 4:05-CV-40, 2006 WL 1008670, at *1-2 (W.D. Mich. Apr. 18, 2006); *Henegar v. Daimler-Chrysler Corp.*, 280 F. Supp. 2d 680, 682 n.1 (E.D. Mich. 2003); *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769, 772-73 (E.D. Mich. 2002).

[10] With the exception of *Boaz*, district courts in this Circuit have consistently held that the FLSA's statute of limitations cannot be contractually abridged. *See Chasteen v. Rock Fin.*, No. 07-cv-10558 (E.D. Mich. Jan. 31, 2012) (attached as Addendum); *Pruiett v. West End Rests., LLC*, No. 3:11-00747, 2011 WL 5520969 (M.D. Tenn. Nov. 14, 2011); *LaCourse v. GRS III LLC*, No. 05-73613, 2006 WL 3694623, at *21 (E.D. Mich. Dec. 13, 2006); *Wineman*, 352 F. Supp. 2d 815.

party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy") (citation omitted). The Supreme Court has explicitly determined that if enforcement of private contracts would violate federal public policy, "it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). Accordingly, this Court has concluded that any contractual provision intended "to create a situation which tends to operate to the detriment of the public interest" is void and unenforceable. *Myers*, 849 F.2d at 261; *see Madry*, 2011 WL 1565807, at *3 (same).

C. The FLSA Has Clearly Expressed Public Policies Providing Unwaivable Employee Rights to a Minimum Wage and Overtime Compensation.

1. The Fair Labor Standards Act is "designed to be 'a broadly remedial and humanitarian statute.'" *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir. 1994) (quoting *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143 (6th Cir. 1977)). The FLSA expressly provides that it is "declared to be the policy" of the Act "to correct and as rapidly as practicable to eliminate" certain "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202. The Act thus establishes a minimum wage, 29 U.S.C. 206(a), "to secure for the lowest paid segment of the nation's workers a subsistence wage."

*D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946). The FLSA also requires the payment of overtime compensation, 29 U.S.C. 207, "to remedy the 'evil of overwork' by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942)). Similarly, the EPA was enacted "to legislate out of existence a long-held, but outmoded societal view that a man should be paid more than a woman for the same work." *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (citing *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974)).

Employees covered by the FLSA have a right to recover unpaid wages, to obtain liquidated damages (subject to an employer defense), to recover costs and attorney's fees, and to sue in any court of competent jurisdiction on behalf of themselves or other workers similarly situated who consent in writing to become parties to the lawsuit. *See* 29 U.S.C. 216(b), 260. The Supreme Court has analyzed the legislative policies underlying the Act, concluding that:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact 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* and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. . . . *No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act*. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

*Brooklyn Sav. Bank*, 324 U.S. at 706-07 (internal citations omitted and emphases added).

2. Because of these strong public policies expressed in the Fair Labor Standards Act, the Supreme Court has consistently concluded that an employee's remedies under the FLSA, including back wages and liquidated damages, cannot be prospectively waived by contract. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Barrentine*, 450 U.S. at 740. Moreover, the Court has determined that employees generally cannot waive or abridge these rights in post-dispute settlements. *See, e.g.*, *D.A. Schulte, Inc.*, 328 U.S. at 112-16; *Brooklyn Sav. Bank*, 324 U.S. at 706-07.[11]

[11] Section 16(c) of the FLSA sets forth the limited circumstances under which employees can waive their rights to file suit under section 16(b) for back wages and liquidated damages by means of a settlement agreement. *See* 29 U.S.C. 216(c). Such waiver is dependent on the Secretary's authority to supervise the payment of the unpaid back wages owing to employees. *Id.*

The Supreme Court has reasoned that, in enacting the FLSA, Congress intended to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Id.* (internal quotation marks omitted). In *Barrentine*, the Supreme Court reaffirmed the "nonwaivable nature" of these fundamental FLSA protections and stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. at 740 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707). It is thus clear that a worker's rights to the minimum wage, overtime compensation, and liquidated damages may not be abridged or waived by private agreement because these fundamental FLSA rights affect the public interest by protecting workers from the abuses of substandard pay, excessive hours, and unequal bargaining relationships. Employees cannot opt out of the protection of the Act because "employers might be able to use superior bargaining power to coerce employees . . . to waive

their protections under the Act." *Tony & Susan Alamo Found.*, 471 U.S. at 302.

Moreover, these FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy. *See Tony & Susan Alamo Found.*, 471 U.S. at 302 (allowing waiver of the FLSA's protections "would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses"); *Brooklyn Sav. Bank*, 324 U.S at 710 ("An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims . . . than are those of his competitor."); *Wineman*, 352 F. Supp. 2d at 821 ("[E]mployees cannot be allowed to preempt the market by waiving statutorily-enacted rights intended to benefit laborers as a class for the expedient of making their individual services more attractive to an employer.").

3. As indicated above, the FLSA has thus been interpreted to generally preclude both prospective and post-dispute waivers of employee rights to back wages and liquidated damages. Other employment statutes reflect a similar public policy interest in prohibiting the prospective waiver of employee rights as a condition of employment. *See, e.g.*, *Alexander v. Gardner-Denver*

*Co.*, 415 U.S. 36, 51 (1974) (stating that it is clear "that there can be no prospective waiver of an employee's rights under Title VII"); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) (explaining that employees cannot prospectively waive Title VII or ADEA rights).

The FLSA is unique, however, because it also prohibits the private settlement of *existing* claims absent supervision from the Department of Labor or authorization by a court. *See, e.g.*, *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (because "parties' ability to settle disputes would allow them to establish sub-minimum wages," courts have "refused to enforce wholly private settlements" of FLSA claims); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353-54 (11th Cir. 1982) (private agreements regarding the settlement of FLSA claims cannot be judicially approved unless supervised by the Department or entered as a stipulated judgment in a suit brought by employees).

This limitation on post-dispute waivers of employee rights under the FLSA has not been applied to many other employment statutes. *See, e.g.*, *Wysocki v. Int'l Bus. Machine Corp.*, 607 F.3d 1102, 1107-08 (6th Cir. 2010) (affirming waiver of USERRA claims in a private settlement agreement); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989) (concluding that plaintiff's waiver of her 42 U.S.C. 1981 claim did not violate

public policy). In *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1042-45 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986), for example, this Court held that the FLSA's general prohibition on post-dispute waivers did not apply to the ADEA as then written.[12] The court distinguished the FLSA by stating that it applies to all workers subject to the national minimum wage and is intended to "secure [for] 'the lowest paid segment . . . a subsistence wage,'" while the ADEA pertains to an "entirely different segment of employees." *Id.* at 1043 (quoting *D.A. Schulte, Inc.*, 328 U.S. at 116). This Court also noted that FLSA cases implicate to a significant degree the unequal bargaining relationship of employers and employees, as well as substandard pay and oppressive work hours, because the FLSA's unique legislative focus is on the "lowest paid segment of the nation's workers who likely have little education and little understanding of their legal rights." *Id.* at 1043 n.6, 1044 (citations and internal quotation marks omitted). Because of

[12] Importantly, in 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978, which amended the ADEA to include numerous specific requirements governing the waiver of ADEA claims. *See* 29 U.S.C. 626(f). The OWBPA was enacted, in part, in response to this Court's *Runyan* decision and other similar Circuit decisions permitting the contractual release of existing ADEA claims. *See* H.R. Rep. No. 101-664 (1990). As amended, the ADEA now clearly states that, unless the statutory requirements are met, an individual "*may not waive*" any ADEA right or claim. 29 U.S.C. 626(f)(1) (emphasis added).

the special statutory purpose underlying the FLSA, this Court concluded that the FLSA's bar on unsupervised post-dispute waivers of statutory rights was inapplicable to the ADEA. *Id.* at 1042-45; *see Bormann v. AT&T Commc'ns, Inc.*, 875 F.2d 399, 401-02 (2d Cir.) (same), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988) (same).

The FLSA's unique limitation on *post-dispute* waivers of statutory rights bolsters the argument advanced here in favor of affording protection to employees against *prospective* waivers of FLSA rights. As discussed above, prospective waivers of statutory rights in private agreements entered into as a condition of employment have been subject to far greater judicial scrutiny than post-dispute waivers and are generally prohibited. The fact that Congress has limited an employee's ability to waive FLSA rights in the context of a post-dispute settlement agreement reflects its intent that such waivers must be precluded in the context of *pre-dispute* agreements, such as the Employment Agreement in this case. The FLSA's unique statutory purpose and limitation on both prospective and post-dispute waivers of an employee's right to back wages and liquidated damages therefore distinguish FLSA cases from those brought under other employment statutes.

D. <u>An Agreement Conditioning Employment on a Waiver of the FLSA Limitations Period is Unenforceable Because it Conflicts with Public Policies Expressed in the FLSA.</u>

1. In *Boaz*, the district court summarily concluded that the FLSA's statute of limitations was procedural in nature, not substantive, and therefore could be truncated by contractual agreement. *See* 742 F. Supp. 2d at 933. As noted above, the other courts in this Circuit addressing the issue under the FLSA have uniformly determined that such contractual provisions are unenforceable.[13] Two of these courts have explicitly concluded that the *Boaz* decision is incorrect. *See Chasteen*, slip op. at 10 (*Boaz* was "wrongly decided"); *Pruiett*, 2011 WL 5520969, at *6 (the analysis set forth in *Boaz* is "flawed" for several reasons).

2. Classifying statutes of limitations as purely "procedural" or "substantive" is difficult because their function and effect depend upon the manner in which they are applied. *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) (observing that "the words 'substantive' and 'procedural' themselves . . . do not have a precise content"); *Phelps v.*

[13] These courts have concluded that contractual provisions purporting to shorten the FLSA limitations period: (1) violate clearly expressed public policies, *see Wineman*, 352 F. Supp. 2d at 821-23; (2) contravene the FLSA's statutory purpose, *see Chasteen*, slip op. at 10; and (3) prevent employees from vindicating their substantive right to full compensation under the Act, *see Pruiett*, 2011 WL 5520969, at *3-6.

*McClellan*, 30 F.3d 658, 661 (6th Cir. 1994) (stating that statutory limitations periods are treated as substantive for *Erie* doctrine purposes, but procedural for choice-of-law purposes); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (treating the FLSA's statute of limitations as procedural insofar as the limitations period is not jurisdictional). In a recent case involving the application of a contractual limitations period to USERRA claims, this Court explained that it "generally defines a period of limitations as a procedural matter." *Oswald*, 2012 WL 1700704, at *5. This Court, however, has also recognized that "rigid, formalistic rules" regarding the procedure-substance dichotomy "have gradually fallen out of favor." *Phelps*, 30 F.3d at 661. In *Chasteen*, the district court expressly rejected *Boaz*'s analysis that "waiver of FLSA rights is governed by an inflexible distinction between substantive and procedural provisions" and concluded that, even if such a distinction were relevant, the FLSA's statute of limitations has an important substantive element that cannot be ignored. Slip op. at 10; *see Wineman*, 352 F. Supp. 2d at 822 (concluding that, because of the impact upon public policies, the classification of 29 U.S.C. 255(a) as procedural or substantive is "a distinction without a difference").

The FLSA's statute of limitations serves several substantive functions. As discussed below, the FLSA's statute of limitations generally establishes the full scope of an employee's remedies under the Act. The unique manner in which claims accrue under the FLSA renders its statute of limitations "part and parcel of a federally-guaranteed substantive right." *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 340 (D. Conn. 2011). Moreover, because the FLSA's limitations period is two years for nonwillful violations but three years for willful violations, it reflects congressional intent that employers that violate the Act willfully be exposed to greater liability. *See Richland Shoe*, 486 U.S. at 132; *Chasteen*, slip op. at 9 (determining that the "relationship between the statute of limitations and the culpability of the employer's conduct reaffirms that the time periods in § 255(a) not only serve the procedural function of providing repose for claims, but also reflect the substantive judgment of Congress about the exposure to liability employers should face in both ordinary and extraordinary cases").[14]

---

[14] An individual alleging an EPA violation may file a charge with the EEOC prior to filing a lawsuit, but the period in which to file a charge is directly affected by the limitations period applied to FLSA claims. *See* 2 EEOC Compliance Manual § 2-IV(A)(2) (2009) ("The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same . . . .").

3. Regardless whether 29 U.S.C. 255(a) is classified as procedural or substantive, the statutory limitations period cannot be waived or abridged because such a waiver is inconsonant with the legislative scheme and violates public policy by precluding employees from vindicating their unwaivable rights and recovering the full amount of back wages and liquidated damages to which they are entitled under the Act.[15] The unique manner in which FLSA claims accrue exemplifies how deeply intertwined the statutory limitations period is with the underlying substantive rights to minimum wage and overtime compensation. Under the FLSA, a claim for unpaid wages and liquidated damages accrues "when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. 790.21(b). An FLSA claim thus accrues "at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed." *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 187 (6th Cir. 2008) (internal quotation marks omitted); *see*

---

[15] There is no legal basis for the district court's conclusion that parties are free to waive procedural rights under the FLSA. In *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court stated that the proper inquiry in determining whether a statutory limitations period could be tolled was not whether the limitations period was procedural or substantive, but "whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 557-58.

*Gandy v. Sullivan Cnty.*, 24 F.3d 861, 864 (6th Cir. 1994) (applying same analysis to EPA claims). Because each paycheck that does not include statutorily required wages is a separate and distinct FLSA violation, a new limitations period commences for every such paycheck. Employees can thus generally recover back wages only for violations that occur within the limitations period. *See Pruiett*, 2011 WL 5520969, at *5.

Therefore, under the FLSA, "a plaintiff's substantive right to full compensation is determined by the statute of limitations." *Pruiett*, 2011 WL 5520969, at *5. Consequently, truncating the FLSA's statute of limitations "necessarily precludes a successful plaintiff from receiving full compensatory recovery under the statute." *Id.* In cases involving misclassification of work performed over several years, such as the instant matter, a worker may have numerous claims for back wages under the FLSA. *See Chasteen*, slip op. at 8-9. The employee can only recover back wages and damages, however, for violations that have occurred within the statutory limitations period. *Id.* The FLSA's statute of limitations therefore defines the scope of remedies available to the misclassified employee.

Applying a six-month contractual limitations period to FLSA claims may prevent employees from enforcing their unwaivable rights to the minimum wage and overtime compensation in two

different ways. If an employee cannot assert an FLSA violation that would be "timely" within the narrow six-month limitations period, her entire case will be dismissed even if she has many other claims that would have been timely under the applicable statute of limitations in the Act. Even if that employee could bring a timely FLSA lawsuit under the contractual limitations period, however, the court may limit her recovery of back wages and damages to the six-month period rather than the full two- or three-year period for which she is entitled to recover under the FLSA.

Permitting parties to contractually abridge or waive the FLSA's limitations period may therefore also permit employers to reduce their liability "to a level below that mandated by Congress" and prevent employees from fully and effectively vindicating their unwaivable substantive rights to full compensation under the statute. *Chasteen*, slip op. at 9; *see Pruiett*, 2011 WL 5520969, at *4-6. The only difference between a contractual provision requiring an employee to waive the Act's statutory limitations period and one requiring her to waive her right to compensation entirely is therefore "one of degree, and not of kind." *Chasteen*, slip op. at 9 (internal quotation marks omitted). An agreement to apply a six-month contractual limitations period to FLSA claims should therefore be viewed as an agreement to prospectively waive all nonwillful minimum wage

and overtime claims arising over the 18-month period between the end of the contractual limitations period and the date on which the two-year statutory limitations period would have expired. In cases involving willful violations of the FLSA, the application of a six-month limitations period functions as a waiver of minimum wage and overtime compensation claims occurring over a 30-month period. Such waivers are clearly impermissible under well-established precedent set forth by the Supreme Court and this Court because they operate to the detriment of the public interest and are not consonant with the legislative scheme established by Congress protecting the rights of workers.[16]

4. Moreover, a contractual waiver of the FLSA's statute of limitations conflicts with public policies expressed in the FLSA favoring a uniform period of liability applicable to employers nationwide. As discussed above, the Portal-to-Portal Act's

---

[16] Notably, this case presents a fundamentally different question than that raised in cases involving the arbitrability of FLSA claims. Unlike in arbitration cases where there is a competing public policy interest, expressed in the Federal Arbitration Act, favoring arbitration agreements, there is no federal public policy favoring the contractual limitation of liability for FLSA violations. *See, e.g.*, *Chasteen*, slip op. at 7. Moreover, even in cases permitting the submission of federal claims to arbitration, the Supreme Court and this Court have made it clear that an agreement to arbitrate a statutory claim is only permissible if the arbitral forum "allow[s] for the effective vindication of that claim." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000); *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (same).

legislative history shows that Congress intended to provide a standard statute of limitations for FLSA claims. Congress made an explicit finding on this issue, stating that varying limitations periods under the Act cause "great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. 251(a). In rejecting a proposed amendment that would have allowed states to vary downwards from the two-year statute of limitations set forth in the Act, for example, Senator Morse expressed concern that this lack of standardization would "give a certain competitive advantage to employers in States with a short statute of limitations" and would impermissibly undermine the "duties and liabilities" under the Act that "should be uniform from coast to coast and from north to south." 93 Cong. Rec. at 2274 (statement of Sen. Morse).

If employers are permitted to shorten the statutory limitations period by private agreement, the confusion and unpredictability experienced by both workers and employers in determining the timeliness of FLSA claims prior to the enactment of 29 U.S.C. 255(a) will recur. Such an outcome will also give a competitive economic advantage to those employers who are able to secure such waivers from their employees and will thus encourage employers across the country to broadly include such waivers in employment agreements, thereby "exert[ing] a general downward pressure on wages in competing businesses." *Tony &*

*Susan Alamo Found.*, 471 U.S. at 302. This result fundamentally contravenes the legislative intent and statutory scheme of the FLSA by failing to protect workers from unequal bargaining relationships and by failing to protect employers from unfair methods of competition in the national economy.

5. Finally, an agreement requiring waiver of the FLSA's statute of limitations eliminates the important distinction between nonwillful and willful violations of the FLSA in contravention of congressional intent to impose greater liability on willful violators. The Supreme Court has explained that Congress's decision to apply a "two-tiered" limitations period to the FLSA, providing a general two-year limitations period but a three-year limitations period for willful acts, reflects congressional intent that there be "a significant distinction between ordinary violations and willful violations." *Richland Shoe*, 486 U.S. at 132. The FLSA thus expresses a deliberate congressional choice to utilize the statute of limitations as the mechanism by which employers that willfully violate the Act are exposed to a heightened risk of liability, both in length of time and amount of damages. The application of a six-month contractual limitations period to all FLSA claims would eliminate any such distinction and effectively neutralize this congressional judgment.

## CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

P. DAVID LOPEZ
General Counsel

LORRAINE C. DAVIS
Acting Associate
General Counsel

DANIEL T. VAIL
Acting Assistant
General Counsel

PAUL D. RAMSHAW
Attorney

Equal Employment Opportunity Commission
Office of General Counsel
131 M Street, NE, 5th Floor
Washington, DC 20507
(202) 663-4737

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

s/ Mary E. McDonald
MARY E. MCDONALD
Attorney

U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, NW
Washington, DC 20210
(202) 693-5555

<u>CERTIFICATE OF COMPLIANCE</u>

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the type volume limitation because it contains 6,999 words, including footnotes but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements because it has been prepared in monospace typeface, Courier New, in 12 point font in text and 12 point font in footnotes. This brief was prepared using Microsoft Word.

<u>s/ Mary E. McDonald</u>
MARY E. MCDONALD
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of July, 2012, the Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Plaintiff-Appellant is being filed electronically and notice of such filing will be issued to all counsel of record through the Court's electronic filing system, including the following:

Adam W. Hansen
Nichols Kaster
4600 IDS Center
80 S. Eighth Street
Minneapolis, MN 55402

Stephen H. Biller
The Biller Law Firm
1000 Ridgeway Loop Road, Suite 305
Memphis, TN 38120

Melissa Kimberly Hodges
FedEx Corporation
3620 Hacks Cross Road
Second Floor Building B
Memphis, TN 38125

s/ Mary E. McDonald
MARY E. MCDONALD
Attorney

# ADDENDUM