> Client Alert

Second Circuit Update: FLSA Plaintiffs Must Plausibly Allege a Willful Violation to Benefit from the Extended Three-Year Statute of Limitations

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Authors and Key Contacts

If you require any additional information related to the Fair Labor Standards Act or any other employment issue, please contact any of the attorneys listed below.

Jeffrey P. Englander
Partner & Co-Chair
P (212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
P (212) 735-8736
kmarkel@morrisoncohen.com

John B. Fulfree
Senior Counsel
P (212) 735-8850
jfulfree@morrisoncohen.com

Theresa D'Andrea
Associate
P (212) 735-8751
tdandrea@morrisoncohen.com

Christopher W. Pendleton
Associate
P (212) 735-8783
cpendleton@morrisoncohen.com

Cassandra N. Branch
Associate
P (212) 735-8838
cbranch@morrisoncohen.com

On April 27, 2021, the United States Court of Appeals for the Second Circuit held that mere allegations of willfulness are insufficient for a plaintiff to secure the benefits of the three-year exception to the general two-year statute of limitations under the Fair Labor Standards Act (FLSA). Rather, for the enhanced three-year look back period to apply, a plaintiff must allege facts at the initial pleading stage that create a plausible inference of willful violation of the statute. The decision, *Whiteside v. Hover-Davis, Inc., Universal Instruments Corporation*, fuels the widening split among federal appeals courts on this issue around the country. This alert first provides some background on the FLSA limitations standard and the Circuit split surrounding it, and then examines the facts of the *Whiteside* decision, offering insight for employers going forward.

Background on the FLSA Limitations Period

The FLSA provides a two-year limitations period within which a plaintiff may assert claims for minimum wage or overtime violations under the statute. 29 U.S.C. § 255(a). The FLSA provides an exception to this rule, however, whereby the limitations period is extended to three years if the violation by the employer is deemed willful. *See id.*

Prior to the *Whiteside* decision, federal circuits throughout the country were divided on what constituted willfulness at the pleading stage in order to obtain the benefit of the extended three-year limitations period. The Sixth Circuit has held that conclusory assertions of willful conduct are not enough to invoke the three-year statute of limitations. *Crugher v. Prelesnik*, 761 F.3d 610, 617 (6th Cir. 2014). By contrast, the Tenth Circuit has held that the mere allegation of willfulness suffices to invoke the three-year limitations period under the FLSA. *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1298-99 (10th Cir. 2018). As explained below, the Second Circuit has agreed with the Sixth Circuit's approach in *Crugher* and disagreed with the Tenth Circuit's conclusion in *Fernandez*, holding that a plaintiff must allege facts at the pleading stage that give rise to a plausible inference that a defendant willfully violated the FLSA for the longer three-year limitations period to apply.

The *Whiteside* Decision

Plaintiff Mark Whiteside ("Whiteside") worked for the defendant Hover-Davis ("Hover-Davis"), Inc., a subsidiary of defendant Universal Instruments Corporation ("Universal" and together with Hover-Davis, "Defendants") from

August 1999 to June 2018. Until January 2012, Whiteside worked as a "Quality Engineer" and was correctly classified as a salaried employee, exempt from overtime pay requirements under the FLSA. In January 2012, Whiteside was asked to "switch positions" and perform the responsibilities of a "Repair Organization Technician," a role which Defendants had historically classified as hourly and non-exempt from overtime pay requirements under the FLSA and, as such, entitled to overtime pay for working in excess of 40 hours in any workweek. Indeed, Defendants classified the individual who Whiteside replaced in the role—and all of Whiteside's co-workers in the role—as non-exempt employees. Despite the role change, however, Defendants continued to treat Whiteside as a salaried employee exempt from overtime pay requirements under the FLSA. Consequently, though Whiteside worked 45 to 50 hours each week in his new non-exempt role, Defendants did not pay him overtime nor provide him with accurate wage statements in connection with his new, non-exempt status.

Whiteside was transferred back to his previous exempt position approximately four years later, on January 26, 2016, making him once again properly classified under the FLSA. On January 8, 2019, he filed a complaint in the United States District Court for the Western District of New York (WDNY) alleging, in part, that Defendants willfully violated the FLSA when they failed to pay him overtime wages during the time he worked in the capacity of Repair Organization Technician, as a non-exempt employee, but continued to be paid as an exempt employee.

On July 3, 2019, Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The WDNY dismissed Whiteside's FLSA claim as barred by the applicable two-year statute of limitations. According to the district court, the three-year exception for willful violations of the FLSA did not apply because Whiteside failed to allege plausibly that Defendants willfully violated the FLSA. Whiteside appealed the dismissal, contending that (i) an FLSA plaintiff need not plead any facts giving rise to an inference of willfulness to secure the benefit of the extended three-year statute of limitations for willful violations of the FLSA; and (2) in any event, Whiteside pleaded facts sufficient to give rise to an inference of willfulness. The Second Circuit Court of Appeals rejected both arguments and upheld the District Court's decision.

In rejecting Whiteside's first argument, the Second Circuit held that "the mere allegation of willfulness is insufficient to allow an FLSA plaintiff to obtain the benefit of the three-year exception at the pleadings stage." The Court supported its holding by citing well-established U.S. Supreme Court precedent that that claims must rest on well-pleaded factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In particular, the Second Circuit relied on the 1988 U.S. Supreme Court case of *McLaughlin v. Richland Shoe Co.*, which recognized that Congress intended to draw a "*significant distinction*" between ordinary and willful violations of the statute. 486 U.S. 128, 132, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988). The Second Circuit noted that the Supreme Court in *McLaughlin* declined to adopt a standard for willfulness that would have required a plaintiff to show only "that an employer knew that the FLSA 'was in the picture.'" Rather, according to the Supreme Court, willfulness means "that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." The Second Circuit further explained that the three-year statute of limitations is a punitive exception to the general two-year statute of limitations period. As such, "[w]hen a plaintiff relies on a theory of willfulness to save an FLSA claim that otherwise appears untimely on its face, it should similarly be incumbent on the plaintiff to plead facts that make entitlement to the willfulness exception plausible."

The Second Circuit went on to determine that Whiteside failed to allege facts plausibly entitling him to such an extension, thereby rejecting his second argument. It explained that a claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." The fine line between conceivable and plausible rests on the "reasonable expectation that discovery will reveal evidence of the wrongdoing alleged, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'"

The Court noted that Whiteside asked it to infer willfulness from the mere fact that he was asked for a period of time to perform non-exempt job responsibilities notwithstanding the position he worked in having been classified

as exempt. Nowhere in Whiteside's various iterations of his complaint did he allege: (i) whether his salary was adjusted to reflect his non-exempt status; (ii) whether he complained of his non-exempt status and lack of overtime pay; (iii) any details about who asked him to change his roles; (iv) that his managers said anything acknowledging the alleged violation; or (v) facts showing his manager's awareness of the violation. Accordingly, the Second Circuit determined that the FLSA's general two-year statute of limitations governed Whiteside's FLSA claims and that those claims were thus properly dismissed by the WDNY as untimely.

Implications For Employers

Following the Second Circuit's alignment with the Sixth Circuit and against the Tenth Circuit on the issue of willfulness under the FLSA, it is possible that a case will arise in the near future through which the Supreme Court will be asked to consider this question and resolve the current Circuit Court split. Until this occurs, however, employers (and their counsel) located in the Second Circuit should be mindful of a plaintiff's obligation to plead facts that raise a plausible inference of a willful violation of wage and hours laws in order to benefit from the three-year statute of limitations exception under the FLSA. In deciding whether to move to dismiss a complaint based on a statute of limitations defense, employers should determine whether the complaint alleges facts sufficient to meet this heightened pleading standard. In the absence of factual allegations in the complaint indicating that an employer was on specific notice or disregarded warnings of an apparent violation (*i.e.*, where an employer fails to reclassify a worker from exempt to non-exempt after the worker raises an issue of concern), a plaintiff would only be entitled to the general two-year limitations period under the FLSA. In such an instance, an employer would be well served discussing with counsel whether a motion to dismiss might be strategically advantageous to escape a stale claim.

With that said, at least in New York State, if a plaintiff sues under the FLSA and adds a pendent state claim under the New York State Labor Law, the plaintiff will have the benefit of the longer New York State limitations period of six years in connection with claimed remedies for underpayment of wages resulting, among other things, from improper classification of workers as exempt from overtime.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice concerning wage and hour claims brought pursuant to the FLSA and/or the New York Labor Law, or such other employment law questions that should arise from time to time and as needed.