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Client Alert

A report for clients and friends of the Firm

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Separation Agreements and The Release Of FMLA Rights and Claims: The Landscape Is Uncertain

Is the waiver and release of a Family and Medical Leave Act (FMLA) cause of action in a separation agreement enforceable? The answer depends on where an employer is located, particularly since most federal appellate courts have not addressed this issue. Notably, the text of the statute itself is silent concerning the waiver or settlement of claims, and the applicable U.S. Department of Labor (DOL) regulation simply states "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d). Courts interpreting this regulation have reached different conclusions as to whether the term "rights" includes legal claims, whether the regulation distinguishes between prospective and retrospective waivers of an employee's FMLA rights, and whether FMLA waivers contained in release provisions are enforceable without court or DOL approval.

In *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007) *(Taylor II), aff'g,* 415 F.3d 364 (4th Cir. 2005), the U.S. Court of Appeals for the Fourth Circuit, in a carefully reasoned opinion, reaffirmed its view that the public policy reasons enunciated at the time DOL adopted 29 C.F.R. § 825.220(d) remained sound and, as is the case with other labor standards statutes, held that employees cannot waive *any* of their rights or claims under the FMLA *without* the approval of the U.S. Department of Labor or a court. This decision, however, is contrary to the opinions expressed by federal courts in the Third and Fifth Circuits which have permitted the waiver of rights *and* claims in certain circumstances and is at odds with DOL's current interpretation of its own regulation.

As employers often rely on "form" separation agreements without customizing release provisions to the specific circumstances inherent in each separation/settlement, they may find, to their surprise, that the inclusion of an FMLA release may be unenforceable, perhaps even making the entire settlement agreement voidable. Thus, *Taylor II* reminds us that the "law" governing the waiver and release of employment rights and claims is ever evolving and can well differ, even at the federal level, by jurisdiction. Pragmatically, therefore, except in states falling within the Fourth Circuit, while the situation remains in flux, and each separation/settlement should be individually considered, the inclusion of a retrospective waiver/release of FMLA rights/claims in a separation agreement remains viable today, although not without risks.

A Primer on FMLA Rights and Waivers

In determining whether employees can waive their FMLA rights, courts have distinguished between three different types of rights. *Substantive rights*, such as the right to take leave (including intermittent leave or leave on a reduced work schedule) and the right to reinstatement following such leave, are the basic rights the FMLA provides to covered employees. The waiver of these rights is especially limited. *Proscriptive rights* include the right *not* to be interfered with, or discriminated or retaliated against for exercising one's substantive FMLA rights. Although waiver of these rights is, generally, prohibited, at least one court has found such a waiver permissible. The third category of rights are *remedial rights*, such as rights to the recovery of damages or an employee's right to obtain equitable relief for the violation of substantive and/or proscriptive rights. There is a dispute as to whether these are technically "rights" under the FMLA, and, recently, the DOL has opined that these should be considered "claims" not subject to 29 C.F.R. § 825.220(d)'s prohibition on the waiver of "rights."

Leaving aside the question whether a specific category of FMLA rights is enforceable in a release *without* court or DOL approval, courts have issued conflicting opinions as to whether the waiver of rights should be limited to the release of past (retrospective) or future (prospective)

claims. Generally, retrospective waivers are viewed more favorably than prospective waivers, in which employees agree to forego future protections under the FMLA including the right to assert legal clams for violations that occur *after* the release is signed. No court that has addressed these issues has permitted employers to obtain a prospective waiver of an employee's *substantive* FMLA rights.

The Fourth Circuit's Decision in *Taylor*

In *Taylor II*, the Fourth Circuit Court of Appeals (which has jurisdiction in Maryland, Virginia, West Virginia, North Carolina and South Carolina), upon the request of the DOL, reconsidered its earlier holding that unsupervised FMLA waivers were unenforceable and reaffirmed its decision that "without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act." 2007 U.S. App. LEXIS 15846, at *21 22. As the *Taylor II* Court explained, "[B]ecause the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute." Thus, "[t]he settlement or waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate'." As such, the Fourth Circuit's decision arises from a broad interpretation of "rights" under the FMLA, the considered view that statutes setting labor standards are distinctly different from anti-discrimination statutes, and is based on an analysis of the DOL's original interpretation of the regulation.

As employers have struggled to understand whether unsupervised waivers of FMLA claims are enforceable, the DOL's position has evolved and, perhaps, is a key source giving rise to the confusion. When the regulations were first promulgated, the DOL advocated that the FMLA, like the FLSA, prohibited the unsupervised waiver of rights and claims both retrospectively and prospectively. Subsequently, in 2003, the DOL argued in *Faris v. Williams WPC I, Inc.*, 332 F.3d 316 (5th Cir. 2003), that the regulation would allow an employee to waive prospectively his/her proscriptive and remedial rights. DOL has since revised that view, arguing in *Taylor II*, that 29 C.F.R. § 825.220(d) bars only the waiver of prospective substantive rights, but permits the unsupervised settlement of retrospective FMLA rights and claims.

Other Courts' Interpretations of 29 C.F.R. § 825.220(d)

Although the Fourth Circuit requires court or DOL approval for the waiver of any rights or claims under the FMLA, other courts have not been so restrictive.

In *Faris, supra*, the U.S. Court of Appeals for the Fifth Circuit (which has jurisdiction in Louisiana, Mississippi and Texas) placed the fewest restrictions on employers, ruling that the phrase "rights under the FMLA" only prohibited the prospective (future) waiver of substantive rights. Therefore, in the Fifth Circuit, without court or DOL approval, an employee can lawfully waive his/her retrospective FMLA claims as well as waive prospectively his/her proscriptive rights (*e.g.*, the right to be free from employer retaliation for asserting FMLA rights) and remedial rights (*e.g.*, the right to sue and the right to recover money damages). In addition, the U.S. Courts of Appeals for the Sixth and Ninth Circuits have each enforced FMLA release provisions retrospectively after applying general contract principles, but did so without analyzing 29 C.F.R. § 825.220(d). *Halvorson v. Boy Scouts of Am.*, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. May 3, 2000); *Schoenwald v. ARCO Alaska Inc.*, No. 98-35195, 1999 U.S. App. LEXIS 20955 (9th Cir. Aug. 30, 1999).

More recently, in *Dougherty v. Teva Pharmaceuticals USA, Inc.*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 11, 2007), decided just three months before *Taylor II*, the federal district court for the Eastern District of Pennsylvania held that the waiver of legal claims for *future* violations of the FMLA required court or DOL approval, but that employers could obtain from employees waivers of rights or claims that had already accrued without court or DOL approvals. This decision reflects the DOL's current interpretation of 29 C.F.R. § 825.220(d), however it does not have substantial precedential value in its own right because it is merely the analysis of one district court judge.

Guidance for Employers

Because many appellate courts, including the First, Second, and Eleventh Circuits, have not directly addressed this issue, most employers cannot determine with certainty whether, and to what degree, a release of an employee's FMLA rights or claims will be enforceable. For now, in those jurisdictions that have not addressed the issue, employers are probably best served by following the DOL's current view of the regulation, as described in *Dougherty*, that is, the retrospective release of FMLA rights or claims, without court or DOL approval, is likely to be enforceable. Employers in the Fourth Circuit (which includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia) must adhere to *Taylor*, and will not be able to enforce a waiver of FMLA rights/claims in a separation agreement without DOL or court approval. Employers in states in the Fifth Circuit (*i.e.*, Louisiana, Mississippi and Texas) may, however, continue to include an FMLA waiver without concern. Employers in the Ninth Circuit should take note of a 2006 federal district court decision that did *not* follow *Schoenwald* and, instead, followed *Taylor's* reasoning that 29 C.F.R. § 825.220(d) prohibits the unsupervised settlement of retrospective FMLA rights/claims, as well as bars their prospective waiver. *Brizzee v. Fred Meyer Stores*, No. CV04-1566-ST, 2006 U.S. Dist. LEXIS 54058 (D. Or. July 17, 2006). Finally, in light of this ambiguity, employers should consider including in their settlement agreements an employee acknowledgement that s/he has received all leaves (paid or unpaid) to which they may have been entitled.

For many employers, this lack of clarity is troublesome and requires that they stay up-to-date with current judicial opinions addressing this issue. The Fourth Circuit's recent decision in *Taylor II* serves notice that "form" settlement agreements with overbroad release and waiver provisions carry unanticipated perils and may even lead a court to hold the entire release unenforceable. Therefore, it is advisable that all settlement agreements include a severability clause that permits a court to enforce the remainder of the agreement while giving no effect to a particular provision deemed illegal, void, or unenforceable. Please contact your Proskauer relationship attorney if you have any questions concerning, or would like us to review, your "form" settlement agreement.

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