

## FOURTH CIRCUIT REAFFIRMS PROHIBITION ON PRIVATE RELEASES OF FMLA CLAIMS

On July 3, 2007, a divided panel of the U.S. Court of Appeals for the Fourth Circuit reinstated a decision it rendered in 2005, but later vacated, that employers cannot enforce a release of claims under the Family and Medical Leave Act (FMLA) unless the release has been approved by a court or the U.S. Department of Labor (DOL).

The court's original opinion, discussed in our Employment Law Update for September 2005 (<http://www.nexsenpruet.com/assets/attachments/249.pdf>), interpreted an FMLA regulation written by the DOL, 29 C.F.R. § 825.220(d). The court ruled that based on the regulation, the plaintiff Barbara Taylor's post-dispute waiver of her FMLA claims contained in a severance agreement was invalid because it was not supervised by a court or the DOL. The regulation provides that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA."

### Response to Original Decision

Following the Fourth Circuit's 2005 ruling, Progress Energy petitioned for reconsideration, arguing that 29 C.F.R. § 825.220(d) barred only prospective releases of FMLA claims. The Secretary of Labor filed an *amicus curiae* (friend of the court) brief in support of Progress Energy's petition, asserting that the Fourth Circuit had misread the regulation.

According to the Secretary, the DOL has never interpreted the regulation to apply to a private settlement of FMLA claims arising from past alleged violations. The Secretary expressed concern that the result of the opinion would be to increase the burden on the DOL in supervising FMLA settlements and to harm employees by delaying resolution of disputes. The U.S. Chamber of Commerce and the Society for Human Resource Management also filed briefs in support of Progress Energy's position.

### Court Disagrees With Department of Labor

The Fourth Circuit granted Progress Energy's motion, vacated its previous decision, and ordered a panel rehearing to consider the arguments raised by the DOL. The Fourth Circuit, however, rejected the DOL's argument that the regulation prohibits only the prospective waiver of FMLA rights, noting that the word "waive" has a retrospective connotation.

Rejecting the DOL's comparison of the FMLA to federal anti-discrimination laws that permit waiver of claims, the Fourth Circuit held that the FMLA is more like the Fair Labor Standards Act (FLSA), which does not allow private settlements of claims to be enforceable without court or DOL approval. According to the Court, the FMLA is a labor standards law that provides minimum protection for employees by guaranteeing leave rights.

The Court reasoned that private settlements of FMLA claims undermine the purpose for providing minimum protection because employers would “have an incentive to deny FMLA benefits if they could settle violation claims for less than the costs of complying with the [FMLA].” Deciding that it was right the first time, the Fourth Circuit reinstated its 2005 opinion.

## Meaning For Employers in the Carolinas

Progress Energy has petitioned the full Fourth Circuit to rehear the case. However, for the time being, to obtain an air tight release of an employee’s FMLA claims, an employer must have court or DOL approval.

In light of Progress Energy’s petition, the DOL has taken the position that its officers will not review or approve releases. There is much speculation that the case will be appealed to the U.S. Supreme Court because courts in other parts of the country have come to different conclusions regarding the meaning of 29 C.F.R. § 825.220(d).

Under these circumstances, Carolinas employers have limited options if they want to use severance agreements that address actual or potential FMLA claims. An employer may consider including in its release an acknowledgment from the departing employee that she has received all of the rights and benefits under the FMLA to which she is entitled and that she is not aware of any FMLA claims. Although this language would not bar the employee from filing an FMLA claim, it may enable the employer to argue effectively that the employee has received all benefits due.

In the meantime, until a final decision is issued in *Taylor*—or until the regulations are revised by the DOL—employers in the Fourth Circuit must recognize that they may not be able to obtain an enforceable release of FMLA claims from employees separating employment.

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## CHECKLIST OF OTHER ISSUES IN RELEASES AND SEVERANCE AGREEMENTS

In addition to the rules relating to private releases of FMLA and FLSA claims discussed above, employers should keep in mind that:

- Most states prohibit the release by private agreement of workers' compensation and unemployment compensation claims.
- According to the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB), a release cannot include language that prohibits an employee from filing a charge of discrimination or participating in an investigation or proceeding before the EEOC or the NLRB.
- A release of claims under the Age Discrimination in Employment Act (ADEA) must, among other things: advise the individual in writing to consult with an attorney; give the individual at least 21 days to consider the agreement (at least 45 days if a group is involved); and provide for a seven-day revocation period.

Severance agreements usually address more than the release of actual or potential claims. Below is a partial listing of additional issues that should be considered in severance agreements:

- Severance pay, business expenses, accrued vacation, and health insurance, and outplacement support;
- Cooperation during severance period;
- Restrictions on reapplying with the employer and prohibition on disparaging the employer;
- Return of company property;
- Non-disclosure, non-solicitation, and non-compete clauses, and injunctive relief;
- Whether disputes will be resolved by arbitration or litigation;
- Governing law;
- No admission of liability; and
- Assignment clauses.

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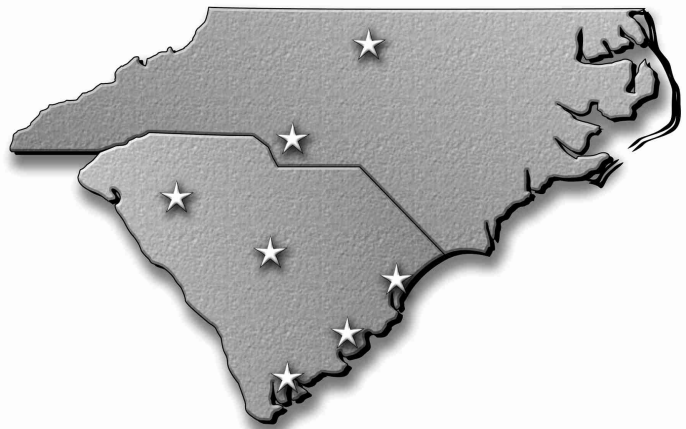
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