

PRIVATE RELEASES OF FMLA CLAIMS REJECTED

Employers routinely ask employees to sign general releases of potential claims in exchange for severance packages or to resolve employment-related disputes. However, a recent decision from the U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over North and South Carolina, calls into question the validity of the portions of releases involving claims under the Family and Medical Leave Act (FMLA). In *Taylor v. Progress Energy, Inc.* (July 20, 2005), the Fourth Circuit refused to enforce the waiver of an FMLA claim because the waiver was not approved by either the U.S. Department of Labor (DOL) or a court.

Background

Barbara Taylor worked for Progress Energy in a clerical position at its Brunswick Nuclear Plant in North Carolina. Starting in April 2000, Taylor began experiencing severe pain and swelling in her right leg and she missed a significant amount of work. On several occasions, Taylor inquired about using FMLA leave for these absences. She was told, incorrectly, that she did not qualify for FMLA leave.

Several months later, Taylor had surgery to remove an abdominal mass and she was out of work for six weeks. Progress told her that this absence was only partially covered by the FMLA.

As a result of her absences, Taylor received a written warning and poor evaluation. Taylor asked Progress to correct her personnel records to reflect that her absences were protected by the FMLA, but Progress refused. Two weeks later, Progress informed Taylor that she was being terminated as part of a reduction-in-force.

Progress offered Taylor a severance package on the condition that she sign a severance agreement containing a general release of all claims. Although the FMLA was not mentioned in the agreement, the release was broad enough to cover any FMLA claim. Taylor signed the agreement and received about \$12,000 in severance pay.

District Court and Fourth Circuit Decisions

When Taylor sued Progress under the FMLA, the company moved for summary judgment, claiming that the general release signed by Taylor barred her claim.

Taylor argued that a DOL regulation, 29 C.F.R. § 825.220(d), barred enforcement of the release. The regulation provides that “employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA” without prior DOL or court approval.

The district court granted summary judgment for Progress, following the reasoning of the U.S. Court of Appeals for the Fifth Circuit in its 2003 decision in *Faris v. Williams WPC-1, Inc.* In that case, the Fifth Circuit held that 29 C.F.R. § 825.220(d) applies only to the *prospective* waiver of FMLA rights (*i.e.*, the waiver of future claims).

On appeal, the Fourth Circuit reversed, holding that 29 C.F.R. § 825.220(d) prohibits *all* private (non-DOL or court-approved) releases of FMLA claims, whether the releases are prospective or, like Taylor's, retrospective (*i.e.*, for claims that pre-date the release).

In analyzing the DOL regulation, the Fourth Circuit concluded that the approach to waivers of Title VII and Age Discrimination in Employment Act (ADEA) claims does not apply to FMLA claims. Title VII and ADEA claims can be waived in private agreements (although ADEA waivers must follow procedures set out in the Older Workers Benefit Protection Act). According to the Fourth Circuit, the DOL concluded that Congress intended for the FMLA's enforcement scheme to parallel that of the Fair Labor Standards Act, which states that rights guaranteed by that statute can only be waived under DOL or court supervision.

The Fourth Circuit also rejected Progress's argument that Taylor ratified the release of her FMLA claims by retaining the \$12,000 she received in exchange for the release.

The Impact In North and South Carolina

Unless *Taylor* is overturned, Carolinas employers have limited options if they want to offer a severance package to an employee with a potential FMLA claim. In most cases, the need for an employee's release of FMLA claims will not be great enough to risk getting the DOL or a court involved. Employers in North and South Carolina should carefully review the wording of severance agreements and releases and consider their post-*Taylor* options regarding FMLA claims.

BENEFITS ALERT— NEW HIPAA COMPLIANCE REQUIREMENTS FOR GROUP HEALTH PLANS

Employers who sponsor and administer employee health plans need to take action to comply with two new sets of rules under the Health Insurance Portability and Accountability Act (HIPAA).

First, the DOL recently finalized regulations addressing the portability of group health plan coverage. These regulations clarify certain procedural, timing, and content requirements applicable to the various notices a group health plan must provide plan participants before imposing a pre-existing condition exclusion. The portability regulations also require inclusion of an educational statement in the HIPAA certificate of creditable coverage that employers must give plan participants upon their loss of plan coverage.

The DOL included in the regulations model notice and plan language that employers may use to satisfy the new requirements. A revised model certificate of creditable coverage is available on the DOL's website at <http://www.dol.gov/ebsa/hipaamodelnotice.doc>.

Employers must comply with these new requirements for plan years that begin on or after July 1, 2005 (or January 1, 2006 for calendar year plans).

Another important HIPAA deadline is approaching for small health plans: the April 20, 2006, deadline for compliance with the HIPAA Security Standards. (Small health plans are defined as those with gross receipts of \$5 million or less; the compliance deadline for large health plans was April 20, 2005.)

Like the HIPAA Privacy Standards, the HIPAA Security Standards are another set of rules under the Administrative Simplification provisions of HIPAA that require covered entities, including health plans, to implement administrative, technical, and physical safeguards to protect the security of electronic protected health information ("E-PHI").

Bringing health plans into compliance with these HIPAA Security Standards has proved to be a time-consuming process that involves a detailed risk assessment; preparation of policies and procedures, plan amendments, and business associates' contract amendments; employee training; and implementation of technical security measures.

Employers should take steps to comply with these new requirements.

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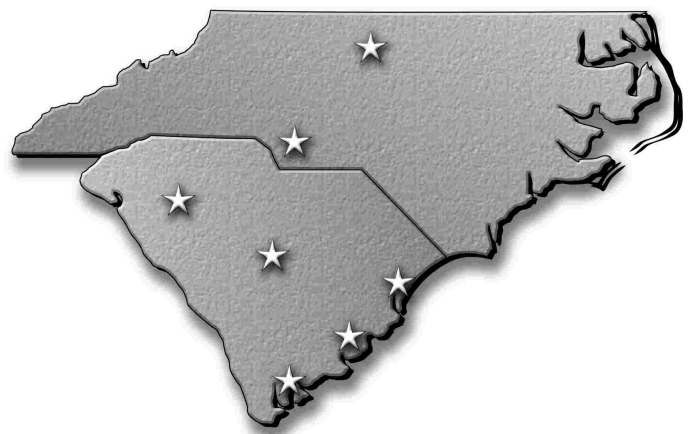
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