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Resolving Cases Through Settlement: The Fourth Circuit Finds That 29 C.F.R. § 825.220(d) Prohibits Waiver of Retrospective Rights Under the Family and Medical Leave Act

The Fourth Circuit recently issued an opinion that could have a significant impact on settling cases involving the Family and Medical Leave Act (FMLA) of 1993 when it heard the case of *Taylor v. Progress Energy Inc*.[1] In 29 C.F.R. § 825.220(d), the Code of Federal Regulations specifically provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." In *Taylor*, the Fourth Circuit addressed the issue of whether this regulation prohibits both prospective and retrospective waiver of all FMLA rights. The *Taylor* court held that the plain language of this regulation prohibits both prospective and retrospective waiver, which includes any claims for a past violation of the FMLA. Although the U.S. Supreme Court has yet to consider this issue, the Fifth Circuit has arrived at a different conclusion than the one reached by the Fourth Circuit.[2] These differing conclusions by the two courts suggest that the Supreme Court could address this circuit split in authority, or the Department of Labor (DOL) might modify the regulation to bring it in line with the department's own interpretation.

In 2005, a panel of the Fourth Circuit heard and issued a decision in *Taylor v. Progress Energy Inc*. (hereinafter referred to as *Taylor I*),[3] holding that 29 C.F.R. § 825.220(d) "prohibits both the prospective and retrospective waiver of any FMLA rights unless the waiver has the prior approval of the Department of Labor or a court."[4] Following *Taylor I*, the employer petitioned for a rehearing en banc, disagreeing with the Fourth Circuit's interpretation of the regulation, and the DOL filed an amicus brief in support of the petition. The Fourth Circuit granted a panel rehearing to allow participation by the DOL and to consider the department's interpretation. In its second consideration of the language in the regulation, a divided panel of the Fourth Circuit issued a second opinion (hereinafter referred to as *Taylor II*). In *Taylor II*, the DOL argued that 29 C.F.R. § 825.220(d) barred only a prospective waiver of FMLA rights, thus posing no barrier to the settlement of disputes related to past violations (or allegations thereof). However, the *Taylor II* panel determined that the DOL's interpretation was inconsistent with the plain language of its own regulation. Therefore, based on the plain language of the regulation, the Fourth Circuit reinstated the opinion reached in *Taylor I* and held that employers cannot induce prospective or retrospective waivers of FMLA rights.

The court held that "rights under the FMLA" include substantive, proscriptive, and remedial rights, defining them as follows:

> Substantive rights include an employee's right to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave. Proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights. The remedial right is an employee's "[r]ight of action," or "right … to bring an action" or claim, "to recover damages or [obtain] equitable relief" from an employer that violates the [a]ct.[5]

Therefore, the *Taylor II* court opined that the regulation's specification of "rights under [the] FMLA' refers to all three types of rights, including the right to sue for violations of the FMLA.

The DOL put forth several arguments to support its position that the regulation should not prohibit the settlement or release of claims. First, the DOL argued that "the regulation refers only to the waiver of FMLA '*rights*' and makes no mention of the settlement or release of *claims*."[6] The court rejected this argument and found that the language of the regulation does not support a "distinction between prospective and retrospective waivers."[7]

Second, the DOL contended that the regulation "does not prohibit the retrospective waiver or settlement of a claim because the 'decision to bring a claim' is not a right under the FMLA." The court rejected this argument on two bases: (1) the right to bring an action is a right under the FMLA, as provided in 29 U.S.C. §§ 2617(a)(2), (a)(4); and (2) although the regulation "does not prevent an employee from deciding not to exercise the right to sue, it does prevent her from waiving or relinquishing that right."[8]

Third, the DOL argued that the court's reading of the regulation was inconsistent with the public poli-

cy "encouraging settlement of claims in employment law."[9] Again, the court disagreed, finding that the FMLA was enacted to fit "'squarely within the tradition of the labor standards laws that … preceded it,' such as the FLSA and the Occupational Safety and Health Act."[10] Like the FLSA, the court found that private settlements of FMLA claims would motivate employers to deny FMLA benefits in hopes of settling claims for less than the cost of compliance, thereby gaining a competitive advantage over competitors who comply with the FMLA. The court found that the FMLA was not similar to Title VII and the Americans with Disabilities Act, both of which permit retrospective waivers, because those statutes do not have an implementing regulation like § 825.220, are not labor standards laws, and the policies underlying those statutes are furthered by private settlements.

The court also found that, when the regulation was promulgated, the DOL specifically rejected proposed amendments that would have clearly allowed waivers and releases in connection with settlement of FMLA claims.[11] The *Taylor II* court rejected the DOL's argument that requiring supervision of settlement of FMLA claims would burden the DOL and the courts. The court found "that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner."[12]

In her dissent, Judge Duncan opined that the use of the word "rights" in the regulation created ambiguity, and thus, the court should defer to the DOL's interpretation of that term. Judge Duncan found that the Fourth Circuit's position in both *Taylor I* and *Taylor II* was reasonable, but she also found that the DOL's belated amicus brief, which disagreed with the court's position, shifted the court's inquiry. Thus, Judge Duncan stated her belief that the court must determine whether its interpretation was "compelled by the language of the regulation," rather than examining its interpretation for reasonableness.[13]

The real significance of *Taylor II* for employment lawyers is its effect on settling cases and disputes between employees and their employers. This opinion, in effect, deprives employers of the security they desire in settling disputes with employees. Therefore, employment practitioners must be clear in drafting release agreements and communicating to their clients whether such release agreements waive any claims for past violations of the FMLA. A release agreement may not contain a waiver of both the employee's prospective and retrospective FMLA rights—at least in the Fourth Circuit.

In light of the Fourth Circuit's decision in *Taylor II*, there are two possible courses of action that may permit the waiver of retrospective FMLA rights. First, the U.S. Supreme Court could address the circuit split over this issue and choose to adopt the reasoning used by the Fifth Circuit in *Farris v. Williams WPC-1 Inc*. On the other hand, the DOL may clarify the language of 29 C.F.R. § 825.220(d) to permit the waiver of retrospective rights under the FMLA. Employment practitioners should pay special attention to this emerging issue and stay attuned to the enforceability of any waiver of claims for past violations of the Family and Medical Leave Act. **TFL**

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Endnotes

[1]*Taylor v. Progress Energy Inc*., 493 F.3d 454, No. 04-1525, 2007 WL 1893362 (4th Cir. July 3, 2007).

[2]*Faris v. Williams WPC-I Inc*., 332 F.3d 316 (5th Cir. 2003) (holding that the regulation applied only to prospective waiver of substantive rights under the statute and did not prohibit post-dispute settlement of claims or waiver of claims for money damages).

[3]*Taylor v. Progress Energy Inc*., 415 F.3d 364 (4th Cir. 2005) (hereafter *Taylor I*).

[4]*Taylor*, 493 F.3d at 456 (citing *Taylor*, 415 F.3d at 369).

[5]*Id*. at 457.

[6]*Id*. at 458. (Emphasis in original.)

[7]*Id* at 458.

[8]*Id*. at 459.

[9]*Id*. at 460.

[10]*Id*. (citing S. Rep. No. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 7).

[11]*Id. at 461* (citing *Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993*, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995)).

[12]*Id*. at 462.

[13]*Id*. at 463.