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One Minute Memo®

Fourth Circuit Reinstates its Decision that FMLA Rights may not be Waived Without Court or DOL Approval

On July 3, 2007, the Fourth Circuit Court of Appeals issued a divided opinion, reinstating a 2005 ruling, which the Court had vacated in 2006 in order to hear further arguments from the employer and the United States Department of Labor (DOL). The DOL enforces the FMLA and wrote the regulations that interpret the FMLA. In the opinion, *Taylor v. Progress Energy Inc.*, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007), the Court held that FMLA regulation, 29 C.F.R. §825.220(d), prohibits employees from waiving rights either prospectively (in the future) or retrospectively (as part of a severance agreement, for example), without first obtaining the approval of the DOL or a court. The regulation in question states: *"Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."*

In choosing to reinstate its earlier ruling, reported at 415 F.3d 364 (4th Cir. 2005), the Fourth Circuit unexpectedly rejected the interpretation of the DOL regarding the regulation the DOL drafted. The DOL argued in *Taylor* and in a second case, *Dougherty v. TEVA Pharms. USA Inc.*, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 11, 2007), that the regulation only prohibits the waiver of prospective (future) rights under the FMLA. In the *Dougherty* case, a Pennsylvania district court adopted the DOL's interpretation of 29 C.F.R. §825.220(d).

In concluding that it had ruled correctly the first time, the *Taylor* majority found unpersuasive the arguments advanced by the DOL. DOL argued that (i) its interpretation is consistent with the express wording of the regulation; (ii) it had never taken a position regarding whether the regulation excludes the settlement of claims from its waiver of rights prohibition; and (iii) requiring DOL or court approval of all FMLA claims waivers will create an added burden and harm employees by delaying a final resolution in their cases. The Court rejected all three arguments.

With the rulings in *Taylor*, *Dougherty*, and an earlier ruling by the Fifth Circuit Court of Appeals, *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316 (5th Cir. 2003), there are currently three distinct interpretations of 29 C.F.R. §825.220(d). In Faris, the Fifth Circuit held that the regulation only prohibits the waiver of a current employee's prospective substantive rights (*i.e.*, the right to the leave itself and the right to be reinstated to the same or an equivalent position), as opposed to the right to sue or recover damages under the FMLA.

Despite the differing interpretations, it is not likely that the United States Supreme Court will agree to hear an appeal in *Taylor* to resolve the divergent opinions, because only

two federal circuits thus far have addressed the question. Nevertheless, the Fourth Circuit's analysis in *Taylor* provides, to date, the most expansive exploration by a federal appeals court of what meaning should be given to the regulation's waiver of rights prohibition, and it presents troubling issues for employers seeking certainty when they agree to provide severance or settle claims.

What this means as a practical matter is that employers in the Fourth Circuit (which includes the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia) who wish to settle FMLA claims with employees may not do so with a release and waiver. Rather, they must go to the DOL or get court approval in order for the waiver to be enforceable. In addition, employers in jurisdictions other than states in the Fifth Circuit (Louisiana, Mississippi, and Texas) must also proceed with caution when entering into waiver agreements. The statute of limitations for an FMLA claim is two years for a non-willful violation and three years for a willful violation. Damages include lost pay and benefits, liquidated damages, attorneys' fees, and expert fees.

Finally, any hope that the DOL would provide relief to employers by changing the regulation seems unlikely, at least in the foreseeable future. On June 27, 2007, the DOL issued a 345 page report summarizing the more than 15,000 comments it received in response to its December 1, 2006 Request for Information on the current regulations including the regulation on waivers. In that report, DOL announced that it would *not* be issuing proposed revisions. Accordingly, for the time being, employers will need to make certain that they follow current case authority in the applicable jurisdiction.

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