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THE FOURTH CIRCUIT HOLDS THAT EMPLOYEES CANNOT WAIVE FAMILY AND MEDICAL LEAVE ACT RIGHTS WITHOUT PRIOR DEPARTMENT OF LABOR OR COURT APPROVAL

In a July 20, 2005 decision, the Court of Appeals for the Fourth Circuit held that United States Department of Labor ("DOL") regulation 29 C.F.R. § 825.220(d) prohibits the waiver or release of any right under the Family and Medical Leave Act ("FMLA"), absent DOL or court approval. (*Taylor v. Progress Energy, Inc.*) Section 825.220(d) was enacted by the DOL as part of its authority to promulgate regulations necessary to administer the FMLA and provides in pertinent part that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." This decision may affect any employer who, for example, requires a departing employee to sign a general release and waiver in order to receive severance benefits or as a condition to amicably resolving a threatened or pending legal action.

While the plaintiff had been employed by Progress, the company repeatedly denied her request for leave under the FMLA for her absences associated with a medical condition. Her health-related absences resulted in a poor performance review and a less than average pay increase. Shortly thereafter, the plaintiff was selected for termination as part of the company's reduction-in-force based, in part, on her past performance. In exchange for additional benefits, including $12,000 in monetary compensation, the plaintiff signed a general release of all claims, including those arising under federal law. Despite the release and the fact that the plaintiff did not return the $12,000, the plaintiff initiated an FMLA action in the federal district court for the Eastern District of North Carolina. The district court granted summary judgment to the employer on the basis of the release that the plaintiff had signed, relying on a prior Fifth Circuit decision holding that § 825.220(d) prohibits only prospective waivers of substantive FMLA rights. The Fourth Circuit reversed the district court's grant of summary judgment, allowing the plaintiff to proceed with her FMLA claim against her employer on the grounds that § 825.220(d) bars all waivers and releases of all FMLA claims, unless prior court or DOL approval is obtained.

The Fourth Circuit, disagreeing with the Fifth Circuit's prior ruling, concluded that the plain language of § 825.220(d) prohibits the retrospective and prospective waiver or release of all FMLA rights, both substantive (the right to take the leave) and proscriptive (the anti-discrimination and anti-retaliation provisions). In support of its reading of § 825.220(d) , the Fourth

Circuit concluded that the DOL intended the regulation to bar all waivers of all FMLA rights, as the DOL had rejected proposals submitted during the rule- making process to allow for waivers and releases in connection with the settlement of FMLA claims and as part of severance packages, as allowed by Title VII and the Age Discrimination in Employment Act. In rejecting such proposals as part of its regulations, the DOL explained that the FMLA's enforcement scheme is intended to mirror that of the Fair Labor Standards Act ("FLSA"), which prohibits the waiver of guaranteed FLSA rights absent court or DOL approval.

The Fourth Circuit then concluded that § 825.220(d), as promulgated by the DOL and interpreted by the Fourth Circuit, is valid under Supreme Court precedent governing deference to agencies charged by Congress with enforcing a federal statute. In doing so, the Fourth Circuit rejected Progress' arguments that such an interpretation is inconsistent with the public policy favoring settlement and that it is arbitrary and capricious. The Fourth Circuit reasoned that the DOL's bar on private waivers or releases is consistent with the purpose of the FMLA itself, that is, to set a minimum standard for family and medical leave for all covered employees, and that to allow private waivers or releases could open the door for unscrupulous employers to systematically violate the FMLA and gain a competitive edge by buying out FMLA claims at a discounted rate. Thus, the Fourth Circuit held that the absolute bar against waiver or releases of FMLA rights, as set forth in § 825.220(d), is based on a permissible construction of the FMLA.

The court's ruling has far-reaching implications on the settlement of FMLA lawsuits, as well as general releases offered as part of severance packages and in connection with the settlement of non-FMLA claims, both of which typically include a release of all claims, including FMLA claims. Under the *Progress* decision, however, in order to be enforceable *vis-á-vis* FMLA claims, the settlement and/or release of FMLA claims must have the prior approval of either the court or the DOL – at least for those employers in the Fourth Circuit, which includes the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia. While this approval may not be so difficult to obtain where an FMLA action has already been initiated and the DOL or court is already involved, the decision leaves open the question of how an employer can ensure a valid release of FMLA rights as part of a general release in the context of severance packages or pre-litigation resolutions of claims. Indeed, many employers may be understandably hesitant to voluntarily contact the DOL or a court when litigation does not already exist. At a minimum and as an alternative, it may be advisable to add language to your form separation agreements whereby the employee acknowledges that s/he has received all leave to which s/he may have been entitled, including leave pursuant to the Family and Medical Leave Act and any similar state laws, and that s/he has not been discriminated or retaliated against for requesting and taking such leave. Finally, the Fourth Circuit left open the question of whether an employee who pursues an FMLA claim after executing a general release can be required to tender back some or all of the paid consideration, and thus, until a court or government agency says otherwise, it might be prudent to also include a tender-back provision in your form separation agreements.

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For more information on this decision and its practical impact, please contact **Claudia M. Cohen** at 212/351-4383 or **William J. Milani** at 212/351-4659 in the firm's **New York** office. Ms. Cohen's e-mail address is **ccohen@ebglaw.com**, and Mr. Milani's is **wmilani@ebglaw.com**. New York Associate **Erin Carney D'Angelo** assisted in the preparation of this Alert.