

**IF I SIGN THIS RELEASE, I CAN STILL SUE YOU LATER,  
RIGHT? THE CURRENT (AND FUTURE) STATUS OF  
FMLA WAIVERS  
SHANNON G. MINK\***

I. INTRODUCTION: A CIRCUIT SPLIT

Jane has been a supervisor at X-Corp for seven tumultuous years. In the past year, she has been late numerous times without calling and without good reason. She has been warned verbally several times, and once in writing, about her excessive tardiness. Jane's manager, Bob, has also had a number of complaints about her attitude and rudeness. Bob has discussed the problems with Jane, but nothing has changed. Jane's behavior is disrupting the office environment and harming morale within her department. Bob is sick and tired of having to deal with the drama Jane creates every day and discusses the situation with human resources and corporate counsel. All decide the best solution is to forgo further disciplinary action and discharge Jane. At the suggestion of corporate counsel, Bob offers Jane two weeks' pay and a check for \$1000 in exchange for signing an agreement which includes a waiver releasing X-Corp from any claim Jane may have against the company. Jane, who is aware that her standing at X-Corp is in danger, decides this is a good deal and agrees to sign. The end. Or is it?

This scenario is not uncommon; across the country employers are faced with similar situations all the time. Chances are most people who have worked in "corporate America" have a Jane story. Sometimes the only solution an employer has is to let the employee go. When an employer discharges an employee, the employer will often ask the employee to sign a separation agreement.<sup>1</sup> These agreements usually include waiver provisions, releasing the employer from claims the

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\* Shannon G. Mink is an evening student at Capital University Law School, class of 2009. I would like to thank the Law Review Editors and Professor Floyd Weatherspoon—your suggestions and help were greatly appreciated.

<sup>1</sup> John F. Lomax, Jr. & John Scalia, *Fourth Circuit Rules that Employees Cannot Waive their FMLA Rights without Court or DOL Approval*, GREENBERG TRAURIG ALERT, July 2005, <http://www.gtlaw.com/pub/alerts/2005/0707.asp>.

employee may have in exchange for a severance package.<sup>2</sup> Such agreements generally include releases of the Family and Medical Leave Act (FMLA) claims.<sup>3</sup> A waiver or release “is a contract in which the employee knowingly and voluntarily waives the right to assert claims against the employer stemming from the employment relationship.”<sup>4</sup> When discharging an employee, it is generally recommended that the employer obtain a release to “reduce exposure to post-employment litigation.”<sup>5</sup> Waivers of FMLA claims can also be included in broad releases that cover “all claims” and in private settlement agreements.<sup>6</sup> Regardless, whether in a severance agreement or a private settlement, all such waivers have the potential to be problematic.

The statute is silent on the issue of waivers, but the Code of Federal Regulations at 29 C.F.R. § 825.220(d) specifically provides that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA.”<sup>7</sup> In July of 2007, the Fourth Circuit in *Taylor v. Progress Energy, Inc.*<sup>8</sup> reaffirmed a prior holding<sup>9</sup> that 29 C.F.R. § 825.220(d),<sup>10</sup> promulgated by the Department of Labor (DOL), “bars the prospective and retrospective waiver . . . of rights under the FMLA, including the right to bring . . . [a] claim for violation of the Act[.]” unless the waiver or release has been approved by a court or the DOL; a

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<sup>2</sup> *Id.* It should be noted that severance packages may include non-monetary benefits in lieu of, or in addition to, cash.

<sup>3</sup> See Jennifer Dellmuth & Melissa Raphan, *United States: Fourth Circuit Holds Department of Labor or Court Approval Required for Release of Family & Medical Leave Act Claims*, MONDAQ BUS. BRIEFING, July 30, 2007, <http://www.mondaq.com/article.asp?articleid=50858>; see also Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000).

<sup>4</sup> Jeffrey S. Klein et al., *Drafting Employment Agreements*, 745 PRACTISING L. INST. 175, 197 (2006).

<sup>5</sup> *Id.*

<sup>6</sup> In this comment, the terms “waiver” and “release” are used interchangeably.

<sup>7</sup> 29 C.F.R. § 825.220(d) (2007).

<sup>8</sup> 493 F.3d 454 (4th Cir. 2007).

<sup>9</sup> *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) [hereinafter *Taylor I*], vacated No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), reinstated 493 F.3d 454 (4th Cir. 2007) [hereinafter *Taylor II*].

<sup>10</sup> 29 C.F.R. § 825.220(d).

requirement added by the Fourth Circuit.<sup>11</sup> This means releases and private settlements made without court or DOL approval are unenforceable if an ex-employee later brings an FMLA claim.<sup>12</sup> Thus, in the Fourth Circuit, the court will not uphold FMLA waivers unless the agreement has prior approval by the DOL or a court.<sup>13</sup> The court's holding applies in both termination and settlement situations. According to the U.S. Chamber of Commerce, in its amicus brief after *Taylor II*, the *Taylor* decision "will have far-reaching and disastrous implications for countless businesses that depend upon the certainty, predictability, and uniformity of federal law."<sup>14</sup>

The Fourth Circuit's holding is in direct contrast with the Fifth Circuit's holding in *Faris v. Williams WPC-I, Inc.*<sup>15</sup> in which the court held that 29 C.F.R. § 825.220(d) does not apply to retrospective rights.<sup>16</sup> Both circuits agree the regulation bars waivers of substantive rights while an employee is actively employed.<sup>17</sup> That is, neither circuit believes an employee should be permitted to waive his or her right to assert a claim in exchange for a benefit *while* employed.<sup>18</sup> This would leave the employee completely unprotected by the FMLA and would clearly undermine the purpose of any employment statute. The issue on which the Fourth and Fifth Circuits disagree is *post*-employment or *post*-dispute waivers.

The Fifth Circuit in *Faris* specifically ruled that, under the regulation, post-employment and post-dispute releases are valid *without* court or DOL approval.<sup>19</sup> According to the Fifth Circuit, the "right to bring a claim" is not a "right" protected by the regulation, and thus no approval is needed.<sup>20</sup>

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<sup>11</sup> *Taylor II*, 493 F.3d at 463.

<sup>12</sup> Carol Wong, *The Family and Medical Leave Act: To Waive or Not to Waive*, 2007 U. ILL. L. REV. 1567, 1580 (2007).

<sup>13</sup> *Taylor II*, 493 F.3d at 463. The court, however, failed to suggest how this would work since neither the DOL nor the federal courts have any procedural process established for such a review. See *infra* note 25.

<sup>14</sup> Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2, *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008) (No. 07-539), 2007 WL 4142604.

<sup>15</sup> 332 F.3d 316, 322 (5th Cir. 2003).

<sup>16</sup> *Id.* at 320.

<sup>17</sup> See *Taylor II*, 493 F.3d at 456–57; *Faris*, 332 F.3d at 322.

<sup>18</sup> See *Taylor II*, 493 F.3d at 456–57; *Faris*, 332 F.3d at 322.

<sup>19</sup> *Faris*, 332 F.3d at 320–21.

<sup>20</sup> *Id.*

On the other hand, the Fourth Circuit held the opposite.<sup>21</sup> The “right to bring a claim” is a protected “right,” and any waiver of that “right” requires prior approval.<sup>22</sup>

The holdings from these two cases have created a split between the circuits. The result of this split is confusion in the world of employment law, which has real world importance. Employers and lawyers in the Fourth Circuit no longer know how to handle releases, and those outside of the Fourth and Fifth Circuits do not know where the law stands today, where it is headed, or how to advise their clients.<sup>23</sup> Not only are future releases unreliable, but past releases may end up being unenforceable, subjecting the employer to the unexpected risk of litigation.<sup>24</sup>

At this point in time, outside the Fourth and Fifth Circuits, it is unclear if FMLA waivers are valid without DOL or court approval. This is not welcome news for employers and attorneys; nor is it good news for the courts or the DOL.<sup>25</sup> Problematic or not, the Fourth Circuit appears to be correct in its interpretation of 29 C.F.R. § 825.220(d); the important point is that the plain language of the regulation quite clearly prohibits waivers of FMLA rights.<sup>26</sup> Nothing in the regulation distinguishes one right from

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<sup>21</sup> *Taylor II*, 493 F.3d at 463.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *Bieber v. THK Mfg. of Am., Inc.*, No. 2:06-CV-481, 2007 U.S. Dist. LEXIS 67033, at \*6-7 (S.D. Ohio Sept. 11, 2007); *Fourth Circuit Reaffirms Prohibition on FMLA Waivers in Release Agreements*, BRIEFING: LAB. & EMP. PRAC. (Winston & Strawn LLP, Chicago, Ill.), July 11, 2007, [http://www.winston.com/siteFiles/publications/Prohibition\\_of\\_FMLA\\_Waivers\\_Reaffirmed.pdf](http://www.winston.com/siteFiles/publications/Prohibition_of_FMLA_Waivers_Reaffirmed.pdf); Kelly D. DeWitt & Todd D. Steenson, *Two Courts of Appeals Raise Significant Cautions for Releases of Employment Claims*, LAB., EMP. & BENEFITS (Holland & Knight LLP, Tampa, Fla.), Oct. 27, 2005, <http://www.hklaw.com/id24660/PublicationId1795/ReturnId31/contentid48023>.

<sup>24</sup> Supplemental Reply Brief on Panel Rehearing of Amici Curiae by the Equal Employment Advisory Counsel et al. at 5-6, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (No. 04-1525), 2006 WL 2503333.

<sup>25</sup> Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc at 14-15, *Taylor I*, 415 F.3d 364 (No. 04-1525) (explaining that the DOL is not prepared to approve every FMLA release and having to approve so many releases would over-burden the Department).

<sup>26</sup> See 29 C.F.R. § 825.220(d) (2007) (“Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.”).

another right.<sup>27</sup> No matter how much a law is disliked or considered overreaching, it cannot simply be ignored—which is exactly what has been happening for years.<sup>28</sup>

A permanent, and the best, solution would be for Congress to amend the FMLA, as it amended the Age Discrimination in Employment Act (ADEA), adding procedures employers must follow in order to effectuate valid waivers.<sup>29</sup> The problem is this could take years. In the meantime, there are still a number of options which, while not ideal, may help employers deal with this situation.

The purpose of this comment is to give the reader an overview of the FMLA waiver problem, a possible long-term solution, and some ideas for employers today. Part II, sections (A) and (B) of this comment cover the Fifth Circuit's decision in *Faris*, explain the court's analysis, and discuss why the court found FMLA waivers do not need approval. Section (C) analyzes where the Fifth Circuit's analysis is incorrect.

Part III, section (A) presents an overview of the facts from the *Taylor* Case. Section (B) covers the holdings from *Taylor I* and *II*, the Fourth Circuit's analysis, and why the court found FMLA waivers require approval.<sup>30</sup> This section also covers the areas where the court's analysis is

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<sup>27</sup> *Id.*

<sup>28</sup> The judiciary interprets the laws that Congress enacts. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). However, if the language of a statute is clear and the court determines that the statute is not unconstitutional, the court cannot ignore the mandates of the statute. *Id.*; see also *United States v. Albertini*, 472 U.S. 675, 680 (1985) (“[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [the plain and unambiguous] language” of a statute.); *Consumer Prod. Safety Comm’n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

<sup>29</sup> See 29 U.S.C. § 626(f) (2000); 29 C.F.R. § 1625.22(a)–(d) (2007). 29 U.S.C. § 626(f) includes a list of requirements necessary for a valid ADEA waiver. These requirements are also covered in detail in Part IV of this comment. 29 C.F.R. § 1625.22 also explains these requirements in more depth.

<sup>30</sup> See *supra* note 9 and accompanying text explaining *Taylor I* and *II* procedural posture.

strong and where it is weak. While the Fourth Circuit's ultimate holding is correct, the court's reasoning is somewhat flawed.

Part IV sets forth a permanent solution: an amendment to the FMLA based on the ADEA's Older Workers Benefit Protection Act (OWBPA). Sections (A) and (B) explain what the OWBPA is and the requirements necessary to draft a valid ADEA waiver. Section (C) demonstrates how an amendment similar to the OWBPA would solve the current problems surrounding FMLA waivers and explains that the requirements in the OWBPA could also work for the FMLA.

Part V notes that an amendment to the FMLA could take years to implement and discusses the fact that employers need help now. This is a problem that employers must deal with today, and while there are no fool-proof solutions, employers can take some steps to help protect themselves. Sections (A) through (C) offer suggestions commentators have made for employers to use during this time of confusion in the law. Section (A) is directed at employers in the Fourth Circuit, section (B) is directed at employers in the Fifth Circuit, and section (C) applies to the rest of the United States. Part VI concludes this comment and briefly discusses the latest developments, including the petition filed by Progress Energy, Inc. to the United States Supreme Court,<sup>31</sup> a brief filed by the Solicitor General of the United States,<sup>32</sup> and the Supreme Court's recent denial of certiorari.<sup>33</sup>

## II. THE FIFTH CIRCUIT AND THE *FARIS* DECISION

### A. *The Facts from Faris*

The facts in the Fifth Circuit's *Faris* opinion are sparse compared to *Taylor*. However, the factual recitation by the court is sufficient to show that the backgrounds in both cases are similar. Carol Faris was an occupational specialist employed with Nextira LLC (Nextira) from November 1997 to June 1999.<sup>34</sup> In June 1999 she was terminated for poor performance.<sup>35</sup> Faris received two weeks pay and \$4063.32 in

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<sup>31</sup> Petition for a Writ of Certiorari, *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008) (No. 07-539), 2007 WL 3129916.

<sup>32</sup> Brief for the United States as Amicus Curiae, *Taylor*, 128 S. Ct. 2931 (No. 07-539).

<sup>33</sup> *Taylor*, 128 S. Ct. 2931.

<sup>34</sup> *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 318 (5th Cir. 2003).

<sup>35</sup> *Id.*

consideration for signing a general release against the company.<sup>36</sup> The release did not specifically mention the FMLA, but the language was broad enough to encompass many federal employment statutes, including the FMLA.<sup>37</sup> As stated previously, FMLA waivers are often included in broad general releases;<sup>38</sup> such was the case here.<sup>39</sup>

Faris kept the money, but later sued Nextira, “asserting she was fired in retaliation for asserting her rights under FMLA.”<sup>40</sup> Nextira moved for summary judgment based on the fact that Faris had signed a release, and Faris countered that 29 C.F.R. § 825.220(d) made the release unenforceable.<sup>41</sup> The district court agreed with Faris that the regulation made FMLA waivers unenforceable and denied Nextira’s motion.<sup>42</sup> The district court held that the “plain language of the regulation dictated that FMLA claims are not waivable.”<sup>43</sup> At this point in the proceeding, the district court certified the questions of law and the Fifth Circuit allowed an interlocutory appeal.<sup>44</sup> Unlike the district court, the Fifth Circuit concluded “that the proper reading of the regulation is that it does not apply to post-dispute claims for damages under the FMLA.”<sup>45</sup>

#### *B. The Fifth Circuit’s Analysis*

The employer in *Faris* argued “that the regulation extends only to ‘substantive rights’ under the FMLA, rather than to post-dispute causes of action for retaliation.”<sup>46</sup> The Fifth Circuit agreed, relying on the fact that the regulation cites as examples of “rights under the law” only substantive rights, such as FMLA right to leave and right to restoration after leave.<sup>47</sup> The court stated “the cause of action for retaliation is unaddressed by these examples, but rather is a *protection for* FMLA rights, the waiver of which

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *supra* notes 2–4 and accompanying text.

<sup>39</sup> *Faris*, 332 F.3d at 318.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 320.

<sup>47</sup> *Id.* at 320–21.

is not prohibited by the regulation.”<sup>48</sup> Thus, the court did not consider the right to assert a claim a “right” under the FMLA at all, but rather just a method of protecting other FMLA rights.<sup>49</sup>

Interestingly, after discussing how the phrase “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA,” must be read in conjunction with the rest of the regulation, the court held: “A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.”<sup>50</sup> The “plain reading” argument is interesting because it would seem that a “plain reading,” examining the actual words, would lead to an opposite conclusion; nonetheless, this is the argument the court uses for its holding. It is also interesting that the court does not consider the text of the statute, merely the regulation when discussing reading in “context.”<sup>51</sup>

Next the court found that public policy supports its holding: “Our reading of the regulation is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts.”<sup>52</sup> The court touched on the ADEA and Title VII and how releases of both Acts are enforced by courts and consistent with public policy.<sup>53</sup> The court held that the protections afforded by the ADEA and Title VII, which both permit waivers, are analogous to the protections afford under the FMLA, so the court knew “of no good reason . . . why the government would proscribe waiver for FMLA retaliation claims and yet favor waivers for claims of both age

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<sup>48</sup> *Id.* at 321 (emphasis in the original).

<sup>49</sup> *Id.* at 320–21.

<sup>50</sup> *Id.* at 321.

<sup>51</sup> *Id.*; see also 29 C.F.R. § 825.220(d) (2007).

<sup>52</sup> *Faris*, 332 F.3d at 321. It is true that generally releases are favored because they help keep costly litigation to a minimum. However, as will be explained later, there are other labor and employment law statutes that do not allow waivers. In some situations, a waiver is not the best policy. See *infra* Parts III, IV.

<sup>53</sup> *Faris*, 332 F.3d at 321. Note that the court does *not* discuss how *only* ADEA waivers that comply with the safeguard requirements set forth in the OWBPA will be enforced. Waivers which do not comply are considered a violation of public policy. For a more detailed explanation about ADEA waivers, see 29 C.F.R. § 1625.22(a)–(b) (2007); *infra* Part IV.

discrimination under ADEA and for civil rights violations under Title VII.”<sup>54</sup>

*C. Where the Fifth Circuit’s Analysis Fails*

The *Faris* court determined that the right to assert a claim is not a protected FMLA right.<sup>55</sup> This determination does not logically make sense when one actually reads the text of the FMLA. Section 2617 of the FMLA is titled “Enforcement.”<sup>56</sup> The first part of this section is titled “Civil Action by Employees.”<sup>57</sup> This part describes the employee’s “right of action” if an employer commits any of the “prohibited acts” from § 2615.<sup>58</sup> The FMLA *itself* creates a “right of action,” which is a right to assert a claim. Without the right to assert a claim—a remedial right—the FMLA is a hollow act. The mandates would be meaningless if they could not be enforced by giving employees a right to sue; without such a right, the FMLA simply has no consequence. The fact that a right to assert a claim is a method of protecting other “rights” does not make it any less of a right under the FMLA.

The court also failed to mention that ADEA waivers were not always freely permitted; it was not until 1990 that “Congress enacted the [OWBPA] as an amendment to the [ADEA], which imposed numerous technical requirements for any release of claims under ADEA.”<sup>59</sup> All ADEA waivers must be “knowing and voluntary” as determined by the employer’s adherence to eight specific requirements.<sup>60</sup> “[A]mbiguities in ADEA waivers easily can run afoul of the requirement that ADEA waivers

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<sup>54</sup> *Faris*, 332 F.3d at 322.

<sup>55</sup> *Id.* at 320–22.

<sup>56</sup> 29 U.S.C. § 2617 (2000).

<sup>57</sup> *Id.* § 2617(a).

<sup>58</sup> *See id.* § 2615. In general, these are the rights to FMLA leave, the right to have your job restored upon return, and the right to be free from discrimination related to FMLA leave. *See id.*

<sup>59</sup> Klein, *supra* note 4, at 197.

<sup>60</sup> *Id.*

be ‘knowing and voluntary.’”<sup>61</sup> The FMLA was enacted in 1993,<sup>62</sup> three years after Congress enacted the OWBPA.<sup>63</sup>

By 1993, Congress had already amended the ADEA and clearly knew how to create waiver provisions. The fact that Congress did not include such a provision in the FMLA may be an indication that Congress chose not to allow FMLA rights to be waived. While the court’s effort to make the FMLA work in the real world is understandable, and from an equity or fairness standpoint probably preferable, the court is asking too much from the language of the regulation. As a result, the Fourth Circuit’s interpretation and implementation of the plain meaning of the statute is the better application of the law.

### III. THE FOURTH CIRCUIT AND THE *TAYLOR* DECISION

#### A. *The Facts from Taylor*

Barbara Taylor had worked for CP & L, a subsidiary of Progress Energy in North Carolina, for seven years when she began to experience “extreme pain and swelling in her right leg” in April of 2000.<sup>64</sup> Her doctor ordered a week of bed rest in late April of 2000 (or early May, the timing here is unclear) and this caused Taylor to miss five days of work.<sup>65</sup> Through June and July of 2000, Taylor missed more days of work due to testing and medical treatment.<sup>66</sup> Taylor asked a human resources representative at her company if she could use FMLA leave, but was told she could not “because she had not been absent from work for more than five consecutive days.”<sup>67</sup> By August of 2000, the cause of Taylor’s pain and swelling was still unknown, so at her doctor’s insistence, Taylor

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<sup>61</sup> *Id.* at 198.

<sup>62</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2000)).

<sup>63</sup> Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978, 978–84 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)).

<sup>64</sup> *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), *vacated* No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), *reinstated* 493 F.3d 454 (4th Cir. 2007).

<sup>65</sup> *Id.* at 366.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

underwent a spinal tap.<sup>68</sup> This caused Taylor to miss five consecutive days of work and a few more days in the weeks after.<sup>69</sup>

Moreover, “In October Taylor received a written warning from her supervisor and the human resources representative stating that she ‘had exceeded the company’s average sick time.’”<sup>70</sup> Taylor’s doctors still had not determined the cause of her pain and swelling.<sup>71</sup> More tests, which caused more missed days, eventually revealed that she had a mass in her abdomen requiring major surgery.<sup>72</sup> Before her surgery, she asked her employer again about FMLA leave and was again told she did not qualify.<sup>73</sup> Taylor had surgery in December 2000, missing approximately six consecutive weeks of work.<sup>74</sup> She contacted the DOL and was told by the DOL that this six week leave did qualify under the Act; however her employer only credited her with four weeks FMLA leave.<sup>75</sup> Thus, her record incorrectly showed four weeks as qualifying FMLA leave and two as non-qualifying medical leave.<sup>76</sup>

The following year, in February 2001, Taylor was given her performance evaluation.<sup>77</sup> Because of the health-related absences in her record, she was given a poor productivity rating and received only a minimal raise.<sup>78</sup> Not long after this evaluation, Taylor discovered the company planned to lay off several employees and was going to use past performance to decide who would be terminated.<sup>79</sup>

Again Taylor contacted her employer about her FMLA leave.<sup>80</sup> Having discussed the situation with the DOL and having learned her absences were covered by FMLA, Taylor wanted her employer to correct

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 366–67.

<sup>76</sup> *Id.* at 366.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (indicating that Taylor’s raise was only 1% as compared to the typical 6%).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 367.

the mistakes on her record.<sup>81</sup> FMLA leave cannot be used against an employee.<sup>82</sup> The employer refused to correct her record.<sup>83</sup> On May 17, 2001, Taylor was told she was being terminated.<sup>84</sup> Progress offered and Taylor signed a general release in return for a period of paid leave and approximately \$12,000 cash. The release did not specifically mention the FMLA, but did include a “catch-all” section that could work to include all federal statutes.<sup>85</sup>

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<sup>81</sup> *Id.* at 366–67.

<sup>82</sup> *Id.* Under the Act, FMLA leave cannot be used against an employee for any reason. 29 U.S.C. § 2615(a)(1) (2000). Thus, the mistake in Taylor’s record was a serious mistake. Taylor rightly feared the weeks mistakenly recorded as non-qualifying would be used against her and that her job could be in danger because of the mistake.

<sup>83</sup> *Taylor I*, 415 F.3d at 367.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The release provided:

GENERAL RELEASE OF CLAIMS. IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEREBY RELEASES CP & L [AND] ITS PARENT . . . FROM ALL CLAIMS AND WAIVES ALL RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE’S EMPLOYMENT WITH CP & L . . . OR EMPLOYEE’S SEPARATION THEREFROM, arising from events which have occurred up to the date Employee executes this General Release, including but not limited to, claims . . . for relief, including but not limited to, front pay, back pay, compensatory damages, punitive damages, injunctive relief, attorneys’ fees and costs or any other remedy, arising under: (i) the Age Discrimination In Employment Act of 1967, as amended, (“ADEA”); (ii) the Employee Retirement Income Security Act of 1974, as amended, (“ERISA”); (iii) Title VII of the Civil Rights Act of 1964, as amended; (iv) the Energy Reorganization Act and Atomic Energy Act, both as amended; (v) the Americans With Disabilities Act (“ADA”); (vi) any wrongful termination claim under any state or federal law; (vii) claims for benefits under any employee benefit plan maintained by CP & L related to service credits or other issues; (viii) claims under the Older Workers Benefit Protection Act of 1990 (“OWBPA”); and (ix) any other federal, state or local law.

*Id.* (emphasis added).

After her termination, Taylor tried, based on the DOL's suggestion, to work out her FMLA complaints with Progress Energy, Inc. directly, but was unsuccessful.<sup>86</sup> She sued Progress in May 2003, alleging "the company had violated the FMLA by (1) not fully informing her of her FMLA rights, (2) improperly denying her requests for medical leave, (3) terminating her employment because of her medical absences, and (4) terminating her employment because she complained about the company's violations of the FMLA."<sup>87</sup> The company moved for summary judgment based on the release, and Taylor countered with the argument that 29 C.F.R. § 825.220(d) barred waiver of FMLA claims.<sup>88</sup> The district court agreed with Progress and granted the motion for summary judgment.<sup>89</sup> Taylor appealed to the Court of Appeals for the Fourth Circuit.<sup>90</sup>

*B. The Taylor Court's Analysis and Holdings: Taylor I & Taylor II*

The regulation, 29 C.F.R. § 825.22(d), reads: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."<sup>91</sup> In *Taylor I* in 2005, the Fourth Circuit held: "[T]he regulation prohibits *both* the prospective *and* retrospective waiver of any FMLA right . . . unless the waiver has the prior approval of the DOL or a court."<sup>92</sup> The court later vacated that opinion, but upon rehearing, reinstated it in 2007 in *Taylor II*.<sup>93</sup> In *Taylor I*, the court began its analysis by applying the *Chevron* deference test to 29 C.F.R. § 825.220(d) to determine if the DOL had authority to promulgate the regulation in the first place.<sup>94</sup> The *Chevron* deference test is:

A two-part test under which a court will uphold a federal agency's construction of a federal statute if (1) the statute is ambiguous or does not address the question at issue, and

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 367–68.

<sup>88</sup> *Id.* at 368.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 29 C.F.R. § 825.22(d) (2007).

<sup>92</sup> *Taylor I*, 415 F.3d at 369. (emphasis added).

<sup>93</sup> *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007).

<sup>94</sup> *Taylor I*, 415 F.3d at 369; *see also* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

(2) the agency's interpretation of the statute is reasonable. If the court finds that the legislature's intent is clearly expressed in the statute, then that intent is upheld.<sup>95</sup>

Based on this analysis, the court determined that the DOL did have authority to promulgate the regulation.<sup>96</sup>

The first step in the *Chevron* deference test is deciding whether Congress directly addressed the issue in question in the relevant statute.<sup>97</sup> Since the FMLA itself does not directly address the issue of waivers, the court concluded that the DOL does have authority to deal with FMLA waivers in its regulations.<sup>98</sup> The second step is deciding "whether the regulation is 'based on a permissible construction' of the FMLA,"<sup>99</sup> that is, whether the DOL based the regulation on an interpretation of the statute that was reasonable. However, before the Fourth Circuit proceeded to step two, the court "resolve[d] the dispute over what [29 C.F.R.] § 825.220(d) actually means."<sup>100</sup> The court determined that the regulation bars waivers *unless* the waiver is approved by the DOL or a court.<sup>101</sup>

According to the Fourth Circuit, the plain language of the regulation applies to the right to assert a claim.<sup>102</sup> The court noted:

There are three categories of "rights under FMLA," substantive, proscriptive, and remedial. Substantive rights include an employee's right to take a certain amount of unpaid medical leave each year . . . . Proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights.

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<sup>95</sup> BLACK'S LAW DICTIONARY 253 (8th ed. 2004) (citing *Chevron*, 467 U.S. at 842–43).

<sup>96</sup> *Taylor I*, 415 F.3d at 369.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 372 (quoting *Chevron*, 467 U.S. at 843).

<sup>100</sup> *Id.* at 369.

<sup>101</sup> *Id.* at 369 (emphasis added). The court does not really explain why DOL or court approval can overcome the bar on waivers, but presumably the Fourth Circuit felt that if the DOL or court approves the waiver, then the waiver must be drafted in such a way that congressional intent is not disturbed.

<sup>102</sup> *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 456–57 (4th Cir. 2007).

The remedial right is an employee's "right of action" or "right . . . to bring an action" or claim.<sup>103</sup>

Since the regulation refers to "rights under FMLA," without distinction between the three kinds of FMLA rights, the regulation includes all three.<sup>104</sup> The court also emphasized that the right to bring a claim is a statutory right, a right created by the FMLA.<sup>105</sup> Lastly, "[s]ection 220(d)'s use of the word 'rights' to refer to a right of action or claim is consistent with the common usage" of the word.<sup>106</sup>

When the court reached step two of the *Chevron* deference test, it held 29 C.F.R. § 825.220(d) satisfied the second step.<sup>107</sup> "The regulation is consistent with the FMLA and must be upheld because it is not 'arbitrary, capricious, or manifestly contrary to the statute.'"<sup>108</sup> In summary, the court held the regulation is a permissible regulation, it bars waivers, and the court will uphold the regulation.

Unlike the *Faris* court, the Fourth Circuit did not find the FMLA to be analogous to the ADEA and Title VII.<sup>109</sup> Rather, the court found FMLA to be analogous to the Fair Labor Standards Act (FLSA), which prohibits unsupervised waivers.<sup>110</sup> The court discussed how waivers of the FLSA without DOL approval would undermine the purpose of the FLSA,<sup>111</sup> which is to impose minimum standards for wages and other basic terms of

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<sup>103</sup> *Id.* at 457 (citations omitted); *see also* 29 U.S.C. §§ 2612–2617 (2000) to read the actual text of FMLA.

<sup>104</sup> *Taylor II*, 493 F.3d at 457.

<sup>105</sup> *Id.*; *see also supra* notes 56–58.

<sup>106</sup> *Taylor II*, 493 F.3d at 457–58 (noting this observation is in keeping with the United States Supreme Court's holding in *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704–05 (1945) and that *Black's Law Dictionary* defines "legal right" as "[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act," *BLACK'S LAW DICTIONARY* 1348 (8th ed. 2004)).

<sup>107</sup> *Taylor I*, 415 F.3d at 375.

<sup>108</sup> *Id.* (quoting *Chevron*, 467 U.S. at 844).

<sup>109</sup> *Taylor II*, 493 F.3d at 461–62.

<sup>110</sup> *Id.* at 462; *see also* *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114–16 (1946).

<sup>111</sup> *Taylor II*, 493 F.3d at 460; *see also* *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Brooklyn Sav. Bank*, 324 U.S. at 710.

employment.<sup>112</sup> The court held that allowing unsupervised waivers of FMLA rights would undermine the purpose of the FMLA as well.<sup>113</sup>

The legislative history implies that Congress agreed with the Fourth Circuit on this point. The court cites the Senate Report regarding the FMLA as follows:

[T]he Act “fits squarely within the tradition of the labor standards laws that . . . preceded it,” such as the FLSA and the Occupational Safety and Health Act. The FMLA, following the FLSA model, provides a “minimum floor of protection” for employees by guaranteeing that a minimum amount of family and medical leave will be available annually to each covered employee.<sup>114</sup>

The rationale behind the no waiver policies has to do with the fact that it is often less expensive for employers to settle claims than to comply with the Acts.<sup>115</sup> An employer can save money, and thus has an advantage over competition, if it does not comply and instead simply settles claims brought by employees. Therefore, allowing unapproved releases, could, in effect, permit employers to ignore the mandates of federal legislation.

This point is a weakness in the *Taylor II* court’s analysis. The FMLA does not have as broad a reach as the FLSA and is more similar to ADEA and Title VII. The argument does work for the FLSA; the FLSA sets out minimum wages and hours for all employees in order to protect the lowest paid.<sup>116</sup> It may truly be cheaper for the employer to force employees to work long hours for little pay in exchange for settling with the few who file a claim. If permitted, many employers would gamble that not many of these low paid employees would actually file a claim, and in the long run the employer would come out ahead. Prohibiting waivers forces the employer to follow the rules and protects these low paid employees.

The purpose of the FMLA is to help families have time for childrearing, to provide limited job security for ill employees, to promote

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<sup>112</sup> *Taylor II*, 493 F.3d at 460.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (quoting in part S. REP. NO. 103-3, at 5 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 7).

<sup>115</sup> *Id.*

<sup>116</sup> *Brooklyn Sav. Bank*, 324 U.S. at 706.

family, to help eliminate gender discrimination (regarding maternity leave), and “to promote the goal of equal employment for women and men.”<sup>117</sup> The FMLA, ADEA and Title VII protect *all* workers, not just the lowest paid.<sup>118</sup> According to one commentator: “The FLSA was enacted in an effort to protect the most vulnerable workers: those who lacked bargaining power and therefore could not negotiate fair wages and reasonable work hours with employers.”<sup>119</sup> The higher paid workers, while technically still “protected” by the FLSA, are not the employees the Act was created to protect. In fact, some white-collar employees are exempt from certain provisions of the FLSA, such as overtime protection.<sup>120</sup> As stated by Rothstein and Liebman:

The legislative history of the FLSA contains no explanation for the white-collar exemptions, but [one commentator] claims that the FLSA was never intended to cover all employees. Instead, they were possibly used as a line-drawing tool between those workers . . . who had so little bargaining power that they needed government intervention, and those who had sufficient bargaining power to protect themselves.<sup>121</sup>

In contrast, the FMLA, ADEA, and Title VII are intended to protect *all* employees. The purpose of the FMLA would not be undermined by waivers made knowingly and voluntarily, especially if OWBPA type safeguards are in place. But, the fact remains, FMLA itself has no provision allowing waivers and the regulation plainly prohibits them.

Lastly, the Fourth Circuit addressed and rejected the contention the DOL set forth in its amicus brief in response to *Taylor I*, that 29 C.F.R.

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<sup>117</sup> 29 U.S.C. § 2601(b)(5) (2000).

<sup>118</sup> See Muniza Bawaney, Note, *Signed General Releases May Be Worth Less than Employers Expected: Circuits Split on Whether Former Employee can Sign Release, Reap its Benefit, and Sue for FMLA Claim Anyway*, 82 CHI-KENT. L. REV. 525, 541 (2002).

<sup>119</sup> *Id.*; see also *Brooklyn Sav. Bank*, 324 U.S. at 706–07.

<sup>120</sup> MARK A. ROTHSTEIN & LANCE LIEBMAN, *CASES AND MATERIAL EMPLOYMENT LAW*, 417–21 (6th ed. 2007); see also 29 C.F.R. § 541 (2007).

<sup>121</sup> ROTHSTEIN & LIEBMAN, *supra* note 120, at 420 (discussing Regan Rowan, *Solving the Bluish Collar Problem: An Analysis of the DOL’s Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 120–25 (2004)).

§ 825.220(d) does not prohibit retrospective waiver or settlements.<sup>122</sup> As noted earlier, the DOL has no system for reviewing FMLA waivers.<sup>123</sup> The DOL, in its brief, said, “[i]n order to comply . . . the Department would have to allocate significant resources to establish a process for reviewing settlement of *all* FMLA complaints that are not pending in court.”<sup>124</sup> The DOL argued that if it had intended for 29 C.F.R. § 825.220(d) to require DOL supervision, it would have created a process for such reviews.<sup>125</sup> Essentially, the DOL said “if we had meant to require approval, we would have created an administrative procedure.”<sup>126</sup> The DOL urged the Fourth Circuit:

to consider the recent *Dougherty* decision in the Eastern District of Pennsylvania. There, the court, on reasoning developed on its own, reached the result sought by the DOL. The court held that section 220(d) 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.<sup>127</sup>

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<sup>122</sup> *Progress Energy, Inc. v. Taylor*, 493 F.3d 454, 458–62 (4th Cir. 2007); *see also* Janet G. Payton, CORPORATE COUNSEL’S GUIDE TO FAMILY AND MEDICAL LEAVE ACT § 1:60. Enforcement – Waivers (2007) (“The case became much more complicated when the DOL filed an amicus brief in support of Progress Energy’s petition for a rehearing en banc. In its brief, the DOL distinguished between ‘rights’ and ‘claims’ under the FMLA. It argued that the Court should adopt the Fifth Circuit’s holding in *Faris* that § 825.220(d)’s prohibition was limited to *prospective* waivers of *substantive rights* under the FMLA. During the course of litigation, the DOL’s position evolved, but the full Circuit Court still rejected the argument.”).

<sup>123</sup> Brief for the Secretary of Labor as Amicus Curiae in support of Defendant-Appellee’s Petition for Rehearing En Banc, *supra* note 25, at 14–15.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 14.

<sup>126</sup> *Id.*

<sup>127</sup> *Taylor II*, 493 F.3d at 459 (citing *Dougherty v. TEVA Pharms., USA, Inc.*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 9, 2007)); *see also Dougherty*, 2007 U.S. Dist. LEXIS 27200, at \*23 (implying that the DOL endorses the *Dougherty* view based completely on the result it produces and nothing else and that the *Dougherty* court based its holding on flimsy reasoning); Payton, *supra* note 122 (“Since the *Dougherty* court agreed with the DOL’s position, the DOL also urged the *Taylor II* court to look at that ruling.”).

Thus, the DOL, like the Fifth Circuit, argued that the term “rights” does not include the right to assert claims. The court, having already determined that the right to bring a claim is a “right,” decided that “[t]he reasoning behind [*Dougherty’s*] holding does not withstand close analysis.”<sup>128</sup> The court explained that the *Dougherty* court ignored the text of the Act: “The FMLA explicitly makes the ‘right . . . to bring an action’ or claim for a violation a right under the Act.”<sup>129</sup>

The court also pointed out that the DOL’s current<sup>130</sup> interpretation is inconsistent with the DOL’s intent at the time the regulation was promulgated.<sup>131</sup> The court explained it will not defer to an agency’s interpretation of a regulation if “an alternative reading is compelled by . . . indications of the Secretary’s intent at the time of the regulation’s promulgation.”<sup>132</sup> When the regulation was in its final stages, the U.S. Chamber of Commerce and various corporations expressed concern about the “no-waiver” provision.<sup>133</sup> The DOL rejected the proposed changes.<sup>134</sup> Ironically, those proposed changes “would have permitted the interpretation now advanced by the DOL.”<sup>135</sup> The DOL argued that it had

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<sup>128</sup> *Taylor II*, 493 F.3d at 459.

<sup>129</sup> *Id.* (citing 29 U.S.C. §§ 2617(a)(2), (a)(4) (2000)).

<sup>130</sup> See Andrew J. Ruzicho & Louis A. Jacobs, *Prospective and Retrospective Waiver of Any FMLA Right Prohibited*, WEST’S EMP. PRAC. UPDATE, Oct. 2007, at 11.

<sup>131</sup> *Taylor II*, 493 F.3d at 461; see also Payton, *supra* note 122. The court noted that the DOL’s position in both *Taylor II* and *Dougherty* was in conflict with its statements at the time the regulation was promulgated in 1995. See *Taylor II*, 493 F.3d at 461. When it initially issued 29 C.F.R. § 825.220(d), the DOL stated that “prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA.” *Id.* at 462 (quoting 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995)). As such, the court was confident that the DOL had no basis for its argument. Payton, *supra* note 122.

<sup>132</sup> *Taylor II*, 493 F.3d at 461 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* The Chamber of Commerce and various interested corporations “recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example).” *Id.* (quoting Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995)).

<sup>135</sup> *Id.*

merely remained silent on the issue, but this is not true; rather, the DOL addressed the issue *by rejecting* the proposed changes and left the “no-waiver” provision intact.<sup>136</sup> Since it was clear to the court that the DOL was endorsing something different from what the Secretary had intended originally, the court refused to defer to the agency’s current, and clearly inconsistent, interpretation.<sup>137</sup>

The court’s argument is stronger than the DOL’s, especially because the DOL has been inconsistent in its interpretation.<sup>138</sup> Based on the DOL’s response to *Taylor*, it looks suspiciously like the DOL is choosing to interpret the regulation in *any* manner which will prevent waivers from requiring DOL approval.

#### IV. A POSSIBLE PERMANENT SOLUTION

A possible permanent solution to the FMLA waiver problem is for Congress to amend the FMLA as it amended the ADEA. The Fourth Circuit held that the purpose of the FMLA was closer to the purpose of the FLSA, which *does* require approval for waivers, than the purpose of ADEA, which *does not* require approval.<sup>139</sup> As explained above, however, the FMLA was enacted, in large part, to prevent employment discrimination based on gender and illness.<sup>140</sup> This places the FMLA more in line with ADEA, which was enacted to prevent age discrimination in employment.<sup>141</sup> The FLSA was enacted to ensure low paid employees received fair wages and hours.<sup>142</sup> Thus, the FLSA is a labor law statute dealing with basic terms of employment. In contrast, the FMLA and

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 462.

<sup>138</sup> For an overview of the DOL’s interpretation in prior litigation, see Ruzicho & Jacobs, *supra* note 130, at 11 (“The DOL advanced several arguments in support of its interpretation. The DOL argued that the court of appeals failed to focus on the word, ‘rights,’ when it initially interpreted section 220(d). The DOL’s position was that ‘rights’ does not include claims. The problem with that argument was that the DOL (in another litigation) had conceded that the ‘right to sue’ is a right under the FMLA that cannot be waived prospectively. The right to sue is, of course, the right to assert a claim.”).

<sup>139</sup> *Taylor II*, 493 F.3d at 460.

<sup>140</sup> 29 U.S.C § 2601(b) (2000).

<sup>141</sup> *See id.* § 621.

<sup>142</sup> SAMUEL ESTREICHER, EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 421, 423 (2001).

ADEA are concerned not with the basic terms of employment, but with leave and discrimination in the workplace. Since both the FMLA and ADEA were enacted, at least in large part, to prevent employment discrimination, it is not unreasonable to argue that waivers should be permitted under the FMLA in a manner similar to waivers permitted under ADEA.

*A. The Passage of the Older Workers Benefit Protection Act*

The status of waivers under ADEA was not always so clear; a fact on which neither the Fourth Circuit nor Fifth Circuit commented.<sup>143</sup> In fact, there once was a circuit split over ADEA waivers, a split that was almost *identical* to the Fourth Circuit–Fifth Circuit split over FMLA waivers happening now.<sup>144</sup> However, “[t]he passage of the OWBPA resolved [the] earlier circuit split [involving ADEA waivers] and its resulting clarity serves as the best model on which to base the FMLA’s waiver standard.”<sup>145</sup>

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<sup>143</sup> See *supra* note 53 for Author’s comment on lack of discussion in *Faris*.

<sup>144</sup> See Jan W. Henkel, *Waiver of Claims Under the Age Discrimination in Employment Act After Oubre v. Entergy Operations, Inc.*, 35 WAKE FOREST L. REV. 395, 398 (2000) (discussing the circuit split over pre-OWBPA waivers). According to Henkel:

One side believed that unsupervised waivers should not be allowed at all. Pointing to the [FLSA], upon which the provisions of the ADEA were based, this group argued that, because the FLSA generally had been interpreted to prohibit unsupervised waivers, this same limitation also applied to the ADEA. In contrast, the other side thought that Title VII and the ADEA had similar goals, including the encouragement of settlements and compromises. Therefore, unsupervised waivers of ADEA claims should be treated the same as unsupervised waivers in the Title VII context and should be allowed so long as they are knowing and voluntary.

*Id.* at 398–99.

<sup>145</sup> Wong, *supra* note 12, at 1591.

*B. The Minimum Requirements Set Forth in the OWBPA*

The OWBPA requirements are firm requirements for an ADEA waiver.<sup>146</sup> If not met, the waiver is not valid.<sup>147</sup> Congress's policy is implemented "via a strict, unqualified statutory stricture on waivers."<sup>148</sup>

The minimum requirements to determine whether a waiver is signed voluntarily and with knowledge are set out in sections 7(f)(1) and 7(f)(2) of the ADEA.<sup>149</sup> One commentator summarized the requirements as follows:

[A waiver under the ADEA is not considered] "knowing and voluntary" unless: (1) it is written in plain language, (2) it specifically refers to ADEA, (3) the employee does not waive rights or claims that may arise after the waiver is executed, (4) there is consideration in addition to anything of value the individual is already entitled to, (5) the employee is advised to consult with an attorney, (6) the individual is given a specified period of time to consider the agreement, (7) there is a seven day revocation period, and (8) if there is a termination program or exit incentive program, it includes additional information about those employees affected.<sup>150</sup>

The first requirement, that the release be written in plain language, means that the agreement should be in writing and be written in such a manner that the employee, or any similarly situated employee, can understand what it means.<sup>151</sup> Accordingly, "Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate."<sup>152</sup> The language must not

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<sup>146</sup> *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). The Court held that the OWBPA disallows ADEA waivers "without qualification" unless "the employer complies with the statute." *Id.* at 427.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> 29 C.F.R. § 1625.22(a)(2) (2007).

<sup>150</sup> Wong, *supra* note 12, at 1593.

<sup>151</sup> 29 U.S.C. § 626(f)(1)(A) (2000); *see also* 29 C.F.R. § 1625.22(b).

<sup>152</sup> 29 C.F.R. § 1625.22(b)(3). Factors the employer should consider include the employee's level of comprehension and education, and so technical jargon and complex sentences should be limited accordingly. *See id.*

mislead the employee; if the employee is less educated than the attorney drafting the agreement, as will frequently be the case, the attorney (or employer) could easily include complex language or legal terms which may confuse or mislead the employee.<sup>153</sup> This is not permitted. The agreement should be easy to understand without “exaggerating benefits or minimizing limitations.”<sup>154</sup>

The second requirement is the release must specifically refer to the ADEA.<sup>155</sup> Thus, a blanket release of claims will not suffice for ADEA waivers; the release must expressly include ADEA claims.<sup>156</sup> This is important because many releases were worded in very general terms, using language such as “all claims” or all “federal statutes.” This no longer works for ADEA waivers; there will most likely need to be a separate provision in the agreement covering only ADEA claims.

The third requirement is the release cannot waive future rights under the ADEA.<sup>157</sup> The statute provides, “The waiver of rights or claims that arise following the execution of a waiver is prohibited.”<sup>158</sup> This safeguard protects the employee from discrimination in the future and assures that the waiver does not leave the employee open to violations not contemplated at the time of execution.<sup>159</sup> Thus, an employee only agrees to waive claims he or she might have for violations that occurred in the past. If a violation occurs in the future, the employee is free to bring a claim. This is generally important in situations where the employee is rehired or was never discharged but signed the release in the course of a private settlement.<sup>160</sup>

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<sup>153</sup> *Id.* § 1625.22(b)(3)–(4).

<sup>154</sup> *Id.* § 1625.22(b)(4).

<sup>155</sup> 29 U.S.C. § 626(f)(1)(B).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* § 626(f)(1)(C).

<sup>158</sup> 29 C.F.R. § 1625.22(c)(2).

<sup>159</sup> *Id.*

<sup>160</sup> *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *supra* note 14, at 7 (“In addition to general releases such as the one at issue in this case, businesses and employees frequently enter into releases to resolve specific claims . . . Such claim-specific releases are commonly utilized, for example, in ongoing employment relationships, where the employer and employee wish to settle a particular dispute but do not desire to end their relationship. The availability of both

(continued)

Under the fourth requirement, the employer must give the employee, in consideration for signing the release, something “in addition to anything of value to which the individual already is entitled.”<sup>161</sup> Thus, if the employee is entitled to a benefit by law, it cannot be used as consideration for signing a waiver. This includes benefits that may have been “eliminated in contravention of law or contract.”<sup>162</sup> For example, if prior to asking the employee to sign a release, the employer cuts a health care reimbursement plan that was guaranteed under an employment contract, the employer cannot now offer to reinstate the plan as consideration for the employee signing the release. Withholding the benefit was a breach of contract. At all times, even when the employer was in breach, the employee was entitled to the benefit. The breach did not diminish that entitlement. The employee was already entitled to the benefit by law, so the employer must give something beyond that entitlement.<sup>163</sup>

The fifth requirement is that the employee should be “advised in writing to consult with an attorney prior to executing the agreement.”<sup>164</sup> The importance of this safeguard is fairly obvious. The employer has an attorney, and the employee most likely would benefit from speaking to one as well. It also lets the employee know that he or she may *need* professional help in understanding his or her options. At the very least, this provision points out to the employee that this is an important decision, important enough that the employee may need a lawyer to understand its impact.

The sixth requirement deals with the length of time an employee should be given to consider the waiver *before* signing.<sup>165</sup> Generally, an employee is given at least twenty-one days.<sup>166</sup> However, “if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least forty-five days within which to

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general and specific releases thus benefits businesses and employees by maximizing the avenues for settling employment-related disputes on mutually favorable terms.”).

<sup>161</sup> 29 U.S.C. § 626(f)(1)(D).

<sup>162</sup> 29 C.F.R. § 1625.22(d)(3).

<sup>163</sup> *Id.*

<sup>164</sup> 29 U.S.C. § 626(f)(1)(E).

<sup>165</sup> *Id.* § 626(f)(1)(F).

<sup>166</sup> *Id.* § 626(f)(1)(F)(i).

consider the agreement.”<sup>167</sup> The twenty-one or forty-five day consideration period “runs from the date of the employer’s final offer.”<sup>168</sup> The employee may voluntarily sign before this period is over, but the decision to do this must be “knowing and voluntary” and not induced by the employer.<sup>169</sup>

The seventh requirement is also about time. The agreement must give the employee seven days to revoke *after* signing the agreement.<sup>170</sup> After signing, the employee has seven days to reconsider. Therefore, the waiver is not effective until seven days after it is executed.<sup>171</sup> Unlike the twenty-one or forty-five day time period above, the seven day revocation period cannot be shortened or cut off.<sup>172</sup> Even if both sides want to shorten it and move ahead, the agreement is unenforceable for seven days.<sup>173</sup> Remember, all of these safeguards are intended to ensure the waiver is made knowingly and voluntarily. Between the sixth and seventh provisions, the employee has ample time, twenty-eight to fifty-two days, in which to make an informed decision, consult with an attorney, and weigh other options.<sup>174</sup>

The eighth requirement will not be applicable in every release situation, as it requires employers to furnish the employee with information about “an exit incentive or other employment termination program offered to a group or class” if the waiver is “requested in connection” with such a

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<sup>167</sup> *Id.* § 626(f)(1)(F)(ii).

<sup>168</sup> 29 C.F.R. § 1625.22(e)(4).

<sup>169</sup> *Id.* § 1625.22(e)(6). Signing before the period is over is in itself a *waiver*. *See id.*

<sup>170</sup> 29 U.S.C. § 626(f)(1)(H).

<sup>171</sup> *Id.*

<sup>172</sup> 29 C.F.R. § 1625.22(e)(5). The employee cannot waive this time period. Unlike the pre-signing time period, Congress made this one mandatory. *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See* 29 U.S.C. § 626(f)(2); 29 C.F.R. § 1625.22(g). If the waiver is part of a settlement to an age discrimination charge already filed with the Equal Employment Opportunity Commission or an action filed in a court, only the first five requirements are mandatory. 29 U.S.C. § 626(f)(2). The time an employee is given to decide whether or not to sign must simply be “reasonable.” *Id.* “Reasonable” means “reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.” 29 C.F.R. § 1625.22(g)(4). If the employer gives the employee twenty-one to forty-five days, however, the time will be presumptively reasonable. *Id.* § 1625.22(g)(5).

program.<sup>175</sup> Therefore, if there is no exit incentive or other similar program, then ADEA waivers must meet only seven requirements. If there is such a program, the eighth requirement must be satisfied, as well.<sup>176</sup>

*C. The OWBPA Requirements Applied to FMLA Waivers*

The OWBPA requirements are very general—none of the requirements are specific to the ADEA and all could be altered to apply to the FMLA. The requirements are neither unreasonable nor overly burdensome for either party.<sup>177</sup> In fact, the requirements ultimately help both parties. Some commentators have even suggested Congress may have intended they apply to all employment discrimination statutes.<sup>178</sup> While this last statement is probably either overbroad or wishful thinking, there is no reason that the OWBPA requirements could not be applied to FMLA waivers. Not only would an OWBPA type amendment clarify whether or not FMLA waivers need court or DOL approval, it would also give the courts a clear standard to apply to FMLA waivers. The value of giving employers, employees, and courts a clear and usable standard should not be underestimated.

An OWBPA type amendment would protect employees' rights and assure employers that the waivers are reliable. The employee is protected by having the time to make a knowing and voluntary waiver. The employee is also less likely to be coerced or feel the need to make a rash decision.<sup>179</sup> If the employee does not understand what the waiver involves, the OWBPA requirements give the employee time to consult with an attorney. The employee is also protected in situations where future violations may occur; the release does not strip the employee of protection

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<sup>175</sup> 29 U.S.C. § 626(f)(1)(H). The employer must inform employees of the decisional unit at the time they consider whether to waive ADEA claims. *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095 (10th Cir. 2006). If the employer furnishes false or incorrect information, the release may be ineffective as matter of law. *Id.*

<sup>176</sup> For more information about this OWBPA requirement, see *Kurchowski*, 446 F.3d at 1093–95.

<sup>177</sup> In many cases the employer will want to include ADEA claims in a release and will therefore have to comply with the OWBPA. Adding similar requirements for FMLA waivers would not burden the employer any more than it is already burdened by the OWBPA requirements.

<sup>178</sup> Henkel, *supra* note 144, at 420.

<sup>179</sup> Wong, *supra* note 12, at 1596.

in the future. The employer is protected because such a waiver will be unlikely to fail if it is ever contested; thus the employer is assured stability and finality.<sup>180</sup>

The current state of FMLA waivers does not help anyone, with the very narrow exception for people who discover they have a claim after signing a waiver and who want to become involved in litigation. Neither employees nor employers want to get drawn into litigation:

The ability to settle FMLA claims provides [an] escape route [from long, expensive litigation], but only so long as the process is clear, and the resulting waiver is enforceable. The current split of authority resulting from the Fourth Circuit's decision below eliminates this certainty, depriving all FMLA stakeholders of the escape route, essentially encouraging litigation despite the willingness and desire of an employer and employee to resolve a disputed claim without resort to the courts.<sup>181</sup>

The OWBPA safeguards help prevent employees from prematurely signing a release in the first place. As a result of the requirements the employee has time to investigate that issue before signing. More often than not, both sides will want to come to an agreement without unreasonable cost or delay.

It is possible that the DOL will rewrite the regulation, although this would not be the best solution.<sup>182</sup> If the DOL rewrites the regulation to allow waivers, employees will not have the protection offered by a OWBPA type process and employers will not have the certainty that the waivers are solid. Regardless, an OWBPA type amendment would protect the parties involved, as the Act intended, and at the same time allow private settlements which save everyone involved time and money. It

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<sup>180</sup> *Id.*

<sup>181</sup> Brief of the Ass'n of Corporate Counsel as Amicus Curiae in Support of the Petitioner at 3, *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008) (No. 07-539), 2007 WL 4207123.

<sup>182</sup> See Michael Newman & Shane Crase, *Developments in the FMLA*, 54 FED. LAWYER, Feb. 2007, at 14. The DOL issued a request for public comment on various issues concerning the FMLA including waivers of past rights in Dec. 2006. See *id.* This was before *Taylor* in 2007; however, the DOL still has made no move to rewrite the regulation.

would also give courts, employees, counsel, and employers a clear standard to apply, and as stated in the introduction of this comment, that is a worthwhile goal.

## V. OPTIONS EMPLOYERS HAVE RIGHT NOW

The glaring problem with the solution above is it could take years to implement. Even if Congress does decide to fix this mess, amendments to federal statutes do not come into existence quickly. There are procedures to follow and these take time—often years. While employers wait for an amendment, employment disputes will still arise and employees will be terminated; severance packages will be given and releases will be signed. The FMLA waiver issue still needs to be addressed by employers and lawyers today, regardless of Congress' action or inaction.

### A. *Employers in the Fourth Circuit*

As of now, in Maryland, North Carolina, South Carolina, Virginia and West Virginia waivers of FMLA claims are invalid unless they have first been approved by the DOL or the court.<sup>183</sup> Accordingly, “[E]mployers in the [Fourth] Circuit will have to find creative alternatives to limit their liability—or simply hope the issue doesn’t come up.”<sup>184</sup> In many cases, FMLA claims will not arise because few employees will have such a claim. But if an employee does or could, “[t]here isn’t a good answer right now, other than [to] write your Congressmen and try to get them to change the law,’ says Edmund McKenna, a partner at Ford & Harrison and counsel to the North Carolina Retail Merchants Association, an amicus curiae for the defense.”<sup>185</sup>

While there may not be any way to assure complete freedom from liability, employers in the Fourth Circuit do have several options that may at least help to protect them. However, as Edmund McKenna pointedly makes clear, DOL approval is “emphatically not one of them . . . ‘At a minimum, it [would be quite expensive],’ McKenna says. ‘I’m not sure

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<sup>183</sup> Jennifer S. Kessler, *Recent FMLA Release Dispute Decided, but Probably Still Not Over*, VA. EMP. L. LETTER, Aug. 2007, at 11.

<sup>184</sup> Staff Writer, *Fourth Circuit Invalidates FMLA Waivers*, INSIDECOUNSEL, Sept. 2007, <http://www.insidecounsel.com/Issues/2007/September%202007/Pages/Fourth-Circuit-Invalidates-FMLA-Waivers.aspx>.

<sup>185</sup> *Id.*

how you'd [sic] even go about doing it.”<sup>186</sup> Getting court approval may be easier, but some commentators worry that it would simply open the door to more problems, as the court might just find more issues to be litigated.<sup>187</sup> Others disagree and suggest “employers . . . encourage the employee to sue and settle immediately, allowing a court to supervise the settlement.”<sup>188</sup> A number of commentators have also suggested having departing employees sign written affirmations, swearing that their FMLA rights were never violated.<sup>189</sup> This is a practice all employers in the Fourth Circuit should implement. While written affirmations will not replace a signed release, it is hard for the employee to explain away later.<sup>190</sup> This practice has been successful with FLSA claims,<sup>191</sup> and is worth trying. Plus, it costs nothing and can be done at the same time the employee signs a release for other claims.

Lastly, employers in the Fourth Circuit should be careful their releases do not include anything about FMLA claims, as this could potentially invalidate the entire release.<sup>192</sup> Needless to say, this is a good time for employers in the Fourth Circuit to review their policies to be sure they are in compliance with the FMLA. The best defense right now may just be eliminating FMLA violations.

#### *B. Employers in the Fifth Circuit*

Presumably, employers in the Louisiana, Mississippi, and Texas can continue doing what they have been doing and assume FMLA claims are included in their general releases. However, lawyers and employers seeking to adopt a “best practices” approach should start implementing OWBPA type requirements for FMLA releases, in case the Act is ever amended; but at this time such an effort is not *required* by law. Since no

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* This option seems like it would depend, however, on the employee being cooperative. An employee who wants to sue may not be all that cooperative.

<sup>189</sup> *Id.*; see also H. Landis Wade, Jr., *The Fourth Circuit Court of Appeals Slams the Door on FMLA Settlements with Employees that do Not Have Agency or Court Approval*, MCGUIREWOODS LLP, July 12, 2007, <http://www.mcguirewoods.com/news-resources/item.asp?item=3135>.

<sup>190</sup> Staff Writer, *supra* note 184.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

one knows where the FMLA waiver issue is headed, employers and counsel should keep abreast of developments in the law.

### C. *Employers in the Other Circuits*

As of this writing, no circuit outside of the Fourth and Fifth has decided this issue<sup>193</sup> (and a petition for review has been denied by the Supreme Court).<sup>194</sup> As a result, “Confusion exists as to whether an employer may obtain a valid release of [FMLA] claims without [DOL] or court approval . . . .”<sup>195</sup> The statute of limitations for FMLA claims is generally two years; however, if the employer willfully violated the Act, the statute of limitations jumps to three years.<sup>196</sup> Two or three years is a long time for an employer to wait—wondering if an employee is going to come back and bring a claim.

As mentioned above, not every termination or settlement will involve FMLA claims, and many will not; however, employers need to be wary of situations that potentially do give rise to such claims. Employers can try to get DOL approval; but, as previously discussed, the DOL has no procedure in place for such approvals, and how one would go about getting an approval, at this point, is unclear.<sup>197</sup> If the parties are already in litigation, getting the court’s approval may turn out to be fairly easy. But, remember, some commentators warn that going to a court for approval could just lead

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<sup>193</sup> Dellmuth & Raphan, *supra* note 3.

<sup>194</sup> See *Petition for a Writ of Certiorari*, *supra* note 31; *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008).

<sup>195</sup> BRADD N. SIEGEL & JOHN M. STEPHEN, *Wrongful Discharge—Releases and Waiver* § 21:31, in *OHIO EMPLOYMENT PRACTICES LAW* (2007); see also *Bieber v. THK Mfg. of Am., Inc.*, No. 2:06-CV-481, 2007 U.S. Dist. LEXIS 67033, at \*7 (S.D. Ohio Sept. 11, 2007) (requesting additional briefing by parties on certain matters, including *Taylor*). “The Court further notes that the . . . Fourth Circuit has recently held that . . . § 825.220(d) ‘bars the prospective and retrospective waiver or release of rights under the FMLA’ without prior approval by a court or the [DOL].” See *id.* at \*6–7.

<sup>196</sup> U.S. Dep’t of Labor, E-laws: Family and Medical Leave Act Advisor, <http://www.dol.gov/elaws/esa/fmla/fcl.asp> (last visited Sept. 16, 2008). This means the employee could have several years after signing a release to come back with a claim. The employer has no way of knowing if the employee is going to do this, so this creates real instability. The whole purpose of releases is to avoid this very situation.

<sup>197</sup> See Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant–Appellee’s Petition for Rehearing *En Banc*, *supra* note 25; Staff Writer, *supra* note 184.

to more litigation.<sup>198</sup> In contrast, others think asking an employee to file suit so the settlement can be approved by the court is a good option.<sup>199</sup> But, it seems counter-intuitive for many employers to seek such litigation.

Regardless, all employers should begin modeling waivers on the requirements of the OWBPA.<sup>200</sup> Waivers made which comply with the OWBPA requirements are more likely to be found voluntary if challenged (because of all the safeguards), and if the FMLA is ever amended, those waivers will remain valid. At the very least, the employer has a strong argument that the waiver conforms to the general “knowing and voluntary” waiver standard.

Another step all employers, not just those in the Fourth Circuit, should take is to get written affirmations from employees that their FMLA rights have not been violated.<sup>201</sup> This costs nothing and, as noted above, will be hard for an employee to overcome if he or she tries to bring a claim in the future.<sup>202</sup> Plus, if the jurisdiction has not decided whether to follow *Faris* or *Taylor*, such a written affirmation may allow the court to avoid the issue

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<sup>198</sup> Staff Writer, *supra* note 184.

<sup>199</sup> *Id.* Obviously, these are options that each employer will need to talk over with counsel. What might be a reasonable option for one employer, might not work at all for another. It might also depend on how strong the employee’s case is or whether or not the employer knows of other potential violations.

<sup>200</sup> See Rita M. McKinney, *Fourth Circuit Doesn’t Allow Unsupervised Waiver*, S.C. EMP. L. LETTER, Sept. 2005, at 1 (“Severance agreements, which are often used to secure waivers, remain viable tools. But you should take the following steps to ensure they’re enforceable: follow the guidance of the Older Workers Benefit Protection Act by using clear, understandable language targeted to the person signing the waiver; specifically refer to the statutes for which you’re requesting a release; notify the employee of her right to consult an attorney; provide consideration (compensation) above and beyond what the employee may be entitled to under your policies; and outline the time frames during which she can consider whether to sign the waiver or revoke it after it’s signed.”).

<sup>201</sup> Staff Writer, *supra* note 184. Neither modeling waivers after the OWBPA or getting written affirmations will replace a release, but these are smart steps for employers to take in any case. Both of these options can only strengthen the employer’s position and lessen the likelihood of an employee succeeding in a claim against the employer. It will be difficult for an employee to show the employer discriminated against her, if she has already signed a written affirmation that she never experienced discrimination.

<sup>202</sup> *Id.*

entirely by holding the employee has no FMLA claim to bring in the first place.

Many employers may now be hesitant to give out large severance packages if they cannot be assured they are completely free from liability.<sup>203</sup> Lowering the cash amount given in severance packages is an option, but the employer must give something as consideration—something that is beyond what the employee is entitled to by law.<sup>204</sup> It may be helpful to point out that the severance packages need not be entirely cash payments.<sup>205</sup> If the employer fears the employee may have a possible FMLA claim, it can combine a lower cash payment with some other type of consideration which may be less burdensome. Options include continuing medical insurance, at least through any gap in coverage; often there is a gap between coverage termination and onset of COBRA.<sup>206</sup> Other benefits that could be extended include life insurance, disability insurance, health club memberships, tuition assistance, child care, career training, etc.<sup>207</sup>

Another creative option, which in many cases may be more attractive than a large cash payment, is allowing the employee to keep certain company property such as a car, laptop, home computer, software, or cell phone.<sup>208</sup> Suggestions such as these largely depend on the employer's

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<sup>203</sup> See *supra* note 2 and accompanying text.

<sup>204</sup> Klein, *supra* note 4, at 195.

<sup>205</sup> *Id.*

<sup>206</sup> William Hollett, *Creating Equitable Severance Packages in a Tough Economy*, HR.COM, Apr. 16, 2003, <http://www.hr.com/sfs?t=/contentManager/onStory&e=UTF-8&i=1116423256281&l=0&ParentID=1120248810940&StoryID=1119651459703&highlight=1&keys=Creating+%2BEquitable+%2BSeverance+%2BPackages&lang=0&active=no>.

<sup>207</sup> *Id.* The benefits that are available will depend entirely on what the employer offers employees. Anything the employer offers employees is an option for use as consideration, if it is something beyond what the employee is entitled to by law.

<sup>208</sup> Howard T. Reben & Adrienne S. Cohen, *Checklist For Negotiating And Drafting Severance Agreements On Behalf Of Employee Clients*, REBEN, BENJAMIN & MARCH, <http://www.rbmlawoffice.com/CM/Articles/Drafting-Severance-Agreements.asp> (last visited Oct. 14, 2008). In some cases, allowing the employee to keep company property, such as a laptop or home computer, may actually cost the employer almost nothing. In many cases, property such as this will be fully expensed and possibly will not even be reused if the employer collects it. So, letting the employee just keep it is good for the employee and costs the employer little or nothing.

situation, but creative severance packages may ultimately save the employer some money. If it turns out the employee has a legitimate FMLA claim, and the court decides to follow *Taylor*, the employer wants to be out as little money as possible. A creative severance package may be the only way to accomplish this goal.

An employer is not usually required by law to make a lump sum severance payment, particularly if the employer is offering benefits in some other form.<sup>209</sup> Making cash payments to the employee over a period of time might end up being easier and less of a hardship. This spreads out the payments and does not require such a large outlay of cash upfront.

Lastly, if ever there was a time to review and tighten up FMLA policies and procedures, this is the time. If no violations have occurred, employees are less likely to bring a claim. Employers should seriously consider having their attorneys look over their current policies and procedures to be sure they really do conform to the law. Until this situation is resolved, it is better to err on the side of caution.

## VI. CONCLUSION

The status of FMLA waivers is less than clear. The split between the Fourth and Fifth Circuits highlights this confusion. It is also unclear where this issue is headed and what the outcome will be. Progress Energy filed a petition to the United States Supreme Court for a Writ of Certiorari on October 22, 2007,<sup>210</sup> but on June 16, 2008 the Supreme Court denied certiorari.<sup>211</sup> Prior to the Court denying certiorari, the Court invited the Solicitor General to file a brief expressing the United States' views on the matter.<sup>212</sup> "Requests for additional briefing often precedes a grant of certiorari,"<sup>213</sup> but that was not the case here. The Solicitor General responded on May 16, 2008.<sup>214</sup> The Solicitor General recommended the

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<sup>209</sup> *Id.* Also, if the employer is making payments, and the employee sues, there is at least a chance that the court will allow the employer to stop making payments. And, even if that doesn't happen, the employer gets to keep the money in the bank longer.

<sup>210</sup> Petition for a Writ of Certiorari, *supra* note 31.

<sup>211</sup> *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008).

<sup>212</sup> *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 1109 (2008) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States.").

<sup>213</sup> *Department of Labor, Supreme Court May Revise FMLA Regulation*, DISABILITY COMPLIANCE BULL., Vol. 36, No. 2, Jan. 31, 2008.

<sup>214</sup> Brief for the United States as Amicus Curiae, *supra* note 32.

Court deny certiorari and also discussed the possibility of the DOL revising the regulation.<sup>215</sup> While the DOL may decide to revise the regulation, it has not done so yet.

If the Supreme Court had decided to review *Taylor*, it is unlikely that the outcome would have changed. The *Taylor* court is reading the regulation correctly. The Supreme Court could not have ignored the mandates of a legitimate and constitutional federal statute just because it is unpopular.<sup>216</sup> No one likes the result of the *Taylor* decision, having to get approval just complicates the entire termination or settlement process, but this does seem to be the result obtained when the FMLA and the regulation are read together. The *Faris* court tried to use a “plain language” argument, but the court’s argument cannot stand up when one actually reads the “plain language.” The result of the *Faris* decision is better from a fairness standpoint, but the *Taylor* court did a better job at applying the law.

At least in the Fourth Circuit, *Taylor* is the current law; FMLA waivers need approval from the DOL or a court. Elsewhere, outside of the Fourth and Fifth Circuits, the current law is more confusing. Attorneys “seeking to protect clients from suit use waivers and releases to ‘close the book’ on all workplace claims, known or unknown, as of a certain date.”<sup>217</sup> Right now the best possible solution is an amendment of the FMLA based in the OWBPA. Whether this happens remains to be seen—and even if Congress started today, it could still be years before it actually happens. “The Fourth Circuit’s rule throws into legal limbo tens (if not hundreds) of thousands of validly executed releases because there is currently no mechanism in place for such releases to be approved.”<sup>218</sup> As Edmund McKenna said, “[t]here isn’t a good answer right now” and writing your Congressman may, in fact, be a very good idea.<sup>219</sup> In the meantime employers need to creatively protect themselves and try to limit their liability as much as possible.

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<sup>215</sup> *Id.* at 19.

<sup>216</sup> See Author’s comment, *supra* note 28.

<sup>217</sup> Brief of the Ass’n of Corporate Counsel as Amicus Curiae in Support of the Petitioner, *supra* note 181.

<sup>218</sup> Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *supra* note 14.

<sup>219</sup> Staff Writer, *supra* note 184.