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Fourth Circuit allows FMLA claim to proceed despite fact that the plaintiff signed a release at the termination of her employment where she waived her right to sue under Title VII, ADA, ADEA and "any other federal, state or local laws."

Leave It Out? Family And Medical Leave Act Claims May No Longer Be Waived By A General Release

By Joseph P. Harkins and Gary D. Shapiro

Based on the recent decision in *Taylor v. Progress Energy*, No. 04-1525 (4th Cir. July 20, 2005), the common employer practice of including Family and Medical Leave Act (FMLA) claims in general releases is in jeopardy. Although it is unclear whether other U.S. Courts of Appeals or the U.S. Supreme Court will follow *Taylor*, employers in the Fourth Circuit must now seek prior approval by the U.S. Department of Labor (DOL) or a court for a release of FMLA claims to be valid.

Hard Cases; Bad Law

Barbara Taylor, an employee of Progress Energy, began experiencing severe pain and swelling in her right leg. Initially, Taylor's doctor was unable to determine the cause of her illness. Over the next few months, she frequently missed work to undergo various medical tests and treatments, including a spinal tap that caused her to miss a full week of work. Ultimately, testing revealed an abdominal mass that required immediate surgery. Because Taylor was suffering from a serious health condition, the Company designated some of her leave as FMLA leave. However, the Company and Taylor could not agree on the amount of leave to be designated under the FMLA and a means to exclude her protected absences from her performance evaluation.

On her next performance evaluation, Taylor received a poor productivity rating. Soon after, the Company terminated Taylor as part of a reduction-in-force. Under the Company's transition plan, Taylor was eligible for certain benefits if she signed a general release. The general release waived the employee's right to sue under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other named statutes as well as "any other federal, state or local laws." Taylor signed the general release and accepted the transition pay.

DOL Regulation at Issue

Later, Taylor sued the Company in U.S. District Court. There, the Company contended that Taylor's FMLA claim should be denied because it fell within the catch-all provision of the general release. Despite a DOL regulation that seemingly prohibits such releases, the employer won summary judgment. The regulation (29 C.F.R. § 825.220(d)) provides that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." The employer advanced the theory that the regulation only prohibits the prospective waiver of substantive FMLA rights, namely, the employee's right to take up to 12 weeks of unpaid leave or to work on a reduced schedule, as well as the right to reinstatement. The Fourth Circuit, however, read the regulation in conjunction with the Preamble introducing it and concluded that FMLA claims can only be waived under DOL or court supervision.

Chevron Analysis

On appeal, Taylor successfully argued that the district court erred in analyzing the disputed DOL regulation under the Supreme Court standard from *Chevron v. Natural Resources Defense Council*. Under *Chevron*, a court must decide whether Congress has directly spoken to the precise question and whether the regulation is based on a permissible construction of the statute. Applying this standard, the Fourth Circuit concluded that

1 The First Circuit includes the following: Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico.

the regulation's plain language prohibits both the retrospective and the prospective waiver or release of all FMLA rights.

At the outset of its *Chevron* analysis, the court found that the FMLA is silent on whether its provisions may be waived. However, the court noted that the Secretary of Labor was delegated rulemaking authority under the FMLA, and that the regulation at issue in *Taylor* was promulgated under that authority.

Addressing the second step of the *Chevron* analysis, the court held that the regulation and Preamble unambiguously prohibit all unsupervised waivers or releases of FMLA claims. Importantly, the court dismissed the argument that the regulation only impacts prospective claims — the rationale of a now conflicting Fifth Circuit decision in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). Rather, the court held that the limitation applies to all claims arising under the FMLA, whether prospective or retrospective. As support for its holding, the court noted that the DOL, in the Preamble to the FMLA implementing regulations, likened the FMLA to the Fair Labor Standards Act, the provisions of which cannot be waived without DOL or court approval. This is in contrast to Title VII and the Age Discrimination in Employment Act, both of which are waivable without court or DOL supervision. The court ultimately held that a requirement of supervised waivers was based on a permissible construction of the FMLA, and consistent with the regulatory scheme designed to guarantee family and medical leave to all covered employees.

Adapting General Releases

Although this decision currently applies to employers in the Fourth Circuit — Maryland, Virginia, West Virginia, North Carolina and South Carolina — it is unclear what stance the other Courts of Appeals will take on this issue and whether they will adopt the reasoning of *Taylor* or the Fifth Circuit in *Faris*. Because this type of Circuit split may need to be resolved by the Supreme Court, employers should be cautious when drafting releases. There is no definitive answer as to whether FMLA claims can or cannot be settled without prior approval by the DOL or a court.

In addition, although *Taylor* does not bar employers from including specific statutes in the release provisions of a severance agreement, employers must now be on the lookout as to which statutes they include in these agreements. In particular, employers should be careful to avoid the common catch-all used by the defendant in *Taylor* — "any other federal, state or local law" — and instead tailor the terms of the release to particular claims and individual jurisdictions. Some case law suggests that an employer that asks an employee to release claims that cannot be privately released may be guilty of fraud. With that in mind, employers should carefully review and analyze their current release language.

The issue may be avoided by limiting the breadth of the release or including a statement that the agreement does not govern claims that cannot be released by private agreement. Similarly, employers should be aware of the inherent risks of listing various statutes in a release or waiver agreement. The inclusion of a laundry list of claims may be interpreted as excluding other statutes from its coverage. Because the wording of these clauses is fact specific and nuanced, employers should consult counsel before continuing to use general releases implicated by the *Taylor* decision.

Finally, employers may want to encourage employees to file complaints with DOL or the courts, *on the condition that* an accompanying agreement and release will be approved. Of course, this risks disapproval or an exploration of other issues.

Under *Taylor*, there are no easy answers.

Joseph P. Harkins is a Shareholder resident in Littler's Washington, D.C. office, and Gary D. Shapiro is an Associate resident in the Littler's Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.LITTLER, info@littler.com, Mr. Harkins at jharkins@littler.com or Mr. Shapiro at gshapiro@littler.com.
