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## A Next Step in Health Care Reform: Ensuring the Protection of Employee Rights Under the Family and Medical Leave Act

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**A NEXT STEP IN HEALTH CARE REFORM: ENSURING THE  
PROTECTION OF EMPLOYEE RIGHTS UNDER THE FAMILY AND  
MEDICAL LEAVE ACT**

APRIL G. DAWSON\*

ABSTRACT

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act into law. Notwithstanding the current constitutional challenges to the law, this historic legislation reaffirmed the basic principle that everyone should be afforded the opportunity to have security when it comes to health care. Such security also includes security in employment when a serious health condition causes an employee to be out of work for a temporary period of time. Indeed, it was the recognition of the need for job security during a time of illness which led Congress to enact the Family and Medical Leave Act (“FMLA”) in 1993, providing eligible employees twelve workweeks of leave each year to allow an employee to care for a spouse, child or parent facing a serious health condition or when the employee is battling his or her own serious health condition.

However, when the Department of Labor (“DOL”) amended FMLA regulations in November 2008 to allow employers to secure unsupervised waivers of employees’ FMLA rights, it severely undercut job security afforded employees under the Act. The DOL’s amendment weakens the intended protection of the Act by providing employers with the ability to easily avoid responsibility for FMLA violations, which in turn facilitates the removal of

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\* Assistant Professor of Law, North Carolina Central University School of Law. Professor Dawson represented the Plaintiff-Appellant throughout the litigation of *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007). I would like to thank my parents, Richard and Carol Gordon, for their unconditional love and support, and for instilling in me the love of learning. I want to especially thank my four incredible kids—Alexander, Kari, Ayanna, and Andrew—who encouraged me to write as often as possible and provided me with much laughter and fun when I needed a break. Thank you to the following individuals who have provided me with invaluable encouragement, suggestions, and guidance with this article: Professor Mary Wright, Associate Dean Wendy Scott, Professor Cheryl Amana, and Professor Charles Smith of North Carolina Central University School of Law. I would like to thank Aishah Casseus and Andrew Kisala for their valuable research assistance. Many thanks to the editors of the Saint Louis University Law Journal for all of their hard work. Finally, thank you to Barbara Taylor who allowed me the privilege of representing her.

employees who should be protected under the FMLA. This Article argues that employees should only choose to waive their FMLA rights after being fully and adequately informed about what their rights are and that this can only be accomplished through supervised waivers. This Article further advocates for executive and legislative action to revise the law, and proposes litigation strategies for effectively challenging FMLA waivers under the current regulatory scheme.

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## INTRODUCTION

On Tuesday, March 23, 2010, President Barack Obama signed the historic health care reform bill making the Patient Protection and Affordable Care Act the law of the land.<sup>1</sup> During the signing ceremony, the President stated that with this new law, the government had enshrined “the core principle that everybody should have some basic security when it comes to their health care.”<sup>2</sup> Security when it comes to health care also includes security in employment when a serious health condition causes an employee to be out of work for a temporary period of time. It was this recognition for the need for job security which led Congress, after years of effort by advocates for federal sick leave legislation, to enact the Family and Medical Leave Act of 1993 (“FMLA”).<sup>3</sup> The FMLA provides eligible employees twelve workweeks of leave each year to allow the employee to care for a child following the birth, adoption, or foster care placement of the child; “to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition”; and to allow an employee to receive treatment “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the [employee’s] position.”<sup>4</sup> Employers may not “interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided [by the Act].”<sup>5</sup> Nor may employers discriminate or retaliate against an employee for exercising his or her FMLA rights.<sup>6</sup>

An issue that received recent attention was whether FMLA rights were waivable absent court or the Department of Labor (“DOL”) approval. The question was whether FMLA rights should be treated like Fair Labor Standards Act (“FLSA”) rights and waivable only with approval by a court or the DOL, or whether FMLA rights should be treated like Title VII rights and waivable without approval by the court or the overseeing administrative agency. At the center of this debate was the 1995 FMLA regulation 29 C.F.R. § 825.220(d), which provided in part that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.”<sup>9</sup>

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make That 20, and it’s Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

2. Stolberg & Pear, *supra* note 1.

3. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–54 (2006)).

4. 29 U.S.C. § 2612(a)(1).

5. *Id.* § 2615(a)(1).

6. *Id.* § 2615(a)(2).

7. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2006).

8. 42 U.S.C. § 2000e-2(a)(1) (2006).

9. 29 C.F.R. § 825.220(d) (1995). The full text of the original 1995 provision of 825.220(d), which was effective until January 15, 2009, is as follows:

Only two circuit courts—the Fifth Circuit and the Fourth Circuit—directly addressed the issue and interpreted the regulation, and they reached opposite conclusions. The Fifth Circuit held in *Faris v. Williams WPC-1, Inc.* that section 825.220(d) only bars the prospective (future) waiver of substantive rights and not the retrospective (after the fact) release of claims.<sup>10</sup> The Fourth Circuit held in *Taylor v. Progress Energy, Inc.* that section 825.220(d) prohibits both the prospective and retrospective waiver of FMLA rights and claims unless the waiver is approved by the DOL or a court.<sup>11</sup> The United States Supreme Court declined to hear *Taylor*.<sup>12</sup> The Supreme Court's decision to deny certiorari was most likely based on the Solicitor General's recommendation that the Court deny certiorari because the DOL had taken steps to amend section 825.220(d).<sup>13</sup>

As the Solicitor General indicated in its brief, the DOL, on November 17, 2008, issued a final rule amending section 825.220(d) to read: "Employees cannot waive, nor may employers induce employees to waive, their *prospective* rights under FMLA."<sup>14</sup> The DOL further amended the regulation

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(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (*see* §825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

10. 332 F.3d 316, 321 (5th Cir. 2003).

11. 493 F.3d 454, 463 (4th Cir. 2007).

12. *Progress Energy, Inc., v. Taylor*, 128 S. Ct. 2931 (2008) (mem.).

13. Brief for the United States as Amicus Curiae at 19, *Progress Energy, Inc., v. Taylor*, 128 S. Ct. 2931 (2008) (No. 07-539), 2008 WL 2095733.

14. 29 C.F.R. § 825.220(d) (2009) (emphasis added). The full text of the amended provision of section 825.220(d), which became January 16, 2009, is as follows:

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (*see* §825.702(d)). An employee's acceptance of such "light duty" assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

*Id.*

to explicitly state that section 825.220(d) “does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.”<sup>15</sup> The amendment to section 825.220(d) became effective January 16, 2009.<sup>16</sup>

Now, approximately two years after the amendment allowing unsupervised waivers of FMLA claims, it appears that the DOL’s rule has threatened the job security of employees requiring leave under the FMLA. As will be discussed, the lack of oversight of the FMLA waiver process allows employers to easily circumvent the requirements of the FMLA and avoid responsibility for violations of the Act. This weakening of the FMLA is even more disconcerting given the current state of massive job losses. The increase in the number of mass layoffs and the reaffirmation that Americans deserve security when it comes to health care issues demand a reexamination of the effects of the DOL’s amendment to section 825.220(d). Part I of this Article provides an overview of the enactment of the FMLA and the promulgation and judicial interpretation of section 825.220(d). Part II examines the rules governing the waiver of rights under the other federal employment statutes. Part III argues that the purpose and uniqueness of the FMLA support a requirement that FMLA waivers be approved before being valid. Finally, Part IV argues for executive and legislative action to revise the law and proposes litigation strategies for effectively challenging FMLA waivers under the current regulatory scheme.

## I. FMLA

### A. *Enactment and Statutory Provisions*

The FMLA was signed into law by President Bill Clinton in 1993, following years of congressional debates and two vetoes by President George H.W. Bush.<sup>17</sup> Congress enacted the FMLA after finding, *inter alia*, that “the

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15. *Id.*

16. Family and Medical Leave Act of 1993, Effectiveness of Information Collection Requirements, 74 Fed. Reg. 2862, 2863 (Jan. 16, 2009).

17. Family and Medical Leave Act, 29 U.S.C. §§ 2601–54 (2006); Statement on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 50 (Feb. 5, 1993). The Family Medical Leave Act of 1990, H.R. 770, 101st Cong. (1990), was vetoed by President George H.W. Bush on June 29, 1990. Message to the House of Representatives Returning Without Approval the Family and Medical Leave Act of 1990, 1 PUB. PAPERS 890 (June 29, 1990). On July 25, 1990 the House of Representatives failed to obtain the necessary votes to override a Presidential Veto, obtaining only 232 of the needed 285 votes (2/3 of House of Representatives membership). 136 CONG. REC. 19,142–43 (1990). Two years later a similar bill, The Family Medical Leave Act of 1992, S.5, 102nd Cong. (1992), was vetoed by President George H.W. Bush on September 22, 1992. Message to the Senate Returning Without Approval the Family and Medical Leave Act of 1992, 2 PUB. PAPERS 1625 (Sept. 22, 1992). The Senate obtained the required votes to override

lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting; [and that] there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods.”<sup>18</sup> Thus, the FMLA was designed “to set a minimum labor standard for family and medical leave.”<sup>19</sup>

Under the FMLA, an “eligible” employee<sup>20</sup> of a “covered” employer<sup>21</sup> is entitled to twelve weeks of leave for one or more of the following:

- (A) . . . the birth of a son or daughter of the employee and in order to care for such son or daughter[;]
- (B) . . . the placement of a son or daughter with the employee for adoption or foster care[;]
- (C) [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition[;]
- (D) [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.<sup>22</sup>

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the Presidential Veto (obtaining 68 votes when 66 were required). 138 CONG. REC. 27,513 (1992). However, on September 30, 1992, the House of Representatives failed to obtain the necessary votes to override the Presidential Veto, obtaining only 258 of the needed 285 votes (2/3 of House of Representatives membership). 138 CONG. REC. 29,140 (1992).

18. 29 U.S.C. § 2601(a)(3)–(4) (2006).

19. *Taylor v. Progress Energy, Inc.* (*Taylor I*), 415 F.3d 364, 374 (4th Cir. 2005).

20. Employees are eligible if they have worked for a covered employer for at least 12 months and worked 1250 hours during the 12-month period immediately preceding the start of the leave. 29 U.S.C. § 2611(2) (2006); 29 C.F.R. § 825.110 (2010).

21. The FMLA applies to all private employers engaged in any industry affecting commerce with 50 or more employees who work 20 or more calendar workweeks within a 75-mile radius. 29 U.S.C. § 2611(4)(A); 29 C.F.R. §§ 825.104(a), 825.111. The FMLA also applies to all public employers and all public and private schools are covered by the FMLA without regard to the number of employees employed. *See* 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104(a), 825.108(d).

22. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100(a). Additionally, on January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”), Pub. L. No. 110-181, 122 Stat. 3. Among other things, the NDAA added a fifth reason for leave that allows an employee to twelve (12) weeks of leave for any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

*Id.* § 585(a)(2)(A), 122 Stat. at 129 (codified at 29 U.S.C. § 2612(a)(1)(E)).

The NDAA also amended the FMLA to permit a “spouse, son, daughter, parent, or next of kin” to take up to 26 workweeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” *Id.* § 585(a)(1), 122 Stat. at 128 (codified at



The FMLA provides three categories of rights—substantive, proscriptive, and remedial.<sup>23</sup> The substantive rights include an employee’s right to receive up to twelve weeks of unpaid leave for a qualifying situation<sup>24</sup> and the right to reinstatement following the leave.<sup>25</sup> Other substantive rights include the continuation of employment benefits,<sup>26</sup> the maintenance of the employee’s group health coverage,<sup>27</sup> and the availability of intermittent leave.<sup>28</sup> Additionally, “employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ‘no fault’ attendance policies.”<sup>29</sup> Congress made it unlawful for an employer to “interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided [by the Act].”<sup>30</sup>

The proscriptive rights include an employee’s right not to be discriminated against or retaliated against for exercising FMLA rights.<sup>31</sup> The FMLA also provides employees with remedial rights, which provide employees with a private right of action to recover both equitable relief and money damages against an employer who interferes with an employee’s exercise of any rights under the Act, or discriminates or retaliates against an employee’s exercise of any rights under the Act.<sup>32</sup>

#### B. *Promulgation of Section 825.220(d)*

Congress delegated authority to the Secretary of Labor to prescribe the regulations necessary to administer the FMLA.<sup>33</sup> As required under the notice-

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29 U.S.C. § 2611(15)); *id.* § 585(a)(2)(B), 122 Stat. at 129 (codified at 29 U.S.C. § 2612(a)(3)). This provision became effective January 28, 2008.

23. *Taylor v. Progress Energy, Inc. (Taylor II)*, 493 F.3d 454, 457 (4th Cir. 2007).

24. 29 U.S.C. § 2612(a)(1) (2006).

25. *Id.* § 2614(a)(1).

26. *Id.* § 2614(a)(2).

27. *Id.* § 2614(c)(1).

28. *Id.* § 2612(b)(1).

29. 29 C.F.R. § 825.220(c) (2010).

30. 29 U.S.C. § 2615(a)(1); *see also* *Babcock v. BellSouth Adver. & Publ’g Corp.*, 348 F.3d 73, 76 (4th Cir. 2003) (noting that an employee may recover damages or equitable relief when such interference, restraint, or denial of FMLA rights occurs).

31. *Taylor II*, 493 F.3d 454, 457 (4th Cir. 2007); *see* 29 U.S.C. § 2615(a)(2); *see also* *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1325 (10th Cir. 1997) (discussing the elements necessary to assert a violation of § 2615(a) due to retaliation).

32. 29 U.S.C. §§ 2615(a)(1)–(2), 2617(a)(1)–(2); *Taylor II*, 493 F.3d at 457; *see also* *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 724–25 (2003) (noting the FMLA’s creation of “a private right of action to seek both equitable relief and money damages”).

33. 29 U.S.C. § 2654. The Secretary designated the Wage and Hour Division of the Department of Labor’s Employment Standards Administration as the agency responsible for

and-comment section of the Administrative Procedure Act (“APA”),<sup>34</sup> the Secretary published a request for comments on issues to be addressed in drafting the regulations for the FMLA.<sup>35</sup> On June 4, 1993, the Secretary published interim regulations for the FMLA, along with comments as to how the regulations had been formulated.<sup>36</sup> In addition to publishing the interim regulations, the Secretary made a request for additional comments before the final regulations were scheduled to take effect.<sup>37</sup>

One of the interim regulations was section 825.220(d), which provided in part that “[e]mployees cannot waive their rights under FMLA . . . [and] [e]mployers are prohibited from inducing an employee to waive rights under the Act.”<sup>38</sup> Some employers expressed concerns with section 825.220(d) and “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).”<sup>39</sup> Rejecting the employers’ recommendation, the DOL stated that it

ha[d] given careful consideration to the comments received on this section and ha[d] concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA.<sup>40</sup>

The final regulations varied little from the interim regulations,<sup>41</sup> and the final version of section 825.220(d) was identical to the interim version.<sup>42</sup>

### C. *Judicial Interpretation of Section 825.220(d)*

The first reported case applying and thus interpreting section 825.220(d) was *Bluitt v. Eval Co. of America*.<sup>43</sup> *Bluitt* involved an employee who was terminated by her employer after she failed to report to work because of

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administering and enforcing the FMLA. Implementation of the Family and Medical Leave Act of 1993, 58 Fed. Reg. 13,394 (Mar. 10, 1993).

34. 5 U.S.C § 553(b) (2006) (stating that “[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law”).

35. Implementation of the Family and Medical Leave Act of 1993, 58 Fed. Reg. at 13,394.

36. Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 (June 4, 1993).

37. *Id.*

38. *Id.* at 31,825–26.

39. Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).

40. *Id.*

41. *Compare, e.g.,* 29 C.F.R. § 825.113(c)(2) (1993), *with* 60 Fed. Reg. at 2244, and 58 Fed. Reg. at 31,817.

42. *Compare* 29 C.F.R. § 825.220(d) (1993), *with* 58 Fed. Reg. at 31,825.

43. 3 F. Supp. 2d 761 (S.D. Tex. 1998).

alleged serious health problems.<sup>44</sup> The employee subsequently filed an FMLA action against her employer asserting that her employer violated the FMLA because she was not advised of her rights under the FMLA prior to her termination.<sup>45</sup> The employee had signed a “Settlement Agreement and General Release” related to an entirely separate action approximately two weeks after her termination.<sup>46</sup> When the employee filed the FMLA action, the employer argued that the employee had waived her rights when she signed the settlement agreement and general release.<sup>47</sup> The court concluded, however, that section 825.220(d) precluded waiver of the employee’s FMLA claim.<sup>48</sup>

Four years later, the second published opinion addressing section 825.220(d) was issued in the case of *Dierlam v. Wesley Jessen Corp.*<sup>49</sup> *Dierlam* involved an employee who filed an FMLA action against her former employer because the employer reduced her bonus based on the employee’s twelve-week leave for adoption of a child.<sup>50</sup> Prior to filing the lawsuit, the employee completed her term with the employer and upon leaving the company the employee signed a Separation Agreement and General Release.<sup>51</sup> Like the court in *Bluitt*, the *Dierlam* court concluded that section 825.220(d) precluded waiver of the employee’s claim despite the all inclusive language of the general release.<sup>52</sup>

Although there was little judicial attention initially given to section 825.220(d) following its promulgation, beginning in 2003, a year after the *Dierlam* decision, a number of courts addressed the meaning of section 825.220(d) and often reached different results.

1. *Faris v. Williams WPC-I, Inc.*

The first court to closely analyze section 825.220(d) was the Fifth Circuit in the case of *Faris v. Williams WPC-I, Inc.*<sup>53</sup> *Faris* involved an employee who maintained that she was terminated in retaliation for asserting her FMLA rights.<sup>54</sup> Prior to filing her lawsuit, Faris had signed a release, which did not specifically mention the FMLA, but provided that Faris was waiving her rights to “all other claims arising under any other federal, state or local law or

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44. *Id.* at 762.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Bluitt*, 3 F. Supp. 2d at 764.

49. 222 F. Supp. 2d 1052 (N.D. Ill. 2002).

50. *Id.* at 1054.

51. *Id.*

52. *Id.* at 1056.

53. 332 F.3d 316 (5th Cir. 2003).

54. *Id.* at 318.

regulation.”<sup>55</sup> Thus, the only issue to be resolved by the Fifth Circuit was whether section 825.220(d) prohibits the waiver of an employee’s right to bring a retaliation claim pursuant to 29 U.S.C. § 2615(a)(2).<sup>56</sup>

The Fifth Circuit began its analysis by discussing whether the term “employee” in section 825.220(d) referred to only current employees.<sup>57</sup> While the Fifth Circuit concluded that there were strong indications that the term “employee” refers only to current employees, it declined to reach that issue.<sup>58</sup>

The Fifth Circuit next addressed the employer’s argument “that the regulation extends only to ‘substantive rights’ under the FMLA, rather than to post-dispute causes of action for retaliation.”<sup>59</sup> The court began its analysis by distinguishing between the substantive rights and the right to be free from retaliation.<sup>60</sup> The court then concluded that the term “rights under the law” in the regulation was in reference to only the substantive rights.<sup>61</sup> The court specifically noted that “[t]he cause of action for *discrimination*, however, is never described as an FMLA right itself, within the regulation or elsewhere.”<sup>62</sup> The court, having distinguished FMLA substantive rights and FMLA proscriptive rights (which include the right to be free from retaliation), concluded that the phrase “rights under FMLA” as used in section 825.220(d) was in reference to the substantive FMLA rights only and did not incorporate proscriptive or retaliation rights.<sup>63</sup> Based on this conclusion, the Fifth Circuit held the regulation did not prohibit Faris from waiving her proscriptive rights, and thus concluded that the release signed by Faris barred her from bringing her retaliation claim.<sup>64</sup>

The court, however, did not end its analysis with the distinction between the prescriptive (substantive) and proscriptive (retaliation) rights under the FMLA. After making the substantive-retaliation distinction and stating that “[s]everal factors support the interpretation that this regulation applies only to waiver of *substantive rights* under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for *retaliation* for the exercise of those rights,”<sup>65</sup> the court concluded without clear explanation or analysis that section 825.220(d) prohibits only the *prospective* waiver of

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55. *Id.*

56. *See id.* at 320–21.

57. *Id.* at 320.

58. *Faris*, 332 F.3d at 320.

59. *Id.*

60. *Id.* at 320–21.

61. *Id.*

62. *Id.* at 321 (emphasis added).

63. *Faris*, 332 F.3d at 322.

64. *Id.*

65. *Id.* at 320 (emphasis added).

substantive rights.<sup>66</sup> However, that language is arguably mere dictum because that issue was not before the court or the basis for the court's conclusion that the regulation did not prevent Faris from waiving her rights to bring a *retaliation* claim.

As will be discussed in greater detail below, notwithstanding the fact that the Fifth Circuit's conclusion that section 825.220(d) prohibits only the *prospective* waiver of substantive rights is dicta, the DOL nevertheless adopted the Fifth Circuit's conclusion that section 825.220(d) only prohibits the *prospective* waiver of rights.<sup>67</sup>

## 2. *Taylor v. Progress Energy, Inc. (Taylor I)*

Two years after the Fifth Circuit issued the *Faris* decision, the Fourth Circuit in 2005 interpreted section 825.220(d) in *Taylor v. Progress Energy, Inc.* ("*Taylor I*").<sup>68</sup> *Taylor* involved an employee who claimed that she was misinformed of her FMLA rights, improperly denied FMLA-qualifying leave, had her FMLA-qualifying leave counted against her in raise determinations, had her FMLA-qualifying leave counted against her in her performance evaluation, and was selected for termination in a reduction in force as a result of her improper performance evaluation and in retaliation for attempting to exercise her FMLA rights.<sup>69</sup> Taylor was required to sign a severance agreement and a general release to receive her severance benefits.<sup>70</sup> The release did not specifically mention the FMLA, but included language which stated that the employee was waiving "claims . . . arising under . . . any other federal, state or local law."<sup>71</sup> Taylor thereafter filed suit alleging a number of FMLA violations.<sup>72</sup> In response to the employer's argument that Taylor waived her rights when she signed the general release, Taylor argued that 29 C.F.R. § 825.220(d) prohibits the waiver of Taylor's FMLA rights through the signing of the general release.<sup>73</sup> The trial court disagreed, adopted the reasoning of the Fifth Circuit decision in *Faris*,<sup>74</sup> and held that section 825.220(d) only bars the prospective (future) waiver of substantive rights and

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66. *Id.* at 321.

67. However, the DOL later disagreed with the Fifth Circuit that the phrase "rights under FMLA" as used in 825.220(d) is limited to only substantive rights. See *Taylor II*, 493 F.3d 454, 458 (4th Cir. 2007).

68. 415 F.3d 364, 365 (4th Cir. 2005).

69. *Id.* at 366–68.

70. *Id.* at 367.

71. *Id.*

72. *Id.* at 367–68.

73. *Taylor I*, 415 F.3d at 368.

74. See *supra* note 63 and accompanying text.

not the retrospective (after the fact) release of claims.<sup>75</sup> On appeal, a unanimous panel of the Fourth Circuit reversed, holding that the release signed by Taylor was not enforceable with regard to her FMLA claims because, based on the plain language of the regulation, section 825.220(d) prohibits both the prospective and retrospective waiver of FMLA rights and claims, unless the waiver is approved by the DOL or a court.<sup>76</sup>

The Fourth Circuit later granted the employer's petition for rehearing and allowed the DOL to file an amicus brief and present oral arguments in support of the employer's position that section 825.220(d) only prohibits prospective, but not retrospective, waiver of rights. The court then went on to issue the *Taylor II* decision.<sup>77</sup>

### 3. *Taylor v. Progress Energy (Taylor II)*

Following rehearing, a now divided panel of the Fourth Circuit again held that section 825.220(d) prohibits the waiver of all of FMLA rights (substantive, proscriptive, and remedial) and is not limited to only prospective waivers of these rights.<sup>78</sup> Looking to the plain language of the regulation, the Court of Appeals concluded that the phrase "rights under FMLA" includes no limitations regarding the specific rights under the FMLA and includes no

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75. *Taylor v. Progress Energy, Inc.*, No. 7:03-CV-73-H(1), 2004 WL 5576902, at \*5 (E.D.N.C. Mar. 22, 2004).

76. *Taylor I*, 415 F.3d at 375.

77. In between *Taylor I* and *Taylor II*, two district courts addressed the issue of the meaning of 825.220(d). In July 2006, the United States District Court for Oregon in *Brizzee v. Fred Meyer Stores, Inc.* followed the Fourth Circuit and held that an employee may not waive their rights under the FMLA without approval from a court or the DOL. No. CV04-1566-ST, 2006 WL 2045857, at \*11 (D. Or. July 17, 2006). The court stated that it was "more persuaded by the thorough analysis and reasoning of the Fourth Circuit's decision in *Taylor*." *Id.* The court reaffirmed its position in 2008. *Brizzee v. Fred Meyer Stores, Inc.*, No. CV 04-1566-ST, 2008 WL 426510, at \*3 (D. Or. Feb. 13, 2008) ("This court has carefully reviewed the arguments for the opposing positions and remains persuaded by the Fourth Circuit's analysis.").

Then in August of that same year, the United States District Court for the Eastern District of Pennsylvania in *Dougherty v. Teva Pharmaceuticals USA (Dougherty I)* addressed the issue. No. 05-2336, 2006 WL 2529632 (E.D. Pa. Aug. 30, 2006). The court initially agreed with the Fourth Circuit in *Taylor I* and held that section 825.220(d) prohibited employees from waiving their FMLA rights. *Id.* at \*6. However, the court granted the employer's motion for reconsideration and in a decision dated April 9, 2007 (after the Fourth Circuit granted rehearing in *Taylor*, but before the Fourth Circuit decided and issued its opinion in *Taylor II*) the *Dougherty* court vacated its earlier order and held "[s]ection 825.220(d) does not prohibit an employee from waiving past FMLA claims as part of a severance agreement or settlement." *Dougherty v. Teva Pharm. USA (Dougherty II)*, No. 05-2336, 2007 WL 1165068, at \*6-7 (E.D. Pa. Apr. 9, 2007). On February 20, 2008, following the Fourth Circuit's *Taylor II* decision, discussed in detail below, the court reaffirmed its holding in *Dougherty II*. *Dougherty v. Teva Pharm. USA (Dougherty III)*, No. 05-CV-2336, 2008 WL 508011, at \*5 (E.D. Pa. Feb. 20, 2008).

78. *Taylor II*, 493 F.3d 454, 463 (4th Cir. 2007).

limitations regarding prospective or retrospective waivers.<sup>79</sup> The court further noted that there is nothing in the plain language that limits the waiver prohibition to only prospective waivers.<sup>80</sup> The court also noted that there is nothing in the plain language that would suggest that the phrase “rights under FMLA” does not include remedial rights—the right of action provided under section 2617(a)(2).<sup>81</sup>

The court also concluded that the DOL’s proffered interpretation was inconsistent with the regulation and should therefore be rejected.<sup>82</sup> The court also concluded that the DOL’s current interpretation was inconsistent with the Department’s position at the time the regulation was promulgated in 1995.<sup>83</sup> The court noted that the DOL specifically considered and rejected a proposed amendment that would have excluded severance agreement waivers (generally retrospective waivers) from the waiver prohibition in section 220(d).<sup>84</sup> Rejecting the request to change the provision, the DOL explained that it had carefully considered the comments on section 220(d) and “concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA.”<sup>85</sup>

The panel reinstated its opinion in *Taylor I*, and reaffirmed its conclusion that “without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act.”<sup>86</sup> The dissenting judge disagreed with the majority’s conclusion that the language of section 825.220(d) was clear and unambiguous and argued that, under *Auer v. Robbins*,<sup>87</sup> deference should be given to the DOL’s interpretation of its own

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79. *Id.* at 456–57.

80. *Id.* at 458. Despite the DOL’s claim that section 220(d) only prohibits the *prospective* waiver of *substantive* rights, the regulation’s plain language controls when a regulation is clear and unambiguous. *Id.*; see *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (“To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”).

81. *Taylor II*, 493 F.3d at 457.

82. *Id.* at 461.

83. *Id.* at 461–62.

84. *Id.* at 461; see Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).

85. 60 Fed. Reg. at 2218.

86. *Taylor II*, 493 F.3d at 463.

87. 519 U.S. 452, 461 (1997).

regulation.<sup>88</sup> The United States Supreme Court denied the Petition for Certiorari filed on behalf of the employer in *Taylor*.<sup>89</sup>

*D. Amendment of Section 825.220(d)*

Prior to the Fourth Circuit's interpretation of section 825.220(d), the DOL was silent regarding the meaning of that regulatory provision. However, following the Fourth Circuit's July 2005 decision in *Taylor I*, the DOL issued a Request for Information ("RFI") on December 1, 2006, requesting information regarding, *inter alia*, employees' waiver of FMLA rights pursuant to section 825.220(d).<sup>90</sup> This was the first indication that the DOL was reviewing and considering taking formal steps to amend the regulation. After the Fourth Circuit decided *Taylor II* in July 2007, wherein it reiterated its holding in *Taylor I* that section 825.220(d) required supervised waivers of FMLA claims, the DOL issued a notice of proposed rulemaking which included a proposed amendment to section 825.220(d).<sup>91</sup> Following the Court's denial of certiorari, the DOL issued a final rule on November 17, 2008, amending section 825.220(d).<sup>92</sup> With the amendment, which became effective January 16, 2009, the DOL modified the regulation to explicitly state that section 825.220(d) "does not prevent the settlement or release of FMLA claims by employees

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88. *Taylor II*, 493 F.3d at 464 (Duncan, J., dissenting).

89. *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008) (mem.). At the request of the Court, the United States Solicitor General filed an invitation brief addressing the issue of review. Although the Solicitor General argued that the Fourth Circuit erred in rejecting the Department of Labor's interpretation of section 825.220(d), he nevertheless recommended that the Court deny certiorari because the DOL had proposed a new regulation that would clarify the issue of employees waiving their FMLA rights. Brief for the United States as Amicus Curiae at 19, *Progress Energy, Inc. v. Taylor*, 128 S. Ct. 2931 (2008), 493 F.3d 316 (2007) (No. 07-539), 2008 WL 2095733.

90. Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69,504, 69,509-10 (Dec. 1, 2006).

91. The DOL stated:

The Department proposes to clarify the language in paragraph (d) in light of the Fourth Circuit's decision in *Taylor* which held that employees cannot voluntarily settle their past FMLA claims. The Department disagrees with that reading of the regulations. As the example in the current regulations reveals, this provision was intended to apply only to the waiver of prospective rights. In the interest of clarity, however, the Department proposes to make explicit in paragraph (d) that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court. The Department does not believe this is a change in the law as it has never been the Department's practice, since the enactment of the FMLA, to supervise such voluntary settlements.

Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7901 (Feb. 11, 2008).

92. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008).



based on past employer conduct without the approval of the Department of Labor or a court.”<sup>93</sup>

When the DOL issued the final rule amending section 825.220(d), the agency maintained that its amendment did not change the regulation, but merely clarified the meaning of the provision.<sup>94</sup> Indeed, the DOL has maintained since filing its amicus curiae brief in *Taylor II* (the first time the DOL commented on the waiver provision of section 825.220(d)) that the phrase “waiver of rights” in section 825.220(d) refers to only prospective waiver of rights.

Despite the DOL’s claim that it has always viewed the language in section 825.220(d)—“an employee may not waive his rights”—as only applying to prospective waivers,<sup>95</sup> it bears noting that in previous litigation the DOL clearly viewed the phrase “waiver of rights” as relating to the waiver of retrospective claims. In *Niland v. Delta Recycling Corp.*<sup>96</sup> the DOL filed an amicus curiae brief in support of the employer, wherein the Secretary uses the phrase “waiver of [Appellant’s] rights” to refer to the settlement of claims arising from *past* violations of employment laws.<sup>97</sup> *Niland* was a case wherein

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93. 29 C.F.R. § 825.220(d) (2009).

94. The DOL stated:

Because of the perceived ambiguity in the 1995 regulation, the Department now clarifies that it intends, as it has always intended, for the waiver prohibition to apply only to prospective FMLA rights. The Department notes that it intended under the proposal to allow employees to enter severance agreements releasing FMLA claims based on past employer conduct, in addition to allowing settlement of FMLA claims in situations where the employee has filed a claim against the employer. The Department has never interpreted the waiver provision as applying to the settlement of claims or to the release of FMLA claims in severance agreements based on past employer conduct, whether known or unknown to the employee at the time of entering the severance agreement. In the interest of further clarity, the Department has modified the language in the final rule. By changing the language from settling past FMLA claims to settling or releasing FMLA claims based on past conduct by the employer, the Department intends to make clear that an employee may waive his or her FMLA claims based on past conduct by the employer, whether such claims are filed or not filed, or known or unknown to the employee as of the date of signing the settlement or the severance agreement. Thus, an employee may sign a severance agreement with his or her employer releasing the employer from all FMLA claims based on past conduct by the employer. An employee may also settle an FMLA claim against his or her employer without Department or court approval. The Department believes this promotes the efficient resolution of FMLA claims and recognizes the common practice of including a release of a broad array of employment claims in severance agreements.

73 Fed. Reg. at 67,987–88.

95. *Id.*

96. 377 F.3d 1244 (11th Cir. 2004).

97. Brief for the Secretary of Labor as Amicus Curiae in support of Defendant-Appellee Delta Recycling Corp. Supporting Affirmance of the District Court at 22, *Niland*, 377 F.3d 1244 (No. 03-14553), 2004 WL 2445519 [hereinafter Secretary of Labor *Niland* Brief].

the employer, Delta Recycling Corp., discovered that it did not pay current and former employees overtime in accordance with the FLSA.<sup>98</sup> The DOL and Delta entered into a Compliance Partnership Agreement to resolve the issue.<sup>99</sup> In part, the Compliance Partnership Agreement required Delta to conduct a self-audit to determine overtime wage liability.<sup>100</sup> In addition, the agreement required the DOL to supervise the payment of any back wages and allowed Delta to use waiver language set forth in DOL Form WH-58 (“Receipt of Payment of Wages”).<sup>101</sup> Delta sent a check for back wages to the plaintiff with a letter indicating that the acceptance of the check constituted a waiver of legal claims.<sup>102</sup> The plaintiff eventually cashed the check and later sued Delta in the District Court for the Southern District of Florida seeking back overtime wages under the FLSA.<sup>103</sup> Delta moved for summary judgment, which was granted.<sup>104</sup> The plaintiff appealed to the Eleventh Circuit Court of Appeals.

In its amicus curiae brief arguing for affirmance of the district court’s grant of summary judgment, the Secretary of Labor argued that the employee “waived his right to bring a private action” under the FLSA for the employer’s *past* violation of the FLSA because the DOL supervised the payment of unpaid wages and the employee signed a DOL-approved receipt form specifically advising the employee that acceptance of such payment would constitute a waiver of his rights under the FLSA.<sup>105</sup> The Secretary’s entire discussion of the phrase “waiver of rights” centered on the alleged *retrospective* waiver and settlement of FLSA rights and claims, and the employee’s waiver of his right to bring a private action.<sup>106</sup> The Eleventh Circuit agreed with the DOL and affirmed the grant of summary judgment.<sup>107</sup> Thus, it is difficult to reconcile the DOL’s current interpretation of the phrase “waiver of rights” with its view of the phrase in *Niland*. Moreover, the DOL’s view in *Niland* that the phrase “waiver of rights” speaks to past violation of claims is consistent with Congress’ use of the phrase<sup>108</sup> and the Supreme Court’s use of the phrase.<sup>109</sup>

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98. *Niland*, 377 F.3d at 1245–46.

99. *Id.* at 1246.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Niland*, 377 F.3d at 1246.

104. *Id.* at 1247.

105. Secretary of Labor *Niland* Brief, *supra* note 97, at 13, 16–17.

106. *Id.* at 13.

107. *Niland*, 377 F.3d at 1248.

108. Congress uses the phrase “waiver of rights” in the context of *retrospective* waiver of FLSA rights or claims. In section 216(c), Congress authorizes the DOL to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . , and the agreement of any employee to accept such payment shall upon payment in full constitute a *waiver by such employee of any right he may have under subsection (b) of this section to such unpaid*

Finally, the DOL's claim that the regulation only related to prospective waiver of claims would render the regulation superfluous and thus unnecessary because the Supreme Court acknowledged in 1974, almost twenty years before the enactment of the FMLA, that "there can be no prospective waiver of an employee's rights under Title VII."<sup>110</sup> Thus, contrary to its assertion, the DOL did more than simply clarify the regulation, but in fact significantly changed the meaning of section 825.220(d). However, notwithstanding the arguments regarding the substance of the DOL's amendment, the end result is, be it through clarification or outright modification of section 825.220(d), that employers may secure unapproved waivers of FMLA rights from their employees.

Proponents of unsupervised FMLA waivers argue that the amendment ensures that FMLA rights are being treated like the majority of the other federally created employment rights, which may be waived without approval

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minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

29 U.S.C. § 216(c) (2006) (emphasis added). When Congress added the waiver provision found in section 216(c) in 1949, it did so to encourage employers who had *already* violated employees' rights under the FLSA to voluntarily settle employees' claims under the supervision of the DOL. *See Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977). Thus, when Congress states in section 216(c) that acceptance of the settlement by an employee constitutes "a waiver . . . of any right . . . under [the FLSA]," Congress is referring to the *retrospective* waiver of rights or settlement of claims.

109. The United States Supreme Court's rationale in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945)—the case in which this Court created a judicial prohibition against waivers of an employee's rights under the FLSA—also supports the conclusion that the phrase "waiver of rights" as used in the FMLA regulation includes retrospective waivers. The specific issue addressed by the Court with respect to two of the consolidated cases was "whether an employee subject to the terms of the [FLSA] can waive or release his right to receive from his employer liquidated damages under Section 16(b)." *Id.* at 699. After stating the general proposition that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," *id.* at 704, the Court concluded that the "attempted release and waiver of rights under the Act [through the signing of the release] was absolutely void," *id.* at 714. The Court recognized that by having the employees execute a release, the employer was attempting to effectuate a retrospective waiver of the employee's rights under the FLSA. *See id.* at 707–08.

110. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Interpreting the regulation in the manner suggested by the DOL would go against the classic canon of statutory construction that courts must avoid any interpretation that would render a regulation superfluous. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))); *Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005) ("It is a classic canon of statutory construction that courts must 'give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.'" (quoting *United States v. Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003))).

from the overseeing agency or the courts.<sup>111</sup> However, as demonstrated below, there are significant differences between the FMLA and the other federal employment statutes and rights that warrant approval of FMLA waivers before they are valid.

## II. WAIVER OF STATUTORY EMPLOYMENT RIGHTS

Currently, there are three different degrees of review of waivers of federal employment rights. A close examination of the oversight mandated before waivers are valid reveals that employees whose FMLA rights have been violated are afforded the least amount of protection when an employer seeks to have employees waive their rights.

### A. Waiver of Fair Labor Standard Act Rights

The most restrictive waiver rules apply when employees are waiving their rights under the FLSA. The FLSA was enacted in 1938 for the purpose of protecting workers from “substandard wages and oppressive working hours.”<sup>112</sup> In addition to mandating a minimum wage for covered employees, the FLSA requires that covered employees be paid overtime wages for each hour worked in excess of forty hours per workweek.<sup>113</sup> Congress, recognizing the unequal bargaining power between employers and employees, made the FLSA’s provisions mandatory.<sup>114</sup> However, when Congress enacted the FLSA, it did not address whether employees’ rights under the statute could be waived. This question was addressed by the United States Supreme Court in *Brooklyn Savings Bank v. O’Neil* seven years after enactment of the statute.<sup>115</sup>

*Brooklyn* involved the claims of workers who were not paid their wages in a timely manner as required by the FLSA.<sup>116</sup> The specific issue addressed by the Court with respect to two of the consolidated cases was “whether an employee subject to the terms of the [FLSA] can waive or release his right to receive from his employer liquidated damages under § 16 (b).”<sup>117</sup> In one case, the employee signed “a release of all of his rights under the [FLSA].”<sup>118</sup> In the

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111. See, e.g., Jessica Snorgrass, Comment, *Waiving the Effectiveness of the FMLA: The Anti-Waiver Approach to Enforceability of FMLA Severance Agreement Waivers*, 45 SAN DIEGO L. REV. 163, 179 (2008).

112. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); see also *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (The FLSA was enacted to protect “the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.”).

113. 29 U.S.C. §§ 206(a)(1), 207(a)(1) (2006).

114. *Brooklyn Sav. Bank*, 324 U.S. at 707.

115. *Id.* at 699.

116. *Id.* at 700–02.

117. *Id.* at 699.

118. *Id.* at 700.

second consolidated case involving the waiver issue, the employee signed a “general release of all claims.”<sup>119</sup>

In addressing the issue of the waivability of FLSA rights, the Court concluded that based on the policy considerations, an individual employee’s statutory entitlements under the FLSA, i.e., right to a minimum wage and to overtime pay, are not subject to negotiation or bargaining between employers and employees.<sup>120</sup> After stating the general proposition that “a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy,”<sup>121</sup> the Court concluded that the “attempted release and waiver of rights under the Act [through the signing of the release] was absolutely void.”<sup>122</sup> The Court reaffirmed this holding a year later in *D.A. Schulte, Inc. v. Gangi*.<sup>123</sup> Thus, while Congress did not explicitly state that employees’ rights afforded under the FLSA may not be waived, the Supreme Court concluded that statutory entitlements under the FLSA cannot be abridged by contract or otherwise waived because it would “nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.”<sup>124</sup>

#### B. Waiver of Title VII Rights

Employers also seek to have employees waive their rights provided under Title VII of the Civil Rights Act of 1964. Title VII was enacted twenty-six years after the enactment of the FLSA.<sup>125</sup> In contrast to the FLSA, which set forth minimum labor standards, Title VII addressed invidious discrimination in employment practices based on race, color, religion, sex, and national origin.<sup>126</sup> However, like the FLSA, the original statutory and regulatory language did not address the waivability of Title VII rights. The issue of the waivability of rights under Title VII arose ten years after its enactment in the case of *Alexander v. Gardner-Denver Co.*<sup>127</sup>

*Gardner-Denver* addressed the issue of whether an employee was precluded from bringing a Title VII action when his claims were adjudicated in binding arbitration pursuant to a collective bargaining agreement.<sup>128</sup> The Court

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119. *Brooklyn Sav. Bank*, 324 U.S. at 701–02.

120. *Id.* at 706–07.

121. *Id.* at 704.

122. *Id.* at 713–14.

123. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114–15 (1946) (noting that employees generally may not waive their right to wages or liquidated damages).

124. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (internal quotation marks omitted).

125. 42 U.S.C. § 2000e-2(a)(1) (2006).

126. *Id.*

127. 415 U.S. 36 (1974).

128. *Id.* at 43.

concluded that the submission, adjudication, and resolution of a claim of discrimination under the procedures provided for under the collective bargaining agreement did not amount to the employee waiving his rights to pursue his claims under Title VII in a court of law.<sup>129</sup> Although the case did not involve a situation in which the employee signed a waiver or general release, the Court noted that “presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement”<sup>130</sup> provided “the employee’s consent to the settlement was voluntary and knowing.”<sup>131</sup> The Court did not specifically address whether such a waiver required supervision by the courts or the associated administrative agency. However, that the Court only noted one requirement, i.e., that the waiver be “voluntary and knowing,” suggests that the Court did not view waivers of Title VII claims in the same manner as waivers of rights under the FLSA, which required court or DOL approval. Indeed, *Gardner-Denver* is frequently cited for the proposition that waiver of Title VII claims need not be supervised.<sup>132</sup>

The distinction between the agencies charged with enforcing the FLSA and Title VII may also explain the difference in treatment of waivers. As noted above, the DOL is tasked with the enforcement of the FLSA.<sup>133</sup> The DOL has the authority to adjudicate claims and impose administrative sanctions against

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129. *Id.* at 52.

130. *Id.*

131. *Id.* at 52 n.15.

132. In promulgating the rule allowing for unsupervised waivers of ADEA claims, the EEOC stated the following:

[T]he Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is “knowing and voluntary.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. *See* 29 U.S.C. 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging “employers and workers [to] find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec. 7076 (Remarks of Sen. Javits) *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA, 52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987).

133. 29 U.S.C. § 204 (2006).

employers it has determined violated the FLSA.<sup>134</sup> Title VII, on the other hand, is enforced by the EEOC.<sup>135</sup> The EEOC was created by the Civil Rights Act of 1964<sup>136</sup> and was given the authority to basically investigate and conciliate charges of discrimination made by employees.<sup>137</sup> It was not until 1972 when Congress amended Title VII that the EEOC was provided with additional authority to institute civil actions against employers the Commission concluded had violated Title VII.<sup>138</sup> However, Congress did not provide the EEOC with direct powers to adjudicate claims or impose administrative sanctions similar to the authority provided to the DOL.<sup>139</sup> Thus, it would have been difficult at the time the Court decided *Gardner-Denver* to also provide for only supervised waivers when the EEOC did not have the same authority over employers as the DOL had when reviewing FLSA violations.

### C. Waiver of ADEA Rights

Employees are also often asked to waive their rights under the Age Discrimination in Employment Act (“ADEA”). The ADEA was enacted in 1967 to address age discrimination of individuals forty years old or older, in the terms and conditions of their employment, including hiring, job retention, and compensation.<sup>140</sup> Like the other federal employment statutes, Congress did not initially address the waivability of ADEA claims. However, some courts and commentators argued that because the ADEA incorporated portions of the FLSA,<sup>141</sup> waiver of ADEA claims required approval from the enforcement agency (in the case of the ADEA, that would be the EEOC<sup>142</sup>) or

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134. *Id.* § 216.

135. 42 U.S.C. § 2000e-5 (2006).

136. *Id.* § 2000e-4(a).

137. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672–73 (2005).

138. *Id.* at 677.

139. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (“[F]inal responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices.”); see Occhialino & Vail, *supra* note 137, at 677.

140. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006).

141. Section 626(b) provides that “[t]he provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in [the FLSA].” *Id.* § 626(b).

142. Michael J. Yaworsky, Annotation, *Validity, Construction, and Effect of Document or Agreement Alleged to Constitute Private, Individual Release of Claim Under Age Discrimination in Employment Act of 1967* (29 USCS §§ 621–634), 88 A.L.R. FED. 412, § 2 (1988) (“Enforcement was originally the responsibility of the Secretary of Labor, but in 1978 was transferred to the Equal Employment Opportunity Commission (EEOC).”).

the court, the same as the waiver requirement for FLSA claims.<sup>143</sup> Others disagreed,<sup>144</sup> and in 1986, an en banc panel of the Sixth Circuit decided *Runyan v. National Cash Register Corp.*, and held that waivers of ADEA claims, like waivers of Title VII claims, did not require court or agency approval to be valid.<sup>145</sup> Several circuits followed<sup>146</sup> and the EEOC promulgated a regulation authorizing unsupervised waivers of ADEA claims.<sup>147</sup>

Following the *Runyan* decision and issuance of the EEOC regulation, Congress, concerned about unrestricted waivers of ADEA claims,<sup>148</sup> amended the ADEA by adding a subsection relating specifically to the waiver of ADEA claims.<sup>149</sup> Congress required the following: (1) the waiver must be written in language that an average employee would understand;<sup>150</sup> (2) the waiver must include a specific reference to waiver of claims arising under the ADEA;<sup>151</sup> (3) the waiver cannot include claims that arise after the date the waiver is signed;<sup>152</sup> (4) the employer must provide consideration in addition to any normal retirement benefit package;<sup>153</sup> (5) the employer must advise the employee in writing to consult with an attorney before signing the waiver;<sup>154</sup> (6) the employee must be given at least twenty-one days to decide whether to sign the waiver;<sup>155</sup> and (7) the employee must have the opportunity to revoke the agreement within seven days of its execution.<sup>156</sup> Congress also placed the burden of proof on the employer to establish the validity of a waiver.<sup>157</sup>

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143. Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261, 263 (1996).

144. *Id.*

145. 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc).

146. Keyes & Farmer, *supra* note 143, at 264.

147. Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA, 52 Fed. Reg. 32,293 (Aug. 27, 1987) (codified at 29 C.F.R. § 1627).

148. Keyes & Farmer, *supra* note 143, at 264–67 (discussing congressional response to *Runyan* and EEOC regulation authorizing unsupervised waiver).

149. Act of Oct. 16, 1990, Pub. L. No. 101-433, §201, 104 Stat. 978, 983–84 (codified at 29 U.S.C. § 626(f) (2006)).

150. 29 U.S.C. § 626(f)(1)(A).

151. *Id.* § 626(f)(1)(B).

152. *Id.* § 626(f)(1)(C).

153. *Id.* § 626(f)(1)(D).

154. *Id.* § 626(f)(1)(E).

155. 29 U.S.C. § 626(f)(1)(F)(i).

156. *Id.* § 626(f)(1)(G).

157. *Id.* § 626(f)(3).



While waivers of ADEA claims do not require the same degree of oversight as waivers of claims under the FLSA, more is required than of waivers of Title VII and FMLA claims.

### III. WAIVER OF FMLA RIGHTS SHOULD REQUIRE COURT OR AGENCY APPROVAL

As noted above, courts were split on the issue of whether waivers of FMLA claims required court or DOL approval to be valid.<sup>158</sup> However, when the DOL amended section 825.220(d) judicial disagreement became irrelevant, and employers may now secure “release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.”<sup>159</sup>

As a result of the DOL’s amendment, waivers of FMLA rights are essentially afforded the least amount of protection of all of the employment statutes. FMLA waivers do not require preapproval like the FLSA or the satisfaction of additional statutory waiver requirements like the ADEA. Although the rules governing FMLA waivers appear identical to waivers of Title VII rights, a close examination reveals that in actuality employees who waive their Title VII claims are afforded more protection than employees who waive their FMLA claims.

The astonishing ease in which employers can secure waivers of FMLA rights undercuts the underlying purpose of the FMLA and thus, threatens the job security the statute was designed to provide. Moreover, the current FMLA waiver rules ignore the significant differences between the FMLA and discrimination statutes like Title VII.

#### A. *Unsupervised Waivers Undercut the Purpose of the FMLA*

Like the FLSA, the FMLA was enacted to set minimum labor standards. While the FLSA’s focus is on minimum labor standards in the area of pay,<sup>160</sup> the FMLA’s focus is on minimum labor standards in the area of sick leave and was enacted to address “inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods.”<sup>161</sup> Moreover, the FMLA was “based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health

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158. *See supra* Part I.C.

159. 29 C.F.R. 825.220(d) (2010); *see supra* Part I.D.

160. 29 U.S.C. §§ 206(a)(1), 207(a)(1) (2006).

161. 29 U.S.C. § 2601(a)(4) (2006).

laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.”<sup>162</sup>

As previously discussed, the Supreme Court held that the FLSA statutory minimum labor standard entitlements, which affected the public interest, could not be waived or released because “such waiver or release contravenes the statutory policy.”<sup>163</sup> Moreover, the Court has held that statutory entitlements under the FLSA cannot be abridged by contract or otherwise waived because this would “nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.”<sup>164</sup> Because the FLSA and the FMLA both establish minimum labor standards, the same policy reasons that supported the employers in *Brooklyn* not being able to avoid their obligations and responsibilities under the FLSA support the conclusion that employees’ FMLA rights and entitlements should not be able to be bargained away.

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162. H.R. REP. NO. 103-8, pt. 1, at 21–22 (1993). The child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment all

arose in response to specific problems with broad implications. The minimum wage was enacted because of the societal interest in preventing the payment of exploitative wages. Children worked for long hours, under unsafe conditions, before the child labor laws were enacted. The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement. The Occupational Safety and Health Act created standards to help assure safe and healthy workplaces.

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There is a common set of principles underlying these labor standards. In each instance, a Federal labor standard directly addressed a serious societal problem, such as the exploitation of child labor, or the exposure of workers to unsafe working conditions. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish standards that employers could meet.

It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

The FMLA was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today’s workplace.

*Id.*

163. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, at 704 (1945).

164. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (internal quotation marks omitted).

Allowing the bargaining away of the rights that serve the public interest will allow employers to avoid the statutory minimum labor standard entitlements that Congress concluded was in the public interest to codify.

*B. The Significant Differences Between the FMLA and Title VII Compel Stricter Treatment of FMLA Waivers*

Not only does the purpose of the FMLA support stricter FMLA waiver requirements, but the many significant differences between the FMLA and Title VII compel stricter treatment of waivers of FMLA claims.

1. Familiarity with the Law

Generally, when courts are determining the validity of an employee's signed release which waives his or her rights under federal employment statutes, the courts look to see if the waiver of rights was "knowing and voluntary."<sup>165</sup> It goes without saying that the more an employee understands the rights afforded under a particular federal employment statute, the greater the chance that the employee's unsupervised waiver of those rights will be "knowing and voluntary." The corollary then is that the less an employee understands about a particular federal employment statute, the lower the chance that an unsupervised waiver of the rights afforded under that statute will be "knowing and voluntary." These propositions underscore the problem with treating waivers of FMLA claims in the same manner as waivers of Title VII claims.

Title VII was enacted in 1964, and since that time, employees have become very familiar with the rights provided under Title VII.<sup>166</sup> The general public fully understands that Title VII makes it illegal for an employer to discriminate in employment practices based on race, color, religion, sex and national origin. More than 50,000 Title VII charges of discrimination have been filed each year during the last decade.<sup>167</sup> More than 68,000 Title VII charges of discrimination were filed during the 2009 fiscal year.<sup>168</sup> Thousands of lawsuits have been filed, many of which have involved high profile cases. Because employees understand and are familiar with Title VII, employees easily recognize those situations when an employer may be engaging in

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165. Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 FLA. L. REV. 305, 310 (2006) (discussing the "knowing and voluntary" standard for waiver of federal employment claims).

166. See Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal District Courts*, 77 MISS. L.J. 977, 1021 (2008) (noting that Title VII is the "most familiar" of all of the federal antidiscrimination statutes).

167. *Title VII of the Civil Rights Act of 1964 Charges*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Oct. 8, 2011).

168. *Id.*

conduct in violation of Title VII. This understanding and familiarity allow employees the ability to waive their rights without the necessity of oversight or approval by the courts or the EEOC.

In contrast to Title VII, the FMLA, which has been in force less than twenty years, is still a mystery to many.<sup>169</sup> Most employees are still unfamiliar with the specific rights afforded under the statute.<sup>170</sup> The number of FMLA claims filed with the DOL each year is but a fraction of the number of Title VII claims filed with EEOC each year.<sup>171</sup> While the differences in the number of claims filed can be explained in part by the unique protections provided under the statutes, the differences in numbers also suggest that employees are not as familiar with their rights under the FMLA as they are with their rights under Title VII.

Compounding the problem of lack of familiarity is that releases often do not specifically mention the FMLA, even though most releases do explicitly identify Title VII claims as claims being released.<sup>172</sup> When employees are unfamiliar with the rights afforded under the FMLA and the release does not make specific reference to the fact that FMLA claims are being released, the employees are not provided a fair opportunity to “knowingly and voluntarily” waive their rights. If supervision of the FMLA waiver was mandated, there would be assurances that the employees were adequately informed before relinquishing their FMLA entitlements.

## 2. Context in Which Waivers Arise

Another key difference between the FMLA and Title VII is the context in which waivers of actual claims arise. As discussed above, most employees are familiar with the prohibitions of Title VII. That being the case, when an employee is not hired, not promoted, terminated, or subjected to some other adverse employment action and the employee believes the adverse action was because of his or her race, color, religion, sex, or national origin, the employee will often take immediate steps to address his or her concern that the employer

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169. See Beverly A. Block, *The Reality of FMLA and Parental Leave*, LAW. J., Sept. 12, 2008, at 7 (noting that lawyers and non-lawyers alike are unfamiliar with the provisions of the FMLA).

170. *Id.*

171. According to the most recent DOL figures, 1889 FMLA complaints were filed with the DOL in 2008. *2008 Statistics Fact Sheet*, U.S. DEP'T OF LABOR, 6 (Dec. 2008), <http://www.dol.gov/whd/statistics/2008FiscalYear.pdf>. Compare this to the almost 70,000 Title VII charges filed in 2008. *Title VII of the Civil Rights Act of 1964 Charges*, *supra* note 167. 2009 FMLA figures are not yet available.

172. Even when the release failed to make specific reference to the FMLA, at least one court found that FMLA claims were waived where the release contained a general catch-all provision. See *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 318, 322 (5th Cir. 2003).

has violated Title VII.<sup>173</sup> Thus, the vast majority of Title VII actions and the accompanying settlements arise out of individual challenges to employer conduct as opposed to mass layoff situations.<sup>174</sup>

While some FMLA challenges to employer actions arise in independent individual situations as well,<sup>175</sup> anecdotal evidence appears to suggest that many FMLA claims and waiver issues arise in the context of a mass reduction in force.<sup>176</sup> Such was the situation in the *Taylor* case.

In *Taylor*, the plaintiff received a poor productivity evaluation when her employer, in violation of the FMLA, counted her FMLA-qualifying leave against her.<sup>177</sup> The plaintiff was then selected for the reduction in force because of her evaluation.<sup>178</sup> As the *Taylor* case demonstrates, FMLA issues may not arise or become evident until a mass layoff or reduction in force occurs. When large numbers of employees are being terminated and are being provided with the same standard release, employees with actual FMLA violation issues may find it difficult to give their FMLA claims the individualized attention they would receive if the issues arose in an individual situation.

These types of waiver concerns in mass layoff situations were also present in ADEA cases. Indeed, Congress enacted the Older Workers Benefit Protection Act (“OWBPA”) out of concern that individuals would waive their ADEA rights in a mass layoff scenario without fully appreciating the rights they were abandoning.<sup>179</sup> So too should employees waiving their FMLA rights be afforded greater waiver protections, especially in mass layoff situations. And again, the best method to ensure that employees give the waiver of their FMLA claims adequate attention is to require supervised waivers.

### 3. Economic Duress

The economic reality facing employees with FMLA claims also supports stricter control of FMLA waivers. While any employee who is facing loss of employment will be confronted with financial hardship, individuals who utilized or sought to utilize their FMLA rights are often in a more difficult economic situation than those waiving rights afforded under Title VII and the other federal employment statutes. This is because employees who have

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173. See *supra* notes 166–167 and accompanying text.

174. See Keyes & Farmer, *supra* note 143, at 266.

175. See, e.g., *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).

176. See Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) (Employers and employer advocates raised concerns regarding the non-waiverability of the FMLA as provided in the original section 825.220(d) and impact the rule would have on early retirement programs.).

177. *Taylor I*, 415 F.3d 364, 366 (4th Cir. 2005).

178. Keyes & Farmer, *supra* note 143, at 365–67.

179. *Id.* at 264–65.

utilized their rights under the FMLA have, by nature of the rights afforded under the statute, required leave from their job to address either their own or a family member's serious health condition.<sup>180</sup> Moreover, serious health issues often result in significant medical bills. Thus, these employees often find themselves in a tight financial situation due to health care costs and the exhaustion of paid sick leave.<sup>181</sup> When faced with a release accompanying the termination of their employment, these employees must decide between signing a release and receiving a modest severance and limited continuation of benefits during a time of financial crisis or refusing to sign the release and receiving no severance or continuation of health benefits following their termination.

Most employees in such a situation will have no choice but to sign the severance agreement in order to, at least in the short term, continue to provide for their families. The superior position of employers over employees facing economic turmoil due to health-related issues underscores the need for supervised waivers in FMLA cases, particularly in mass-layoff situations.

#### 4. Greater Consequences When FMLA Claims Are Waived

When an employee waives a viable claim under the FMLA via a release when his employment is being terminated, an often underappreciated consequence results—the employee will not be covered under the FMLA again until that employee has been employed with a covered employer for at least one year.<sup>182</sup> This is in stark contrast to waivers of claims of any of the other employment statutes. If an employee waives his rights under Title VII, the ADEA, or even the FLSA, the employee is afforded the protection of those statutes immediately upon securing other employment with a covered employer. The waiving of an FMLA claim in the same context will not only affect the employee's ability to prosecute the employer's FMLA violation, but it will affect the employee's ability to be covered under the Act for at least a year.<sup>183</sup> It is not hard to imagine that many employees would fail to fully appreciate this consequence when faced with termination and a release that will provide temporary compensation and benefits. And when employees do not fully appreciate what they are foregoing in releasing their FMLA claims, they are not able to properly assess whether the consideration offered in

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180. 29 U.S.C. § 2612(a)(1) (2006). The FMLA also provides for leave following the birth or adoption of a child. *Id.* These cases do not generally result in a violation of the FMLA because employers by in large are accustomed to providing maternity and paternity leave.

181. The FMLA provides for 12 weeks of unpaid leave. *Id.* § 2612(a)(1), (c). So, unless the employer provides for paid sick leave, employees who utilize their FMLA leave have job protection upon their return, *id.* § 2614(a)(1), but not income during their leave period.

182. 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a) (2010).

183. *See* 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a).

exchange for their release is adequate. In determining the adequacy of the consideration, the employee should consider the available FMLA leave under the employee's current employment, the ability to promptly secure new employment so the employee could begin accumulating time toward the one-year employment prerequisite, and the need for FMLA leave in the future. Because in reduction-in-force scenarios employers usually provide the same severance amount or use the same severance formula when paying terminated employees in exchange for the employees' agreement to release employment claims, the severance amounts are not adequate consideration when an employee is waiving a viable FMLA claim, particularly when the employee is also giving up protection under the statute for no less than a year. In such an unequal bargaining situation, the need for review of waivers is obvious.

*C. Requiring Supervised Waivers of FMLA Claims Will Not Reduce the Number of FMLA Settlements or Unduly Burden the Process*

Many proponents of unsupervised waivers of FMLA claims cite to the policy favoring settlement of employment claims. Indeed, the courts and Congress have repeatedly expressed the preference that employment claims be resolved via voluntary settlement by the parties.<sup>184</sup>

However, requiring supervised waivers of FMLA claims will not necessarily reduce the number of voluntary settlements. Requiring supervised settlements will simply provide employees who are waiving their rights with relevant information from which they can make a "knowing and voluntary" decision. It bears noting that despite having the requirement of supervised settlement, most FLSA claims are resolved by settlement rather than litigation.<sup>185</sup> The supervised waiver requirement under the FLSA is not meant to decrease the number of voluntary settlements; rather, the supervision is intended to ensure that employers are not thwarting the purpose of the statute by securing waivers of employees' entitlements under the statute.

Furthermore, requiring supervised FMLA waivers will not unduly burden the DOL or the courts as some have argued. Employers are able to identify those situations in which significant FMLA liability risks are present. Not every employee is eligible for FMLA leave.<sup>186</sup> Not every eligible employee requires or seeks FMLA leave. Not every employee who seeks FMLA leave is

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184. See Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 110 (2005).

185. *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1225 (M.D. Fla. 2009) (explaining that "[m]ost FLSA cases now generally settle early-on in the litigation process").

186. Employees are eligible if they have worked for a covered employer for at least 12 months and worked 1250 hours during the 12-month period immediately preceding the start of the leave. 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110.

denied the requested leave. Thus, the employer should not have a difficult time identifying those situations where a risk of FMLA liability exists.<sup>187</sup>

Moreover, the potential risk of an FMLA violation by an employer is *far less* than the potential risk of an FLSA violation. Indeed, the DOL's enforcement numbers bear this out. In fiscal year 2008, the Wage and Hour Division of the Department of Labor collected more than \$185 million in back wages for 228,645 employees.<sup>188</sup> Of those employees, more than 197,000 were employees with minimum wage and overtime back wage violations.<sup>189</sup> In contrast, only 1,082 of the 228,645 employees who received back wages had FMLA violation cases.<sup>190</sup> Based on these enforcement numbers, employers have a *much greater* risk of violating the FLSA than violating the FMLA.

Because of the low risk of FMLA liability and the employers' ability to identify those situations where risk of liability exists, employers will continue to handle severance and settlement agreements as they have in the past, i.e., seeking DOL or court approval only in those *rare instances* where significant FLSA or FMLA liability exists.

Additionally, both the courts and the DOL are equipped to handle requests for approval when such approval is required because both entities have processes in place by which to supervise settlements of FMLA claims. With respect to the DOL, the Secretary supervises FMLA settlements in the same manner as the Secretary supervises settlements under the FLSA.<sup>191</sup> With respect to the courts, where an FMLA case is pending before the court, there is nothing in the legislative or regulatory scheme that would prevent the court from approving settlements in the same manner as it approves FLSA settlements.

If waivers of FMLA rights required approval, two things would occur. First, employers would take steps to ensure that employees' rights have not been violated, and second, employees would be fully informed of the effects of

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187. In its supplemental brief filed during the Fourth Circuit review of *Taylor v. Progress Energy, Inc.*, the employer acknowledged that

[w]hen employers and employees enter into severance or settlement agreements, they rarely seek DOL approval of the release of FLSA claims because the risk exposure from unreleased minimum wage and overtime compensation claims is limited and employers can identify those situations in which significant liability risks are present and limit their approval requests to such situations.

Supplemental Brief of Appellee at 11, *Taylor II*, 493 F.3d 454 (4th Cir. 2007) (No. 04-1525), 2006 WL 2432028.

188. 2008 *Statistics Fact Sheet*, *supra* note 171, at 1.

189. *Id.* at 2.

190. *Id.* at 7.

191. 29 U.S.C. § 2617(b)(1) (directing the DOL to resolve FMLA complaints in the same manner it resolves complaints under the FLSA—in accordance with 29 U.S.C. § 216).



waiving their rights before waiving them. The end result would be a statute that ensures basic job security when it comes to employees' health care issues.

#### IV. CHANGING AND CHALLENGING THE FMLA NON-SUPERVISION OF WAIVER RULE

Although, as discussed above, there are very strong arguments supporting the requirement that FMLA waivers be supervised, such is not the case under the current law.<sup>192</sup> Employees and advocates who want to ensure that employees who waive their FMLA rights do so only after being fully and adequately informed through supervised waivers may advocate for executive, legislative, and judicial actions to modify the existing law.

##### A. *Executive and Legislative Options*

During the last months of the prior president's administration, a number of regulatory amendments were proposed. When regulation changes take place during a change in the administration, the new executive often takes steps to halt the amendment process. Indeed, President Obama, in one of his first acts as President, ordered federal agencies to "[w]ithdraw from the [Office of the Federal Register] all proposed or final regulations that have not been published" to allow his administration to review them.<sup>193</sup> However, the rule amending section 825.220(d) was not affected by this order because the final rule amending section 825.220(d) was issued on November 17, 2008 and became effective January 16, 2009, prior to President Obama taking the oath of office on January 20, 2009.<sup>194</sup>

The only other option for the Executive is to initiate through the DOL a new administrative rulemaking to nullify the previous administration's amendment to section 825.220(d).<sup>195</sup> With the economic crisis, high unemployment, and the health care crisis, it is no surprise that the Administration and the DOL have not had the amendment of section 825.220(d) as a top priority, especially where the new rulemaking process can be time-consuming and costly.<sup>196</sup> It appears unlikely that such a rulemaking will occur anytime soon.

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192. *See supra* Part I.D.

193. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435 (Jan. 26, 2009). White House Chief of Staff Rahm Emanuel issued the memorandum on Tuesday, January 20, 2009. *Id.*

194. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008).

195. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 592 (2003).

196. *See id.* ("[A] new administration wishing to change the policy may face significant costs. Just as the outgoing administration initially did in issuing the rule, the new administration usually must expend resources on a *second* full-scale APA notice-and-comment rulemaking, which has evolved into a relatively expensive and time-consuming process. The now-familiar requirements

As far as congressional action, Congress had the option of utilizing its powers under the Congressional Review Act (“CRA”)<sup>197</sup> to review the amendment to section 825.220(d) when the regulation was first amended. The CRA, in essence, provides Congress with legislative “veto” authority over agency rules and might have provided Congress with a means to nullify the amendment in an expedited manner.<sup>198</sup> However, this Act has not proven to be very effective in nullifying agency rules,<sup>199</sup> and Congress was apparently disinclined to utilize the CRA in this situation.

Another option is for Congress to pass new legislation. Indeed, on April 29, 2009, Congresswomen Carol Shea-Porter (D-NH), along with twenty-four cosponsors, introduced bill H.R. 2161, entitled: To Nullify Certain Regulations Promulgated Under the Family and Medical Leave Act of 1993 and Restore Prior Regulations and to Direct the Secretary of Labor to Revise Certain Additional Regulations Under that Act.<sup>200</sup> Representative Shea-Porter explained that the purpose of H.R. 2161 was to “restore the Family and Medical Leave Act to its original intent and spirit.”<sup>201</sup> Included in the proposed revisions is the restoration of section 825.220(d) to its original form, which prohibits both the prospective and *retrospective* waiver of FMLA rights.<sup>202</sup>

H.R. 2161 was referred to three committees on April 29, 2009—the House Education and Labor Committee, the House Oversight and Government Reform Committee, and the House Administration Committee.<sup>203</sup> As of this writing, none of these committees have reported back to the general body of the House of Representatives. Even though Democrats have at times made up the majorities in these committees, it is not surprising that this bill has not made it out of committee, as the House has been preoccupied addressing more pressing issues, such as the war, healthcare reform, and a failing economy. The unfortunate and sobering reality is that it is not likely that this bill will be

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include the publication of a detailed proposal, often with extensive supporting analyses, and, after public comments have been received, written responses to all significant comments.” (footnotes omitted).

197. Congressional Review Act, 5 U.S.C. §§ 801–08 (2006).

198. Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL’Y 362, 371–72 (2008).

199. *Id.* at 372 (noting, that “[i]n the decade following the enactment of the CRA, ‘[a]lmost 42,000 rules were reported to Congress over that period, including 610 major rules, and only one, the Labor Department’s ergonomics standard, was disapproved in March 2001.’” (quoting 10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law, 109th Cong. 22 (2006))).

200. Family and Medical Leave Restoration Act, H.R. 2161, 111th Cong. (2009).

201. *Legal Alert: Legislation to Revise FMLA Introduced*, FORD & HARRISON, LLP (May 11, 2009), <http://www.fordharrison.com/getpdf.aspx?Type=News&ID=4780>.

202. *See* H.R. 2161, §2(a)(1).

203. 155 CONG. REC. H4998 (daily ed. Apr. 29, 2009).

signed into law, as the vast majority of bills do not make it out of committee, and failure to act by a committee effectively “kills” the bill.

### B. *Litigation Options*

Where the executive and legislative options may not be viable, court challenges to the regulation and actual waivers may result in meaningful change.

#### 1. Direct Challenges to the Regulation

One of the most direct ways for employee advocates to change the current law is to challenge the legality of the DOL’s amendment. Advocates would essentially argue that the regulation is invalid because it is contrary to Congress’ intent.

When enacting the FMLA, Congress saw fit to not only create statutory entitlements related to sick leave, but, as a review of the statutory language and legislative history suggests, Congress also intended FMLA rights to be afforded the same treatment as FLSA rights. As previously discussed, the waiver restriction on FLSA claims was a judicially-created restriction.<sup>204</sup> Congress, seeing the wisdom in the Court’s 1945 ruling, explicitly added language codifying the FLSA supervision requirement in 1949. In section 216(c) of the FLSA, Congress authorized the DOL

to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.<sup>205</sup>

When it enacted the FMLA, Congress specifically directed the DOL to resolve the FMLA complaints *in the same manner it resolves complaints under the FLSA*.<sup>206</sup> Additionally, both statutes provide for collective actions<sup>207</sup> and the remedies provided under the FMLA are analogous to the remedies provided under the FLSA.<sup>208</sup> Congress’ reliance on the well-established FLSA

204. See *supra* notes 120–124 and accompanying text.

205. 29 U.S.C. § 216(c) (2006).

206. 29 U.S.C. § 2617(b)(1); see also S. REP. NO. 103-3, at 35 (1993) (“[The FMLA’s] enforcement scheme is modeled on the enforcement scheme of the FLSA.”), reprinted in 1993 U.S.C.C.A.N. 3, 37.

207. 29 U.S.C. § 216(b); 29 U.S.C. § 2617(a)(2).

208. See S. REP. NO. 103-3, at 35 (1993) (“The relief provided in FMLA also parallels the provisions of the FLSA.”), reprinted in 1993 U.S.C.C.A.N. 3, 37; see also *Jordan v. U.S. Postal Serv.*, 379 F.3d 1196, 1201 (10th Cir. 2004) (looking to the FLSA “for guidance in interpreting FMLA damages because of the similarity of the damages provisions”); *Arban v. West Publ’g Corp.*, 345 F.3d 390, 407 (6th Cir. 2003) (“[T]his court previously has turned to the Fair Labor

enforcement and remedial provisions strongly supports the conclusion that it was Congress' intent that FMLA claims be treated as FLSA claims, including the requirement that waivers be supervised to be valid.

Indeed, the DOL appeared to recognize Congress' intent when it initially promulgated section 825.220(d). As previously noted, the DOL explicitly rejected the employers' recommendation that the language of the regulation be modified to allow waivers and releases of FMLA claims in the same manner as Title VII and ADEA claims.<sup>209</sup> The DOL stated that it had "concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA."<sup>210</sup>

Because the DOL amendment is contrary to congressional intent, advocates should challenge the validity of the amendment in the courts.

## 2. Challenges of the Waivers

Another, and possibly the most viable, option is for employees to challenge the waiver of FMLA rights in their individual situations. As discussed above, jurisdictions require that employees "knowingly and voluntarily" waive their rights under federal employment statute before the waiver will be enforced against them.<sup>211</sup> Also discussed was employees' lack of familiarity with the FMLA, particularly when compared to employees' knowledge of other employment statutes.<sup>212</sup> Because of the continuing confusion surrounding the rights and responsibility under the FMLA, employees should challenge waivers on the ground that the waivers were not voluntarily and knowingly made in cases where employers secured waivers utilizing releases that did not explicitly state that the employees were waiving their rights under the FMLA.

Employees should also challenge waivers when an employer, who knows, or has reason to know, that the employee is entitled to FMLA relief, fails to so advise the employee before securing a waiver of the employee's FMLA rights. The FMLA imposes an affirmative duty on employers to advise employees that they may be entitled to FMLA leave when the employer receives information

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Standards Act (FLSA), which contains similar remedial provisions, for guidance in interpreting the FMLA."); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 968–69 (10th Cir. 2002) (interpreting FMLA cost provisions in the same way they are interpreted under the FLSA); *Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) ("Because the FMLA's link to the remedial provisions of the FLSA is stronger than it is to Title VII . . . we rely on case law under the FLSA rather than Title VII . . .").

209. *See supra* notes 38–42 and accompanying text.

210. *Supra* note 40.

211. *See supra* note 165 and accompanying text.

212. *See supra* Part III.B.1.

that would indicate that the employee may be entitled to FMLA leave.<sup>213</sup> Section 825.303 provides that “the employee need not expressly assert rights under the FMLA or even mention the FMLA” and that “[t]he employer will be expected to obtain any additional required information through informal means” to determine if the leave request falls under the FMLA.<sup>214</sup>

Thus, employers have an affirmative duty under the FMLA to inform employees that they are or may be eligible for FMLA protection even if employees are not aware of their entitlement. This affirmative duty on the employer to determine if an employee is entitled to FMLA leave recognizes that employers are often in a better position than employees to determine whether leave requested is FMLA-qualifying leave. The employer’s affirmative duty set forth in sections 825.300 and 825.303 also underscores the principle that the employer should not benefit from an employee’s lack of understanding or knowledge of the rights afforded under the FMLA.

This affirmative duty should likewise apply when an employer seeks to have an employee waive his or her FMLA rights. An employer should not be allowed to secure a waiver of FMLA rights when the employer is aware or should be aware that the employee may be waiving a viable FMLA claim without first clearly and explicitly advising the employee of her possible entitlement to FMLA rights. Allowing an employer to secure a waiver of FMLA rights when the employer has information which indicates that the employee is entitled to utilize rights under the FMLA but fails to so inform the employee, not only allows the employer to thwart the purpose of the statute, but also fails to produce a waiver that was knowingly and voluntarily given.<sup>215</sup> Thus, employees should challenge waivers when the employer had sufficient information to know that the employee was entitled to FMLA coverage, but failed to so inform the employee before securing a waiver of the employee’s rights under the FMLA.

#### CONCLUSION

Throughout history, all three branches of government have recognized the importance of the right of individuals to be gainfully employed to support their family. Our government has also recognized that individuals are entitled to

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213. 29 C.F.R. § 825.300 (2010).

214. *Id.* § 825.303(b) (providing the contents of an employee notice for unforeseeable FMLA leave); *see also id.* § 825.302(c) (providing the contents of an employee notice for foreseeable FMLA leave).

215. Requiring employers to come forward with information related to a possible employment claim prior to securing a waiver of employment rights is not unprecedented. Employers are obligated under the ADEA to provide employees with demographic information related to age before an employer may secure the employees’ waiver of ADEA rights in mass layoff situation. 29 U.S.C. § 626(f)(1)(H) (2006).

fair treatment in the conditions of employment. Such fair treatment includes, *inter alia*, the right to a safe working environment, the right not to lose one's job because of gender, race, or age, and the right to fair compensation. The principles of fairness also dictate that an employee who has worked for one year or more for an employer should not lose her job simply because a serious health condition causes that employee to miss work for a short period of time. Congress affirmed the fairness and rightness of job security in the face of health issues when it enacted the FMLA. Principles of fairness then also require that employers not be allowed to secure a waiver of FMLA rights from an employee without that employee having given the waiver of her FMLA rights thoughtful and deliberate consideration. And, the only way to ensure a knowing and voluntary waiver of FMLA rights is to require approval of waivers of FMLA claims by the courts or the DOL. Indeed, this is what Congress intended when it enacted the FMLA and what the DOL intended when it promulgated the FMLA waiver regulation. Now with the country being confronted with massive job losses and inadequate health care, hopefully the President, Congress, and the judiciary will take steps to ensure that the rights afforded employees under the FMLA are not stripped away with the use of unsupervised waivers.

