

WAIVER OF RIGHTS
DOL Topic: I¹

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT WAIVER OF FMLA RIGHTS.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL has requested information regarding an employee’s waiver of FMLA rights. Although the statute itself does not address whether waivers of FMLA rights are enforceable, under 29 C.F.R. § 825.220(d), an employee “cannot waive, nor may employers induce employees to waive” their FMLA rights. Courts have interpreted this regulation to prohibit employees both from waiving FMLA rights prospectively and from signing waivers that release an employer from liability for existing FMLA claims.

The DOL solicited comments on whether the regulation should limit only the waiver of prospective FMLA rights.³

¹ This topic is not discussed in depth in the Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor’s Request for Information on the Family and Medical Leave Act,” available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ The question posed in the RFI was worded ambiguously. The RFI asked whether “a limitation should be placed on the ability of employees to settle their past FMLA claims.” This could be read as asking whether employees should have the right to engage in a full-fledged settlement and negotiation of their FMLA claims, resulting in agreements that release the employer from liability. However, as the *Taylor* case put forward by the DOL for comment makes clear, the question is the broader one of whether employees should be permitted to waive all past FMLA claims in the context of agreements signed upon termination, even without any awareness that they might have a valid FMLA claim.

ISSUE: Employee Waiver of FMLA Rights

- **The RFI asked: Should employees be able to waive past FMLA claims in settlements with employers?** The case cited in the RFI dealt with an employee's waiver of her FMLA rights in an agreement she signed upon her termination:
 - **Taylor v. Progress Energy, Inc.**, 415 F.3d 364 (4th Cir. 2005), *vacated and rehearing granted* (June 14, 2006), opinion reinstated in *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 WL 1893362 (4th Cir. July 3, 2007). [Note: when the RFI was published, the Taylor case had been vacated and was pending rehearing. The reinstated opinion was issued a few days following the release of the DOL Report.]

In *Taylor*, an employee requested several times that her time off for medical purposes be counted as FMLA leave. A human resources representative denied her requests several times on the grounds that she had not been out of work for more than five consecutive days.

The employee was ultimately terminated based on poor attendance. Upon being notified of her termination, the employee signed a release and settlement agreement, including a provision that released her employer from all state and federal law claims. In return, she received \$12,000 of severance pay.

The district court held that the employee's waiver was valid. On appeal, the Fourth Circuit reversed, holding that 29 C.F.R. § 825.220(d) bars both the prospective and retrospective waiver of substantive and proscriptive FMLA rights without the prior approval of the DOL or a court. The court held that, in this respect, the FMLA was similar to the FLSA and different from non-discrimination laws such as Title VII, the ADEA and the ADA.

The company petitioned for rehearing en banc and the DOL filed an amicus brief in support of rehearing. The panel vacated its decision and reheard the case in order to take into account the interpretation by the agency of its own regulation.

Upon rehearing, a divided panel reinstated its opinion. *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 WL 1893362 (4th Cir. July 3, 2007). The majority rejected the agency's interpretation of its own regulation as prohibiting the waiver only of prospective claims as inconsistent with the plain language of the regulation. The dissenting judge concluded the regulation was ambiguous and would have given the agency's interpretation of its own regulation deference.

EMPLOYER-SIDE COMMENTS

The bullets below encapsulate the few employer-side comments on this topic.

- Employers express the view that § 825.220(d) should prohibit only prospective waivers. Employers note that the text of the regulation does not bar both retrospective and prospective waivers of employees' FMLA rights. Employers state that public policy favors settlement by providing an incentive for employers to correct any existing (or alleged) FMLA violations, and that the regulations should not be read in a manner that is inconsistent with this important public policy. Further, employers object to the promulgation of any regulations requiring employees to obtain prior approval from a court or the DOL before settling their claims. Employers state that imposing such requirements will ratchet up the cost of settlements, and discourage employers from reaching settlements with employees who have valid claims, resulting in increased litigation costs, and delaying claim resolution.
- Employers state that employees should be able to waive their rights to future litigation in exchange for a settlement of claims arising before the waiver agreement. Employers observe that, as is true in the settlement of ADEA claims, employees have the opportunity to obtain legal advice before entering any such agreement.
- Suggested Change: Revise § 825.220(d) to permit employees to sign waiver agreements that prevent them from bringing litigation over past FMLA claims.

EMPLOYEE-SIDE COMMENTS

The bullets below encapsulate the few employee-side comments on this issue.

- Employee organizations state that § 825.220(d) prohibits both prospective and retroactive waivers. Employee organizations also observe that the regulation does not distinguish between the two.
- Employee organizations express the view that employees must be able to fully vindicate their rights under the FMLA. The AFL-CIO notes that the general release in *Taylor* allowed the employer to insulate itself from liability for multiple FMLA violations by obtaining a release that did not notify Taylor that she was "abandoning her FMLA claims." The AFL-CIO believes this reflects the need for a prohibition on retroactive waivers because such a release is at odds with congressional intent to permit a private right of action for FMLA claims.

EMPLOYEE-SIDE COMMENTS

- Employee organizations note that parts of the FMLA were modeled on the Fair Labor Standards Act (FLSA), which permits only court or DOL-approved waivers. Employee organizations state that *Taylor's* decision to apply the same approval requirements to FMLA waivers as those that are applied to FLSA waivers was correct.
 - The AFL-CIO notes that *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) involved waivers under the FLSA. In *O'Neil*, an employee was offered a check for withheld overtime compensation in exchange for a release of any FLSA claims. The employee later sued for liquidated damages under the FLSA, and the Supreme Court held that his waiver was invalid as an employee cannot waive his rights under the FLSA. Employee groups suggest that the same no-waiver rule should be applied to any employee settlement waivers under the FMLA.
 - Employee organizations note that the FLSA also rejects private settlements, but allows the DOL to approve settlements. This policy position is what led the *Taylor* court to hold that § 825.220(d) bars a waiver of both substantive and proscriptive FMLA rights without the prior approval of the DOL or a court.
 - The Partnership's suggested course of action: Conduct "a separate discussion with all stakeholders to explore ways to appropriately resolve complaints and ensure that employees retain their FMLA rights."

PART TWO

THE APPLICABLE REGULATORY PROVISION RELATED TO TOPIC I HAS BEEN EXCERPTED BELOW.

REGULATION

29 C.F.R. § 825.220(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

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI⁴

Cases

- *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
- *D.A. Shulte, Inc. v. Gangji*, 328 U.S. 108 (1946).
- *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).
- *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).
- *Sloop v. ABTCO, Inc.*, 178 F.3d 1285 (4th Cir. 1999).
- *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982).
- *Dougherty v. Teva Pharm. U.S.*, No. 05-2336, 2006 WL 2529632 (E.D. Pa. Aug. 30, 2006).
- *Conway v. Stryker Med. Div.*, No. 4:05-CV-40, 2006 WL 1008670 (W.D. Mich. April 18, 2006).
- *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052 (N.D. Ill. 2002).
- *Bluitt v. Eval Co. of Am.*, 3 F. Supp. 2d 761 (S.D. Tex. 1998).

⁴ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.