



Does a Settlement Agreement Really Settle the Matter?

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Does a fully executed severance/settlement agreement containing a full release of all claims against the Company insulate you from claims under the Family Medical Leave Act (“FMLA”), Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), and the host of other state and federal laws governing the employment relationship? Not necessarily! In several recent court opinions, federal courts in various parts of the country have ruled that an employee’s waiver of his or her rights under the FMLA are not valid unless the agreement has been approved by the U.S. Department of Labor (“DOL”) or a court. The Equal Employment Opportunity Commission (“EEOC”) has also convinced several courts to invalidate waivers of claims under Title VII and other federal statutes based on language in the agreements restricting employees from filing claims at the EEOC. In light of these recent decisions, employers should reevaluate their form severance and settlement agreements, even if they have been approved previously by counsel.

FMLA Waivers May Require DOL or Court Approval

The DOL’s regulations on the FMLA, specifically 29 C.F.R. section 825.220(d), prohibit employees from waiving, and employers from inducing employees to waive, their “rights” under the FLMA. In reliance on the U.S. Court of Appeals for the Fifth Circuit’s decision in *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316 (5th Cir. 2003), as well as case law under other federal anti-discrimination statutes, *e.g.*, Title VII, employment law practitioners have typically assumed that the DOL regulations’ prohibition on the waiver of FMLA “rights” does not apply to departing or former employees who waive their FMLA rights as part of a severance or settlement agreement. Rather, as the *Faris* court held, the DOL regulations only forbid the prospective waiver by employees of their *substantive* FMLA rights, *e.g.*, their right to take leave and to reinstatement after such leave. According to *Faris*, and conventional wisdom based on the law under other federal laws, the DOL regulations do not prohibit the post-dispute settlement of claims under the FMLA.

In *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (2005), however, the U.S. Court of Appeals for the Fourth Circuit reached a dramatically different conclusion. In *Taylor*, the Fourth Circuit concluded that the DOL regulations prohibit not only the prospective waiver by employees of their substantive FMLA rights, but also the right of current and former employees to waive or release their *proscriptive* rights to bring discrimination and retaliation claims under the FMLA unless the waiver has been approved by either the

DOL or a court. As a result of this holding, the *Taylor* court found that the former employee, who at her termination had signed a severance agreement releasing all claims against her employer, could proceed with her FMLA claims in federal court since neither the DOL nor a court had approved the waiver of her FMLA claims in the severance agreement she signed.

Adding insult to injury, the *Taylor* court further found that the former employee did not need to return the severance money she had received in order to maintain her suit. In doing so, the court observed that FMLA rights were not waiveable by agreement or by *ratification*, *i.e.*, the legal doctrine that provides that if an employee retains the consideration paid to her in exchange for her release, she will be deemed to have ratified the agreement and is bound by its terms even if those terms would otherwise be voidable.

Although the Fourth Circuit vacated its decision in *Taylor* in June 2006 (almost a year later) and granted rehearing, at least one other federal court since that time has explicitly adopted its reasoning. In *Dougherty v. TEVA Pharmaceuticals USA*, Civil Action No. 05-2336 (E.D. Pa. August 29, 2006), the U.S. District Court for the Eastern District of Pennsylvania extended the Fourth Circuit's holding in *Taylor* to find that section 825.220(d) of the DOL regulations prohibits an employee from waiving his right to sue for FMLA violations in a severance agreement.

As in *Taylor*, the *Dougherty* court also rejected the employer's argument that the employee had nonetheless ratified the agreement as a result of her failure to return the severance money to her employer before bringing her FMLA suit. In addition, the *Dougherty* court rejected the employer's argument that it was entitled to summary judgment on the employee's claims under the Americans with Disabilities Act ("ADA") since that statute does not contain the same prohibition on waivers as the FMLA. Noting that the severance agreement did not contain a severability clause and the employer had not addressed the issue of severability, the court found that the employer had failed to show that plaintiff's ADA claims were barred as a matter of law by the severance agreement.

Employees Cannot Waive Their Right to File Administrative Charges

The EEOC for some time has held the position that it is unlawful to force employees to waive their right to bring charges at the EEOC or cooperate with an EEOC investigation in exchange for severance pay or even settlement money. Such waivers are *per se* retaliatory in the view of the EEOC. In *EEOC v. Lockheed Martin Corp.*, Case No. 05cv0287 (D. Md. August 8, 2006), the U.S. District Court for the District of Maryland, agreed with the EEOC on this point. In *Lockheed*, the employer had required a departing employee who was part of a reduction in force to dismiss her pending EEOC charge in exchange for severance benefits to which she was otherwise entitled. In addition, the severance agreement itself further required her to promise not to bring any EEOC charges against her employer in the future.

The *Lockheed* court denied the employer's motion to dismiss the EEOC's claim that the employer had retaliated against the employee by denying her severance benefits after she refused to sign the severance agreement and instead, in a separate opinion, granted the EEOC summary judgment. Specifically, the court found that requiring the employee to dismiss her EEOC charge in exchange for severance benefits was unlawful retaliation under several different anti-discrimination statutes, including Title VII. In support of its decision, the court reasoned that an employer cannot dole out a benefit of the employment relationship, such as severance benefits, in a discriminatory fashion and only provide the benefit to those employees who dismiss their EEOC charges. The court also found that the release itself was facially retaliatory because it required the employee to promise not to bring any EEOC charges against her employer in the future. While the court acknowledged that an agreement by the employee not to seek any monetary relief in a subsequent proceeding at the EEOC would be valid, the court noted that the release before it was not so limited and instead specifically prohibited the filing of all EEOC charges. In *EEOC v. SunDance Rehabilitation Corp.*, 328 F. Supp. 2d (N.D. Ohio July 26, 2004), the U.S. District Court for the Northern District of Ohio reached the same result in considering a claim of retaliation under the Age Discrimination in Employment Act ("ADEA").

Advice for Employers

In the wake of these decisions, employers may face increased challenges to the validity of their severance and settlement agreements. Nonetheless, there are many practical steps employers can take to ensure that their releases will not be invalidated in the future and that their settlement agreements truly settle the matter. These steps include the following:

- include language in the release agreements that preserve for employees their right to file charges at the EEOC, the DOL and state administrative agencies, while precluding their right to recover any monetary damages in any such proceedings;
- include a *severability* clause in their release agreements that provides that if any portion of the release is invalidated, the remaining portion will nonetheless survive;
- consider including factual representations in the release that the employee did not qualify for FMLA leave, took all FMLA leave for which she was entitled, etc. Such statements will not bar future lawsuits, but may be helpful if an FMLA claim is later filed;
- consider the pros and cons of seeking DOL or court approval of the release if a valid FMLA claim is a risk; and
- ensure that all form releases are reviewed and approved by experienced employment law counsel.

If you would like to discuss this topic or have us review your release agreements, please do not hesitate to contact your Morgan, Brown & Joy, LLP attorney or Diane Saunders at 617.788.5017 or dsaunders@morganbrown.com

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