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U. S. Supreme Court Likely to Review
Fourth Circuit's Position on FMLA Waivers

In Taylor v. Progress Energy, Inc., 493 F. 3d 454 (4th Cir. 2007), petition for cert. filed, 75 U.S.L.W. 3226 (U.S. October 22, 2007) (Docket No. 07-539), the Fourth Circuit Court of Appeals held that employees cannot waive rights or claims under the Family and Medical Leave Act ("FMLA") unless such a release or waiver has been specifically approved by the U. S. Department of Labor ("DOL") or a court. The Fourth Circuit's ruling is significant because it applies to releases waiving *past FMLA violations* (as distinguished from releases that would waive future FMLA violations). Thus, in the Fourth Circuit, releases or waivers of any past alleged FMLA violations, such as those contained in a typical severance or settlement agreement, are deemed unenforceable without DOL or court approval.[1]

There is now a strong possibility that the U . S. Supreme Court may provide guidance on this important issue. A petition for writ of certiorari was filed, on October 22, 2007, by the employer in Taylor, seeking review of the Fourth Circuit's decision. In a key development, on January 14, 2008, the U. S. Supreme Court invited the Solicitor General to file a brief expressing the DOL's view on releases or waivers of past FMLA violations. Progress Energy, Inc. v. Taylor, Docket No. 07-539, 128 S. Ct. 1109 (U. S. January 14, 2008). Although the Court has not yet granted cert, this step indicates the strong possibility that it will review the Fourth Circuit's decision before the end of the Court's current session in 2008. If the Court hears the matter, it will decide whether both retrospective (for past violations) and prospective (for future violations) waivers of FMLA rights are enforceable without DOL or court approval.

The Fourth Circuit's decision is contrary to earlier, less restrictive decisions in the Fifth Circuit and other courts. The text of the FMLA is silent on waiver and settlement agreements, but disagreement exists on the interpretation of a DOL regulation which states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d) (2007). The Fourth Circuit in Taylor followed a strict reading of the DOL's regulation, barring past act and future act waivers or releases of FMLA claims absent DOL or court approval. Other courts, such as the Fifth Circuit and the Eastern District of Pennsylvania have

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[1] The Fourth Circuit includes Maryland, Virginia, West Virginia, North Carolina and South Carolina.

adopted less restrictive interpretations of the DOL's regulation. Faris v. Williams WPC-I, Inc., 332 F. 3d 316 (5th Cir. 2003) (29 C.F.R. § 825.220(d) prohibits only waivers of future substantive FMLA rights, *not* past rights); Dougherty v. Teva Pharm. USA, Inc., No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. April 11, 2007) (29 C.F.R. § 825.220(d) does not prohibit waiver or release of claims for past FMLA violations).[2]

In the months following the Fourth Circuit's Taylor decision, no real clarification has been offered by the courts regarding the waiver of FMLA rights. In one significant case, Hicks v. John F. Murphy Homes, Inc., 2008 U.S. Dist. LEXIS 5914, *2 (D. Me. January 25, 2008), the District Court of Maine found court approval of an FMLA-related release to be unnecessary, stating that "[i]n the absence of binding precedent requiring that this Court approve all FMLA-related releases, such approval is not required." Although it did not decide the waiver issue, the court reviewed the opinions of the Fourth Circuit, Fifth Circuit, and the Eastern District of Pennsylvania, and determined that it would likely "adopt the interpretation of 29 C.F.R. § 825.220(d) found in both Faris and Dougherty," and indicated that it would allow the waiver or release of retrospective FMLA rights without DOL or court approval. Id. Since the Fourth Circuit's decision in Taylor, no appellate court has addressed the issue.

If the U. S. Supreme Court grants cert and decides the split in the circuits on this issue, its decision could have a significant impact on employers. Although Taylor currently only affects employers within the Fourth Circuit, if the Court affirms the holding in Taylor, release agreements could no longer protect employers in any state from liability against past FMLA claims.

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[2] Prior to the Fourth Circuit's decision in Taylor, the Sixth and Ninth Circuits upheld FMLA waivers without comment. See, Halvorson v. Boy Scouts of America, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. May 3, 2000); Schoenwald v. Arco Alaska, Inc., No. 98-35195, 1999 U.S. App. LEXIS 20955 (9th Cir. August 30, 1999).