

SIGNED GENERAL RELEASES MAY BE WORTH LESS THAN  
EMPLOYERS EXPECTED: CIRCUITS SPLIT ON WHETHER  
FORMER EMPLOYEE CAN SIGN RELEASE, REAP ITS BENEFIT,  
AND SUE FOR FMLA CLAIM ANYWAY

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INTRODUCTION

There is a general public policy favoring the post-dispute settlement of claims.<sup>1</sup> And why wouldn't there be? After all, litigation is socially wasteful.<sup>2</sup> Indeed, litigation is often described as a "zero-sum" game, which transfers assets from party *A* to party *B* without any resulting gain in society's wealth.<sup>3</sup> Moreover, when one realizes that litigation requires the costly intervention of lawyers and the courts, it is not difficult to see how the transfer of assets from party *A* to party *B* actually results in a loss to society wealth.<sup>4</sup> In contrast, waiver agreements result in a surplus of society's wealth.<sup>5</sup> In a waiver agreement, the potential plaintiff waives his claim for compensation from the potential defendant.<sup>6</sup> The waiver results in a net gain shared by the potential parties and is usually quantified in precisely the same amount as the loss from litigation.<sup>7</sup>

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1. See, e.g., *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 373 (4th Cir. 2005), *reh'g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

2. For a more detailed view of this assertion and specific examples of when litigation is most wasteful, refer to Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000).

3. *Id.* at 217.

4. *Id.* at 217-18.

5. *Id.* at 221. For an in-depth discussion on wealth maximization, see Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

6. Hylton, *supra* note 2, at 220.

7. For a detailed explanation of how waiver agreements result in a net gain in precisely the same amount as the loss from litigation, see *id.* at 220-23.

The Fifth Circuit,<sup>8</sup> in *Faris v. Nextira LLC*, recognized the public policy of favoring the enforcement of post-dispute waivers or settlement agreements when it ruled that the post-termination release<sup>9</sup> signed by the plaintiff was enforceable notwithstanding 29 C.F.R. § 825.220(d), a regulation issued pursuant to the Family and Medical Leave Act of 1993 (“FMLA”).<sup>10</sup> This regulation states in pertinent part, “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.”<sup>11</sup>

The Fifth Circuit correctly concluded that § 825.220(d) applies only to waivers of substantive rights under the FMLA, such as rights to leave and reinstatement, and not to retaliation claims brought by former employees.<sup>12</sup> The Fifth Circuit’s interpretation of § 825.220(d) was not questioned until recently when the Fourth Circuit<sup>13</sup> reached a strikingly different conclusion under practically the same set of facts in *Taylor v. Progress Energy, Inc.*<sup>14</sup> According to the Fourth Circuit in *Taylor*, § 825.220(d) bars the prospec-

8. The Fifth Circuit is the Federal Court of Appeals for Louisiana, Mississippi, and Texas.

9. The release that the plaintiff signed in *Faris v. Nextira LLC* was essentially a general release that purported to waive her rights to all claims arising under any federal, state, or local law or regulation. The release did not specifically mention the Family Medical Leave Act. *Faris v. Williams WPC-I, Inc.* (Faris v. Nextira LLC), 332 F.3d 316, 318 (5th Cir. 2003).

10. *Id.* at 322.

The FMLA was enacted on February 5, 1993. In general, FMLA entitles an “eligible employee” to take up to a total of 12 workweeks of unpaid leave during any 12-month period for the birth of a child and to care for such child, for the placement of a child for adoption or foster care, to care for a spouse or an immediate family member with a serious health condition, or when he or she is unable to work because of a serious health condition. Employers covered by the law are required to maintain any pre-existing group health coverage during the leave period and, once the leave period is concluded, to reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment.

Supplementary Information: Family and Medical Leave Act, 60 Fed. Reg. 2180, 2180 (Jan. 6, 1995); see also 29 U.S.C. § 2612 (2000). Unless otherwise stated, all future references in the main text to 29 C.F.R. § 825.220 and its respective subsections will be in the form of the section (and subsection) number only (e.g. § 825.220, § 825.220(d)).

11. 29 C.F.R. § 825.220(d) (2005). The rest of 29 C.F.R. § 825.220(d) reads as follows:

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. 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.”

*Id.* (citation omitted).

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

13. The Fourth Circuit is the Federal Court of Appeals for Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

14. See 415 F.3d 364, 375 (4th Cir. 2005), *reh’g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

tive and retrospective waiver<sup>15</sup> or release of the FMLA's "substantive"<sup>16</sup> and "proscriptive"<sup>17</sup> rights.<sup>18</sup> However, the Fourth Circuit managed to create a caveat that makes post-dispute waiver or settlement agreements of FMLA rights enforceable, despite its interpretation that such waivers are generally barred by § 825.220(d).<sup>19</sup> The catch is that one must obtain the prior approval of the Department of Labor<sup>20</sup> ("DOL"), the agency charged with administering the FMLA, or a court.<sup>21</sup> Thus, the Fourth Circuit held that § 825.220(d) allows an employee to waive FMLA rights with the prior approval of the Department of Labor or a court,<sup>22</sup> while at the same time maintaining that the "plain language" of § 825.220(d) bars the prospective and retrospective waiver or release of the FMLA's substantive and proscriptive rights.<sup>23</sup> The Fourth Circuit's conclusion is inconsistent, to say the least. Also troubling is the fact that the plaintiff in *Taylor* was no longer an employee when she signed the waiver agreement.<sup>24</sup> Arguably, the plaintiff in *Taylor* should not have been prohibited from waiving even her substantive rights under the FMLA, because she was not an "employee"<sup>25</sup> in the first place, and thus not covered by the prohibiting regulation.<sup>26</sup>

15. A right can be waived either prospectively or retrospectively. *Black's Law Dictionary* defines the term "prospective waiver" as "[a] waiver of something that has not yet occurred, such as a contractual waiver of future claims for discrimination upon settlement of a lawsuit." BLACK'S LAW DICTIONARY 1612 (8th ed. 2004). By contrast the adjective "retrospective" is used to describe "matters that have occurred in the past." *Id.* at 1343.

16. According to the *Taylor* court, the substantive rights that are included in the FMLA are [1] an employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition; [2] the right to take such leave on an intermittent basis, or on a reduced work schedule, when medically necessary; and [3] the right to reinstatement following such leave.

*Taylor*, 415 F.3d at 369 (citations omitted). "Substantive" rights are also referred to as "prescriptive" rights.

17. According to the *Taylor* court, the proscriptive rights that are included in the FMLA are (1) the employee's right not to be discriminated against for exercising substantive FMLA rights or for otherwise opposing any practice prohibited by the FMLA, and (2) the employee's right not to be retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice prohibited by the FMLA. *Id.*

18. *Id.*

19. *See id.*

20. Congress directed the DOL, also known as the Secretary of Labor ("Secretary"), to issue regulations "necessary to carry out" the FMLA. 29 U.S.C. § 2654 (2000).

21. *Taylor*, 415 F.3d at 369.

22. *Id.*

23. *Id.* at 368.

24. Taylor signed and returned a general release to the defendants after her termination and was therefore no longer an "employee" at the time she signed the release. *See id.* at 367.

25. The term "employee" consistently refers to current employees throughout the regulation. *Faris v. Williams WPC-I, Inc. (Faris v. Nextira LLC)*, 332 F.3d 316, 320 (5th Cir. 2003).

26. The regulation speaks in terms of "employees" not former employees. *See* 29 C.F.R. § 825.220 (2005). The Fifth Circuit spends a good amount of its opinion discussing this issue but does not resolve it. *See Faris*, 332 F.3d at 322.

After carefully examining the decisions of both the Fifth and the Fourth Circuits, this comment will argue that the Fifth Circuit's interpretation of § 825.220(d), that the regulation bars only the prospective waiver of substantive rights under the FMLA and does not apply to the post-dispute release or settlement of FMLA claims, leads to a better result. The plain language of the regulation makes clear that it does not reach retaliation claims made by former employees under the FMLA and that it favors the post-dispute settlement of claims. Public policy favors the enforcement of releases, and similar waivers are allowed and enforced under the Age Discrimination in Employment Act<sup>27</sup> ("ADEA") and Title VII.<sup>28</sup> Furthermore, the Fourth Circuit's interpretation of § 825.220(d), that the regulation bars the prospective and retrospective waiver or release of the FMLA's substantive and proscriptive rights—absent DOL or court approval—is impractical and inefficient.

Part I of this comment will examine the Fifth Circuit's decision in *Faris v. Nextira LLC*. Part II will analyze the Fourth Circuit's decision in *Taylor v. Progress Energy, Inc.* and contrast it with that of the *Faris* court. Finally, Part III will demonstrate that the Fifth Circuit's interpretation of the regulation leads to a better result than that of the Fourth Circuit.

#### I. ANALYSIS OF THE FIFTH CIRCUIT'S DECISION IN *FARIS V. NEXTIRA LLC*

In *Faris v. Nextira LLC*, the plaintiff Carol Faris began working as an occupational health specialist for defendant Nextira LLC ("Nextira") in November 1997.<sup>29</sup> Her supervisor fired her in June 1999, citing poor per-

27. The Age Discrimination in Employment Act makes it unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this [Act].

29 U.S.C. § 623(a) (2000) The prohibitions of the Age Discrimination in Employment Act are limited to only those individuals who are at least forty years old. 29 U.S.C. § 631.

28. See, e.g., *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (ADEA), *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (Title VII). Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2000).

29. 332 F.3d at 318.

formance.<sup>30</sup> Nextira gave Faris two weeks' pay in lieu of notice.<sup>31</sup> Additionally, Nextira offered her an extra \$4,063.32 as consideration for signing a release that purported to waive her rights to, *inter alia*, "all other claims arising under any other federal, state or local law or regulation . . ."<sup>32</sup> Nextira also provided Faris with a memorandum advising her that she had forty-five days to consider the release and seven days to revoke or change her mind if she did sign.<sup>33</sup> The Fifth Circuit noted that Faris "understood that the payment was in return for the signing of the release" and never returned the payment to Nextira.<sup>34</sup> Faris later sued her supervisor and Nextira, claiming that she was fired in retaliation for asserting her rights under the FMLA.<sup>35</sup> After discovery proceedings, the defendants moved for summary judgment on the issue of the enforceability of the release.<sup>36</sup> Faris moved for partial summary judgment, claiming that the release was unenforceable under § 825.220(d). The district court denied the defendants' motion and granted the plaintiff's.<sup>37</sup> According to the district court, "the plain language of the regulation dictated that FMLA claims are not waivable."<sup>38</sup> The defendants appealed.<sup>39</sup>

The defendants argued that the district court erred in its ruling that the plain language of § 825.220(d) rendered the plaintiff's release void.<sup>40</sup> Specifically, the defendants argued that the plain language of the regulation does not reach the waivability of post-termination FMLA claims.<sup>41</sup> Alternatively, the defendants argued that even if § 825.220(d) was ambiguous, the relevant law under similar statutes, such as Title VII and the ADEA, and the common law's preference for waivability support the limited reading they advocated.<sup>42</sup>

30. *Id.*

31. *Id.*

32. *Id.* (internal quotations omitted). The \$4,063.32 amount was equivalent to one month of plaintiff's salary, and the release did not specifically mention the FMLA. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. The Fifth Circuit granted the defendants leave to bring an interlocutory appeal. *Id.*

40. *Id.* at 319.

41. *Id.*

42. *Id.* The defendants also argued that if the Fifth Circuit found that the regulation did extend to post-dispute waivers or settlements, then it was invalid under the *Chevron* test. The Fifth Circuit dismissed this argument, stating that it may not be considered on appeal because it was "not presented to nor passed on by the district court . . ." *Id.* at 319 n.2.

The defendants in *Faris* supported their argument that the plain language of § 825.220(d) does not reach retaliation claims brought by former employees by pointing out that the regulation speaks in terms of “employees” and not *former* employees.<sup>43</sup> The regulation reads “Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.”<sup>44</sup> The defendants focused on the meaning of the term “employee” and reasoned that the term could only refer to *current* employees, as *former* employees are simply no longer employed.<sup>45</sup> The FMLA defines “employee” with reference to the Fair Labor Standards Act of 1938 (“FLSA”),<sup>46</sup> which defines an employee as “any individual employed by an employer.”<sup>47</sup> The Fifth Circuit found this definition, by itself, unhelpful.<sup>48</sup> Moreover, the court found the term “employee” to be ambiguous as used in the FMLA, because in certain situations it referred to current employees, but in others it referred to former employees.<sup>49</sup> The Fifth Circuit reasoned that in order to decide whether the waiver prohibition applied to retaliation claims under the FMLA, it would have to look at the context in which the term was used in § 825.220, specifically.<sup>50</sup>

The Fifth Circuit found that the term “employee” consistently and unambiguously refers to current employees in § 825.220.<sup>51</sup> The court emphasized that the regulation distinguishes between “employees” and “prospective employees,” which implies that the term “employee” encompasses only those who are currently employed.<sup>52</sup> For example, § 825.220(c) prohibits employers “from discriminating against *employees* or *prospective employees* who have used FMLA leave.”<sup>53</sup> The *Faris* court cited other examples that strongly supported its interpretation that “employee” as used in § 825.220 refers only to *current* employees.<sup>54</sup> At the very least, the Fifth

43. *Id.* at 319.

44. 29 C.F.R. § 825.220(d) (2005).

45. *Faris*, 332 F.3d at 319.

46. 29 U.S.C. §§ 201–219 (2000). The FLSA, covering a broad range of workers, establishes federally mandated minimum wage and premium wage rates for overtime work. *See* Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062–64, 1067 (codified at 29 U.S.C. §§ 201–219) (setting forth minimum wage provision, overtime pay provision, and child labor provision). Originally set at forty-four hours, the standard workweek is now set at forty hours. *See id.* § 7(a).

47. 29 U.S.C. § 203(e)(1).

48. *Faris*, 332 F.3d at 319.

49. *Id.* at 320.

50. *Id.*

51. *Id.*

52. *Id.*

53. 29 C.F.R. § 825.220(c) (2005) (emphasis added).

54. For example, employers are prohibited from “transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act . . . .” 29 C.F.R. § 825.220(b)(1). Because companies can obvi-

Circuit concluded that there are “strong indications” in the regulation that the term “employee” refers only to *current* employees and that it could not successfully be argued that the use of the term “employee” unambiguously includes *former* employees.<sup>55</sup>

The defendants’ second major point was that § 825.220(d) extends only to “substantive rights” under the FMLA and not to post-dispute retaliation claims.<sup>56</sup> The meaning of the phrase “rights under [the] FMLA” was at issue.<sup>57</sup> The Fifth Circuit found that “several factors support the interpretation that this regulation applies only to waiver of substantive rights under the statute . . . .”<sup>58</sup> First, the Fifth Circuit noted that both “[t]he [FMLA] and regulation consistently use the term ‘rights under the law’ or ‘rights under FMLA’ to refer to the statutory rights to leave, certain conditions of that leave, and restoration, as set forth in 29 U.S.C. §§ 2612–14.”<sup>59</sup> Yet, the *Faris* court observed that § 825.220 does not refer to the cause of action for damages as a right under the FMLA.<sup>60</sup>

Next, the *Faris* court highlighted the title of the regulation: “How are employees protected who request leave or otherwise assert FMLA rights?”<sup>61</sup> The court stated that the regulation describes how FMLA rights are protected and discusses the prohibition of discrimination as a means of protecting those rights, and that a discrimination claim is never described as an FMLA right itself in the regulation or elsewhere.<sup>62</sup> Therefore, the *Faris* court concluded that § 825.220(d) must be read in accordance with the heading, which describes protections for employees who “request leave

ously only transfer current employees, the Fifth Circuit found the use of the term “employee” in this context as unambiguously referring to only current employees. The Fifth Circuit noted that both of the examples immediately following the nonwaivability statement concerned current employees as well. *Faris*, 332 F.3d at 320. The examples were as follows:

[E]mployees . . . 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. 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.”

29 C.F.R. § 825.220(d).

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

56. According to the *Faris* court, “substantive rights” under the FMLA include rights such as the right to leave and the right to reinstatement. In contrast, a retaliation claim against an employer was not considered to be a part of the “substantive rights” under the FMLA, but instead an exercise of those rights. *Id.* at 320–21.

57. *See id.* at 320.

58. *Id.*

59. *Id.*

60. *Id.* at 320–21.

61. *Id.* at 321.

62. *Id.*

or otherwise assert FMLA rights,” because it responds to that heading, limiting waiver of rights considered in the heading.<sup>63</sup>

The Fifth Circuit reiterated that the examples of nonwaivability used in the regulation deal with prohibitions on the prospective waiver of substantive rights under the FMLA.<sup>64</sup> The *Faris* court noted that in the examples, the rights to leave and restoration are “rights under [the] FMLA.”<sup>65</sup> The court explained that a cause of action for retaliation was never addressed in the examples provided in the regulation.<sup>66</sup> The Fifth Circuit reasoned that the cause of action for retaliation is a *protection for* FMLA rights, the waiver of which is not prohibited, rather than a “right under [the] FMLA.”<sup>67</sup> Thus, the Fifth Circuit logically concluded that a plain reading of § 825.220—that it does not prohibit the post-dispute settlement of claims—was consistent with the rest of the language of the regulation.<sup>68</sup>

The Fifth Circuit further supported its interpretation of § 825.220 by arguing that public policy favored the enforcement of settlements and that similar waivers are allowed in other regulatory schemes, such as the ADEA and Title VII.<sup>69</sup> Indeed, the *Faris* court emphasized that it enforces releases and settlement agreements under the ADEA without question.<sup>70</sup> Moreover, the Fifth Circuit stated that releases of Title VII claims are also commonly enforced.<sup>71</sup> The Fifth Circuit found that there was “no good reason” why the government would prohibit waiver of FMLA retaliation claims on the one hand and yet favor waiver of retaliation claims under the ADEA and Title VII on the other.<sup>72</sup> The Fifth Circuit concluded that if the Secretary of Labor (“Secretary”) had intended to abandon the sound policy employed in analogous areas, the Secretary would have explicitly manifested its intent

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. For example, the court stated,

[A]lthough an employee cannot waive the right to file a charge with the [Equal Employment Opportunity Commission (“EEOC”)], the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf.

*Id.* (alterations in original) (internal quotations omitted) (quoting *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987)).

70. *Id.* (pointing out that waivers of the right to bring suit under the ADEA are enforced by the Fifth Circuit and are not void against public policy).

71. “[A] general release of Title VII claims does not ordinarily violate public policy. To the contrary, public policy favors voluntary settlement of employment discrimination claims brought under Title VII.” *Id.* (quoting *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986)).

72. *Id.* at 322. The *Faris* court noted that the plaintiff also had not provided any such reason.

to do so.<sup>73</sup> The *Faris* court pointed out that the regulation, besides showing no signs of such an intent, uses examples that are “entirely consistent” with the waiver requirements set out in the ADEA and Title VII.<sup>74</sup> The *Faris* court thus found the policies behind the ADEA and Title VII to be “highly persuasive.”<sup>75</sup>

In sum, the Fifth Circuit held that § 825.220(d) bars only the prospective waiver of substantive rights under the FMLA and does not apply to the post-dispute release or settlement of FMLA claims.<sup>76</sup> The Fifth Circuit noted that its interpretation of the regulation was not only consistent with public policy, but also with the law under similar regulatory schemes such as the ADEA and Title VII.<sup>77</sup> Therefore, because § 825.220(d) did not render the plaintiff’s release unenforceable, the *Faris* court reversed and rendered judgment for the defendants.<sup>78</sup>

## II. CRITIQUE OF THE FOURTH CIRCUIT’S DECISION IN *TAYLOR V. PROGRESS ENERGY, INC.*

In *Taylor v. Progress Energy, Inc.*,<sup>79</sup> the plaintiff, Barbara Taylor, began working for Carolina Power & Light Company (“CP & L”), a subsidiary of defendant Progress Energy, Inc. (“Progress”), in the Document Services Unit at North Carolina’s Brunswick Nuclear Plant in 1993.<sup>80</sup> In April 2000, Taylor began experiencing pain and swelling in her right leg and missed five days of work as a result.<sup>81</sup> Subsequently, Taylor did not go to work for a number of days due to medical testing and treatment.<sup>82</sup>

In August 2000, Taylor missed a full week of work and additional days in the weeks following a spinal tap procedure.<sup>83</sup> Taylor then received a written warning from her supervisor and the human resources department informing her that she “had exceeded the company’s average sick time.”<sup>84</sup>

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* For a reminder of what constitutes a “prospective waiver,” see *supra* note 15.

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

78. The Fifth Circuit also stated that while in practice, its holding may make the regulation applicable only to current employees, as suggested by the defendants, that question remained unresolved. *Id.*

79. It is important to note that since the district court granted the defendant’s summary judgment motion, the Fourth Circuit Court of Appeals stated the facts in the light most favorable to Taylor because she was the non-moving party. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 366 (4th Cir. 2005), *reh’g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (internal quotations omitted).

Taylor later missed an additional five days of work following medical testing in November and six weeks following surgery in December.<sup>85</sup>

In February 2001, Taylor received a poor productivity rating in her performance evaluation for the previous year.<sup>86</sup> In May 2001, as part of a reduction in force, CP & L terminated Taylor's employment.<sup>87</sup> The company told Taylor that she was eligible to receive benefits under its transition plan, including seven weeks of paid administrative leave.<sup>88</sup> Furthermore, CP & L told Taylor that she would receive additional monetary compensation if she signed and returned a general release<sup>89</sup> within forty-five days.<sup>90</sup> Taylor signed and returned the release within that period and kept the check that CP & L sent her, which was roughly in the amount of \$12,000 pursuant to the terms of the release.<sup>91</sup>

Nevertheless, Taylor sued Progress under 29 U.S.C. § 2617 on May 9, 2003.<sup>92</sup> In her complaint,<sup>93</sup> Taylor alleged that Progress had violated the FMLA.<sup>94</sup> Progress filed a motion for summary judgment, arguing that the release that Taylor signed was a complete defense to Taylor's claim.<sup>95</sup> Taylor replied by arguing that 29 C.F.R. § 825.220(d) rendered the release unenforceable with regard to her FMLA rights.<sup>96</sup> The district court granted

85. *Id.*

86. *Id.* Based on Taylor's poor productivity rating in her performance evaluation, Taylor received only a 1 percent pay raise. The average raise for CP & L employees was 6 percent. *Id.*

87. *Id.* at 366–67.

88. *Id.* at 367.

89. The relevant portion of the release read, *GENERAL RELEASE OF CLAIMS. IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEARBY RELEASES CP & L . . . FROM ALL CLAIMS AND WAIVES ALL RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE'S EMPLOYMENT WITH CP & L . . . OR EMPLOYEE'S SEPARATION THEREFROM, arising from events which have occurred up to the date employee executes this General Release, including but not limited to, claims . . . for relief . . . arising under . . . the Age Discrimination In Employment Act of 1967, . . . the Employee Retirement Income Security Act of 1974, . . . Title VII of the Civil Rights Act of 1964, . . . [or] any other federal, state or local law.*

*Id.* (internal quotations omitted). While the general release did not mention FMLA claims, Taylor's FMLA claims fell into the catchall category of "other federal . . . law" claims besides those specifically mentioned in the release. *Id.*

90. *Id.*

91. *Id.* Taylor returned the signed release to CP & L on June 4, 2001.

92. *Id.*

93. In her complaint, Taylor sought an injunction directing Progress to rehire her, compensatory damages, liquidated damages, and attorneys' fees and costs. *Id.* at 368.

94. Specifically, Taylor alleged that CP & L had violated the FMLA by "(1) not fully informing her of her FMLA rights, (2) improperly denying her requests for medical leave, (3) terminating her employment because of her medical absences, and (4) terminating her employment because she complained about the company's violations of the FMLA." *Id.* at 367–68.

95. *Id.* at 368.

96. *Id.*

Progress's motion for summary judgment and held that § 825.220(d) did not bar enforcement of the release.<sup>97</sup> The district court held that § 825.220(d) prohibits only the prospective waiver of substantive FMLA rights, consistent with the holding of the Fifth Circuit in *Faris v. Nextira LLC*.<sup>98</sup> Taylor appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. Taylor argued that the district court erred in granting Progress's summary judgment motion because § 825.220(d) precludes Progress from enforcing the release she signed with respect to her FMLA rights.<sup>99</sup> The Fourth Circuit sided with Taylor and concluded that § 825.220(d) rendered the release unenforceable with regard to her FMLA rights.<sup>100</sup>

Unlike the Fifth Circuit's decision in *Faris*, the Fourth Circuit did not begin its analysis by defining the term "employee" in the regulation.<sup>101</sup> In fact, the Fourth Circuit never even considered the straightforward reasoning that § 825.220(d) must not reach termination-based retaliation claims under the FMLA, because the regulation speaks in terms of "employees" and not *former* employees.<sup>102</sup> Instead, the Fourth Circuit began its discussion by defining two types of FMLA rights: substantive rights and proscriptive rights.<sup>103</sup> Immediately thereafter, the Fourth Circuit proceeded to apply the *Chevron* test<sup>104</sup> to determine whether the agency (the DOL) acted within its discretion in enacting § 825.220(d).<sup>105</sup>

Under *Chevron*, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the stat-

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Compare *Taylor*, 415 F.3d 364 (beginning its analysis by defining FMLA rights), with *Faris v. Williams WPC-I (Faris v. Nextira LLC)*, 332 F.3d 316 (5th Cir. 2003) (beginning its analysis by defining the term "employee").

102. Compare *Taylor*, 415 F.3d 364 (failing to consider the distinction between employees and former employees in the context of the regulation), with *Faris*, 332 F.3d 316 (discussing the distinction between employees and former employees in the context of the regulation).

103. The *Taylor* court defines "substantive rights" as including

an employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition; the right to take such leave on an intermittent basis, or on a reduced work schedule, when medically necessary; and the right to reinstatement following such leave.

*Id.* at 369 (citations omitted). In contrast, the *Taylor* court defines "proscriptive rights" as including "an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the [FMLA]." *Id.* (citations omitted).

104. The Supreme Court unanimously developed the *Chevron* test, a two-step test with respect to judicial review of agency interpretations of statutes the agencies administer, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

105. See *Taylor*, 415 F.3d at 369.

ute.”<sup>106</sup> A court reviewing an administrative agency’s construction of a statute is confronted with two questions. The first question to ask under the *Chevron* test is whether Congress has directly spoken to the question at issue. If Congress has directly addressed the precise question at issue and Congress’s intent on the matter is clear, then there is no need to move on to the second question of the *Chevron* test because the reviewing court must adhere to the unambiguous intent expressed by Congress. If, however, the court finds that Congress has not directly spoken to the question at issue, the court cannot impose its own construction of the statute, as it would do in the absence of an administrative interpretation. Thus, if the statute is silent or ambiguous regarding the specific question at issue, the reviewing court must ask the second question under the *Chevron* test, which is “whether the agency’s answer is based on a permissible construction of the statute.”<sup>107</sup>

As the *Taylor* court recognized, the first question to ask under the *Chevron* test was whether Congress had directly spoken to the specific question of whether employees could waive their rights under the FMLA.<sup>108</sup> The Fourth Circuit noted that the FMLA did not explicitly provide for nor preclude the waiver or post-dispute settlement of claims.<sup>109</sup> The *Taylor* court therefore concluded that Congress had not spoken directly to this issue, which meant that Congress had authorized the Secretary (or the DOL) to address the matter.<sup>110</sup> The court determined that before it could move on to the second step of the *Chevron* test it had to figure out what § 825.220(d) actually meant.<sup>111</sup>

The *Taylor* court began its analysis of the meaning of § 825.220(d) by focusing on the language of the regulation that states, “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA.”<sup>112</sup> According to the court, the above language does not limit itself to precluding only the prospective waiver of FMLA rights.<sup>113</sup> The Fourth Circuit highlighted the word “waive” and declared that no definition of “waive” suggested that it has only a prospective connotation.<sup>114</sup> To support its argument, the Fourth Circuit referred to the definition of “waive” in

106. *Chevron*, 467 U.S. at 844.

107. *Id.* at 842–43.

108. *Taylor*, 415 F.3d at 369.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.* (alteration in original) (internal quotations omitted) (quoting 29 C.F.R. § 825.220(d) (2005)).

113. *Id.* at 370.

114. *Id.*

*Black's Law Dictionary*<sup>115</sup> and *Webster's Third New International Dictionary*.<sup>116</sup> While doing so, the *Taylor* court ignored the fact that the regulation speaks only in terms of waiving "rights" and does not at all refer to the settlement or release of "claims."<sup>117</sup>

The distinction between "rights" and "claims" is one that is recognized by Congress. Congress explicitly acknowledged this distinction when it regulated the waiver of "any rights or claim" in the Older Workers Benefit Protection Act.<sup>118</sup> Therefore, if the DOL intended for § 825.220(d) to be interpreted as prohibiting not only the waiver of rights under the FMLA but also the release of FMLA claims, it would have expressly done so. Indeed, in an amicus curiae brief in support of Progress's petition for rehearing en banc, the Secretary lays the Fourth Circuit's "erroneous" interpretation of § 825.220(d) to rest by acknowledging that "[s]ection 220(d) bars only the prospective waiver of FMLA rights; it has never been interpreted by the Department as barring the private settlement of past FMLA claims."<sup>119</sup> Furthermore, "[t]he regulation was never intended to restrict, nor has the Secretary ever interpreted it as restricting, the retrospective settlement of FMLA claims."<sup>120</sup> This explains why several courts have addressed the validity of the settlement of private FMLA claims without ever referring to § 825.220(d).<sup>121</sup>

Next, the Fourth Circuit highlighted the title of the regulation, just as the Fifth Circuit in *Faris* had done, but the Fourth Circuit reached a different conclusion. The Fourth Circuit explained that § 825.220 began with the question, "How are employees protected who request leave *or otherwise*

115. "Black's defines 'waive' as '[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily.'" *Id.* (alteration in original) (quoting BLACK'S LAW DICTIONARY 1611 (8th ed. 2004)).

116. "Webster's defines 'waive' as 'to give up . . . : FORSAKE . . . to withdraw . . . to relinquish voluntarily (as a legal right) . . . to refrain from pressing or enforcing (as a claim or rule) . . . RELINQUISH.'" *Id.* (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2570 (2002)).

117. *See* 29 C.F.R. § 825.220(d).

118. 29 U.S.C. § 626(f)(1) (2000). If "rights" and "claims" were synonymous, then the use of one of those terms would be sufficient. Congress used both.

119. Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc at 3, *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006) [hereinafter Brief for the Secretary of Labor].

120. *Id.* at 4.

121. *See, e.g.,* *Halvorson v. Boy Scouts of America*, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. 2000) (unpublished); *Kujawski v. U.S. Filter Wastewater Group Inc.*, No. 00-1151(DWF/AJB), 2001 U.S. Dist. LEXIS 17578 (D. Minn. 2001); *Riddell v. Medical Inter-Insurance Exchange*, 18 F. Supp. 2d 468 (D.N.J. 1998).

*assert FMLA rights?*"<sup>122</sup> Unlike the Fifth Circuit, however, the Fourth Circuit read this title in conjunction with § 825.220(c)<sup>123</sup> and theorized that an employee seeking redress for his or her employer's FMLA-based discrimination or retaliation is "otherwise assert[ing] FMLA rights," which is the equivalent of asserting "rights under [the] FMLA," and such rights cannot be waived.<sup>124</sup> Based on the cursory reasoning above, the Fourth Circuit stated that it was therefore "clear" that the phrase "rights under [the] FMLA" included both substantive rights and proscriptive rights.<sup>125</sup>

Although the Fourth Circuit was correct in acknowledging the difference between substantive rights and proscriptive rights,<sup>126</sup> it was wrong in concluding that the regulation precluded both. As the Secretary pointed out, the *Taylor* district court was correct in holding that § 825.220(d) "does not preclude the post-dispute settlement of a *claim* alleging that those substantive rights have been previously violated. What it does preclude is the prospective bargaining away of those substantive *rights*."<sup>127</sup> The *Taylor* district court even provided an illustrative example of exactly what § 825.220(d) prohibits: "For example, if an employer and employee signed a 'contract' at the outset of employment in which the employee agreed to waive all of her FMLA rights in exchange for \$100, then such a contract would not be enforceable."<sup>128</sup>

The Fourth Circuit, apparently attempting to support the weak reasoning it used to ascertain the plain meaning of § 825.220(d), moved on to examine the "Summary of Major Comments" published with the final version of the FMLA implementing regulations. The Fourth Circuit pointed out that although some businesses<sup>129</sup> and the United States Chamber of Commerce had suggested that there be an "explicit allowance of waivers and releases in connection with [the] settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims,

122. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 370 (4th Cir. 2005) (internal quotations omitted) (quoting 29 C.F.R. § 825.220), *reh'g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

123. Section 825.220(c) states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions . . ." 29 C.F.R. § 825.220(c).

124. *Taylor*, 415 F.3d at 370 (alterations in original) (internal quotations omitted).

125. *Id.*

126. See *supra* notes 16 and 17, for the *Taylor* court's definitions of "substantive" rights and "proscriptive" rights.

127. Brief for the Secretary of Labor, *supra* note 119, at 4-5 (internal quotations omitted) (quoting *Taylor v. Progress Energy, Inc.*, No. 03-CV-73-H(1), slip op. at 12 (E.D.S.C. Mar. 22, 2004)).

128. *Taylor*, No. 03-CV-73-H(1), slip op. at 12.

129. Specifically, Nationsbank Corporation (Troutman Sanders) and Southern Electric International, Inc. (Troutman Sanders).

for example),”<sup>130</sup> the DOL “rejected”<sup>131</sup> this suggestion.<sup>132</sup> The Fourth Circuit assumed that because the DOL did not adhere to the suggestion that an *explicit* allowance be made for waivers and releases in the regulation, the DOL must never have intended for § 825.220(d)’s waiver prohibition to have only a prospective application.<sup>133</sup> Such an assumption is without merit; a more reasonable conclusion as to why the Secretary chose to remain silent instead of making such an explicit allowance was because it was unnecessary to do so, since the regulation does not apply to releases in the first place.

However, there is no need to guess at what the DOL had in mind when the DOL itself states exactly what it meant. The DOL pointed out that the court

incorrectly interpreted the Department’s silence as to the retrospective settlement of FMLA claims in the preamble to the final regulations as an indication that such settlements are prohibited under section 220(d). Instead, the Department’s silence is correctly understood as an indication that it did not perceive such settlements as falling within the scope of the regulation.

As the examples in the preamble make clear, the Department viewed section 220(d) as barring only the prospective waiver of rights.<sup>134</sup>

Moreover, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>135</sup> It is no wonder that the Fifth Circuit did not devote any language from its opinion to this issue.<sup>136</sup>

The *Taylor* court made its next mistake by assuming that the FMLA’s enforcement scheme was meant to parallel the FLSA’s scheme merely

130. Summary of Major Comments: Family and Medical Leave Act, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).

131. The DOL’s actual response to the suggestion was

The Department has given careful consideration to the comments received on this section and has 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. This does not prevent an individual employee on unpaid leave from returning to work quickly by accepting a “light duty” or different assignment. Accordingly, the final rule is revised to allow for an employee’s voluntary and uncoerced acceptance of a “light duty” assignment. An employee’s right to restoration to the same or an equivalent position would continue until 12 weeks have passed, including all periods of FMLA leave and the “light duty” period.

*Id.* at 2218–19.

132. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 370–71 (4th Cir. 2005), *reh’g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

133. *Id.* at 371.

134. Brief for the Secretary of Labor, *supra* note 119, at 9 (citation omitted).

135. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

136. *See Faris v. Williams WPC-I, Inc. (Faris v. Nextira LLC)*, 332 F.3d. 316 (5th Cir. 2003).

because the DOL used the FLSA as one example where prohibitions against employees waiving their rights constituted sound public policy.<sup>137</sup> Because the FLSA allowed employees to waive or settle their rights under the FLSA with prior court or DOL approval, the Fourth Circuit reasoned that the FMLA must allow the same.<sup>138</sup> Thus, although according to the Fourth Circuit's own interpretation, the plain language of § 825.220(d) prohibits both the *prospective* and *retrospective* waiver or release of an employee's FMLA rights,<sup>139</sup> the court nonetheless held that an employee may waive or settle his or her FMLA rights with the prior approval of a court or the DOL.<sup>140</sup> As a result, the court effectively rewrote the regulation.

First of all, unlike the FLSA, where Congress has expressly given the DOL authority to supervise claims,<sup>141</sup> Congress has given no such authority to the DOL in the FMLA. Moreover, while the Secretary has created an administrative process pursuant to which the *Wage and Hour Division* investigates and tries to resolve FMLA complaints in the same manner that it does FLSA complaints, it has never construed section 107(b)(1)<sup>142</sup> of the FMLA as requiring its approval of *all private settlements*—"a unique, judicially-imposed requirement under the FLSA."<sup>143</sup> In fact, as the Secretary noted, courts have consistently rejected attempts to apply such a requirement to other employment statutes.<sup>144</sup> For example, the ADEA contains an enforcement provision that is expressly based on the FLSA.<sup>145</sup> However,

137. *See supra* note 131.

138. *See Taylor*, 415 F.3d at 371.

139. *Id.* at 368.

140. *Id.* at 371.

141. *See* 29 U.S.C. § 216(c) (2000) ("The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title.").

142. Section 107(b)(1) of the FMLA authorizes the Secretary of Labor to "receive, investigate, and attempt to resolve complaints of violations" of the FMLA in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of the Fair Labor Standards Act. Family and Medical Leave Act of 1993 § 107(b)(1), 29 U.S.C. § 2617(b)(1).

143. Section 107(b)(1) "provides the Secretary the authority to establish the same administrative complaint procedure that she utilizes under the minimum wage and overtime provisions of the FLSA. It clearly does not, however, require the Secretary to supervise all FMLA settlements—a unique, judicially-imposed requirement under the FLSA." Brief for the Secretary of Labor, *supra* note 119, at 10.

144. *Id.* In addition, the Secretary itself noted that the *Taylor* court incorrectly relied on the FLSA when it concluded that private settlements of FMLA claims were not permitted. *Id.*

145. The statute reads,

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title [Fair Labor Standards Act], and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of [the Fair Labor Standards Act]. Amounts owing to a person as a result of a violation of this chap-

courts have consistently refused to apply any requirement that all settlements of ADEA claims be approved by a court or an administrative agency, and were correct to refuse arguments advocating such requirements.<sup>146</sup>

The judicial bar against the private settlement of FLSA claims and the ensuing requirement that all FLSA settlements be approved by the DOL or a court is based on policy considerations that are unique to the FLSA.<sup>147</sup> The purpose of the FLSA is “to secure ‘the lowest paid segment . . . a subsistence wage,’”<sup>148</sup> whereas both the ADEA and FMLA are directed toward “an entirely different segment of employees, many of whom were highly paid and capable of securing legal assistance without difficulty.”<sup>149</sup> Indeed, the FLSA is a remedial statute that sets the floor for minimum wage and overtime pay.<sup>150</sup> Moreover, the FLSA was enacted in an effort to protect the most vulnerable workers: those who lacked bargaining power and therefore could not negotiate fair wages and reasonable work hours with employers.<sup>151</sup>

The policy considerations underlying the FMLA are unlike those behind the FLSA and similar to those of the ADEA and Title VII.<sup>152</sup> The FMLA, like the ADEA and Title VII, protects all segments of the workforce, not just low wage workers. Furthermore, unlike the FLSA, virtually all claims that are brought under the FMLA are individual claims brought by employees, just as they are under the ADEA and Title VII.<sup>153</sup> The FMLA is more similar to the ADEA and Title VII, both of which permit the unsupervised settlements of claims, than it is to the FLSA. The mere fact that the FMLA’s enforcement scheme was modeled after the FLSA’s provides no basis to conclude that Congress intended to transfer the limitations of FLSA settlements into the FMLA, especially when the ADEA,

ter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of [the Fair Labor Standards Act] . . . .  
29 U.S.C. § 626(b).

146. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991) (“[N]othing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement.”); *Runyan v. Nat’l Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir. 1986) (en banc) (“[A] practice . . . has developed that permits effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement.”).

147. Brief for the Secretary of Labor, *supra* note 119, at 13.

148. *Runyan*, 787 F.2d at 1043 (alteration in original) (quoting *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946)).

149. *Id.* (distinguishing the ADEA from the FLSA).

150. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–707 (1945).

151. *Id.*

152. Brief for the Secretary of Labor, *supra* note 119, at 13.

153. *Id.* at 13–14.

which actually includes the same enforcement scheme of the FLSA, has no such limitations.

The Fourth Circuit took a brief moment to note that its holding was inconsistent with that of the Fifth Circuit and the Fourth Circuit's district court.<sup>154</sup> The Fourth Circuit explained that the Fifth Circuit in *Faris* held that the "plain reading" of § 825.220(d) made clear that the regulation only prohibited the "prospective waiver of [substantive] rights, not the post-dispute settlement of claims," and that both the Fifth Circuit and the district court in *Taylor* agreed that § 825.220(d)'s prohibition did not apply to the retrospective waiver or release of FMLA claims, nor to employees' waivers or releases of discrimination or retaliation claims against their employers.<sup>155</sup> The Fourth Circuit announced that it disagreed with the Fifth Circuit and the district court because § 825.220(d) "plainly prohibits the waiver or release of FMLA claims" but nevertheless managed to add, in parenthesis, "unless there is DOL or court approval."<sup>156</sup>

Finally, the Fourth Circuit decided that it was time to answer the second question under the *Chevron* test, which was whether § 825.220(d) was "based on a permissible construction" of the FMLA.<sup>157</sup> Progress argued that the Fourth Circuit's conclusion that the regulation bars enforcement of Taylor's release meant that § 825.220(d) must therefore be deemed unenforceable, because it was inconsistent with the general public policy favoring settlements and because congressional silence on the waiver issue showed that Congress never intended to regulate the waiver or release of FMLA claims.<sup>158</sup> Moreover, Progress argued that if the regulation was interpreted as entirely prohibiting the waiver or release of all claims, then the regulation is arbitrary and therefore invalid under the *Chevron* test.<sup>159</sup>

The *Taylor* court essentially glossed over Progress's first argument by stating that although it agreed that "there is a general public policy favoring the post-dispute settlement of claims," consideration of such a policy simply had no place in the analysis of whether the regulation was based on a permissible construction of the FMLA.<sup>160</sup> The court spent even less time on rejecting Progress's second argument that Congress's silence on the waiver

154. See *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 371–72 (4th Cir. 2005), *reh'g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

155. *Id.* (alteration in original) (internal quotations omitted) (quoting *Faris v. Williams WPC-I, Inc.* (*Faris v. Nextira LLC*), 332 F.3d 316 (5th Cir. 2003)).

156. *Id.* at 372.

157. *Id.*

158. *Id.* at 373.

159. *Id.*

160. See *id.*

issue demonstrated an intention not to regulate the waiver or release of FMLA claims. The Fourth Circuit rejected the argument by merely reciting a quote<sup>161</sup> from a prior Fourth Circuit decision that was based on a belief rather than laws or facts.

But in fact, Congress was not merely silent. As it turns out, Congress had expressly rejected a provision that attempted to prohibit releases of FMLA claims when it drafted the FMLA. In 1990, the House of Representatives attempted to pass the following provision: “Waiver of Rights Prohibited. The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.”<sup>162</sup> If Congress intended to bar the release of FMLA claims it would have passed the above provision, but Congress did the exact opposite. Moreover, not only did Congress reject this provision, it also failed to include any similar provision in the FMLA. Therefore, Congress’s silence on the waiver issue after it expressly rejected the “Waiver of Rights Prohibited” provision strongly suggests that Congress did not intend to prohibit the waiver or release of FMLA claims.

The Fourth Circuit responded to Progress’s third argument—that § 825.220(d) is an arbitrary regulation if it is interpreted as completely barring the waiver or release of FMLA claims—by reiterating that employees could still waive their FMLA rights with prior court or DOL approval.<sup>163</sup> Therefore, the Fourth Circuit concluded that Progress’s third and final argument failed because the regulation did not completely bar the waiver or release of FMLA claims and, as a result, was not “arbitrary.”<sup>164</sup>

The *Taylor* court’s reasoning here is plainly wrong. Instead of focusing on the plain meaning of § 825.220(d), which is what the *Taylor* court was supposed to do, it interpreted the regulation using its own judicial gloss that allows waivers or releases with prior DOL or court approval. Once the Fourth Circuit concluded that the plain language of § 825.220(d) “prohibits both the retrospective and prospective waiver or release of an employee’s FMLA rights,”<sup>165</sup> it was required to use that conclusion in deciding whether the regulation is arbitrary. The Fourth Circuit, however, failed to

161. “We also reject Progress’s second argument that Congress’s silence on the question of waiver should be interpreted as indicating an intent to allow the waiver or release of FMLA claims. We do so because ‘inferences from congressional silence, in the context of administrative law, are often treacherous.’” *Id.* (quoting *EEOC v. Seafarers Int’l Union*, 394 F.3d 197, 202 (4th Cir. 2005)).

162. Family and Medical Leave Act of 1990, H.R. 770, 101st Congress, § 201(d) (1990).

163. *Taylor*, 415 F.3d at 373.

164. *See id.* at 375.

165. *Id.* at 368.

do so and instead argued that the regulation is not arbitrary because the Fourth Circuit would allow employees to waive their FMLA rights, even though, according to the *Taylor* court, the “plain language” of the regulation expressly prohibits this.<sup>166</sup> The Fourth Circuit must have realized that its interpretation of § 825.220(d), which bars the release of FMLA claims altogether, would be unenforceable. Therefore, in an attempt to salvage its own interpretation of the regulation, the Fourth Circuit relied on its own judicial gloss. The Fourth Circuit’s effort to save face, while creative, lacks regulatory support. Indeed, the regulation states that “[e]mployees cannot waive . . . their rights under [the] FMLA,”<sup>167</sup> and absolutely nowhere does it include “unless the waiver has the prior approval of the DOL or a court.”<sup>168</sup>

Next, the Fourth Circuit used an unrelated policy argument to support the notion that § 825.220(d) is entirely consistent with the FMLA. The Fourth Circuit argued that “[t]he FMLA was enacted to set a minimum labor standard for family and medical leave . . . .”<sup>169</sup> According to the Fourth Circuit, this minimum standard was justified and necessary.<sup>170</sup> Indeed, whether the FMLA’s minimum standard was justified or necessary is in no way relevant to the question of whether § 825.220(d) was based on a permissible construction of the FMLA. Nor does it answer why the Fourth Circuit believed that employees should not be able to voluntarily settle their FMLA claims, a right these employees enjoy under the ADEA and Title VII. Nevertheless, the *Taylor* court found that § 825.220(d) is not “arbitrary, capricious, or manifestly contrary” to the FMLA, but was instead entirely consistent with the statute.<sup>171</sup> As a result, the *Taylor* court reversed the district court’s order granting the defendant’s summary judgment motion.<sup>172</sup> The Fourth Circuit held that § 825.220(d) prohibits the prospective and retrospective waiver or release of both the substantive and proscriptive FMLA rights, except where prior approval from a court or the DOL was obtained.<sup>173</sup>

166. *See id.* at 373.

167. 29 C.F.R. § 825.220(d) (2005).

168. This additional language can be found only in the *Taylor* court’s opinion, not in the regulation itself. Compare *Taylor*, 415 F.3d at 369 (requiring prior approval by the DOL or a court for the validity of an employee’s waiver of FMLA rights), with 29 C.F.R. § 825.220(d) (including no language requiring the prior approval of the DOL or a court).

169. *Taylor*, 415 F.3d at 374.

170. *See id.*

171. *Id.* at 375.

172. *Id.*

173. *Id.*

The *Taylor* court's erroneous holding, however, was short lived because it was vacated after Progress filed a petition for rehearing en banc.<sup>174</sup> The petition was supported by two amicus briefs,<sup>175</sup> one of which was filed by the Department of Labor itself. On June 14, 2006, the Fourth Circuit vacated its *Taylor* opinion and granted a panel rehearing of the case.<sup>176</sup> The Fourth Circuit ordered both sides to file supplemental briefs by August 7, 2006 to address issues raised by the DOL's amicus curiae brief, but has postponed panel reargument to a date uncertain.<sup>177</sup>

### III. THE FIFTH CIRCUIT'S INTERPRETATION OF 29 C.F.R. § 825.220(D) LEADS TO THE BETTER RESULT

The *Taylor* court's decision that private parties cannot execute a valid release of FMLA claims or settle such claims without the prior approval of the DOL or a court<sup>178</sup> has serious adverse effects on hundreds of thousands of employers and employees within the Fourth Circuit and possibly elsewhere. To begin, the *Taylor* court's decision inappropriately interferes with both voluntary separation settlements and involuntary separation severance pay agreements. Employers who necessarily have to reduce their workforce routinely offer severance benefits to ease the hardships of their former employees. Some employers even offer early retirement incentives whenever possible. These employers are offering benefits that are significantly greater than what they are legally required to offer. So in exchange for these extra benefits, employers reasonably ask that the employees who accept these benefits sign a general release of claims.

But the *Taylor* court's decision renders these general releases unenforceable with regard to claims arising under the Family and Medical Leave Act.<sup>179</sup> In this respect, employers who generously offer fat severance packages in exchange for general releases that cover FMLA claims may be getting much less than they bargained for. In fact, employers in this situation are not getting anything, other than a false sense of security, in ex-

174. Progress Energy, Inc. (the Defendant-Appellee) filed its Petition for Rehearing En Banc with the United States Court of Appeals for the Fourth Circuit on August 3, 2005. Although the petition was denied, the Fourth Circuit agreed to a panel rehearing.

175. The first amicus curiae brief was submitted jointly by the Equal Employment Advisory Council, the Chamber of Commerce of the United States of America, and the Society for Human Resource Management in support of the Defendant-Appellee's Petition for Rehearing En Banc on August 2, 2005. The second amicus curiae brief was submitted by the Secretary of Labor in support of the Defendant-Appellee's Petition for Rehearing En Banc on August 16, 2005.

176. *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006).

177. Order at 2, *Taylor v. Progress Energy, Inc.*, No. 04-1525 (4th Cir. July 17, 2006).

178. *Taylor*, 415 F.3d at 375.

179. *See id.*

change for the extra benefits they are providing; the employees could cash their severance checks, turn around, and sue the employer anyway with respect to alleged FMLA claims.

But in the end, it is not just the employers who suffer as a result of the *Taylor* court's decision; employees suffer as well. After all, it will not take very long for employers to realize that the general releases that their employees sign are not worth the benefits being exchanged. As the Equal Employment Advisory Council and the Chamber of Commerce note in their amicus curiae brief in support of Progress's petition for rehearing en banc, the *Taylor* court's holding that a general release is unenforceable with respect to FMLA claims without prior approval from the DOL or a court "undermines the preclusionary effect of any general release of employment claims in any context, reducing its value to employers and in turn what they are willing to pay for it, to the ultimate detriment of the employees who are the recipients of the consideration given for the release."<sup>180</sup> Indeed, the ruling of the Fourth Circuit creates a disincentive for employers to offer separation benefits at all, because the potential risk of employees accepting the benefits only to turn around and sue their employers anyway, as the plaintiffs in *Faris* and *Taylor* did, is a great one. Thus, massive layoffs will still occur if the economy demands it, but because of the Fourth Circuit's decision many of those laid off employees will have to go without the fat severance checks they would have had.

The *Taylor* court seemed to assume that the consequences of its decision would not be a big deal. But as labor law attorneys have noticed,<sup>181</sup> this is simply not the case. Attorneys Joseph P. Harkins and Gary D. Shapiro warn that

[a]lthough this decision currently applies to employers in the Fourth Circuit . . . it is unclear what stance the other Courts of Appeals will take on this issue and whether they will adopt the reasoning of *Taylor* or the

180. Brief *Amici Curiae* of the Equal Employment Advisory Council et al. in Support of Defendant-Appellee's Petition for Rehearing *En Banc* at 3-4, *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006) [hereinafter Brief for the Equal Employment Advisory Council].

181. Labor and Employment lawyers have not only noticed the consequences of the *Taylor* decision but are also writing about them in newsletters and action alerts. See, e.g., *Can an Employer Secure the Release of an FMLA Claim in the 4th Circuit?*, LAB. & EMP. UPDATE (Buchanan Ingersoll PC, Pittsburgh, Pa.), Nov. 2005, at 5; *The Family and Medical Leave Act Bars Waivers—Or Does It?*, EMP. L. ALERT (Nixon Peabody LLP, New York, NY), Feb. 2004, at 2-3; *Fourth Circuit Rules that Employees Cannot Waive Their FMLA Rights Without Court or DOL Approval*, ALERT (Greenberg Traurig, New York, N.Y.), July 2005, at 1-3; Ed Harold, *Woman Takes Money, Signs Release, Sues Anyway; Fourth Circuit Says "Okay."* LAB. LETTER (Fisher & Phillips LLP, Atlanta, Ga.), Sept. 2005, at 3; Melissa M. Kidd, *Fourth Circuit Holds that a General Release Is No Bar to FMLA Claims*, WORKCITE EMP. & BENEFITS LEGAL UPDATE (Helms Mulliss Wicker, Charlotte, N.C.), Aug. 18, 2005, <http://www.hmw.com/workcite/20050818.htm>.

Fifth Circuit in *Faris*. Because this type of circuit split may need to be resolved by the Supreme Court, employers should be cautious when drafting releases.<sup>182</sup>

David K. Haase and John W. Drury, writing for *The National Law Journal*, have also focused on the consequences of the *Taylor* court's decision:

The implications of the 4th Circuit's decision are significant for the many employers who condition severance benefits on employee agreements to release the employer from liability. The implications also are significant for situations where an employee threatens litigation and both employer and employee wish to settle, but the potential for unenforceability presents a potential obstacle.<sup>183</sup>

These attorneys attempt to offer advice on how to deal with this "bad law" but not without disclaimers like "[u]nder *Taylor*, there are no easy answers," and "[t]his is not a complete solution."<sup>184</sup>

The Secretary also realizes the impact of the Fourth Circuit's decision and has stated that "[t]he consequences of the decision would be *disastrous* both for employers who want to settle claims with finality and for employees who want to obtain the compensation due to them promptly . . . ."<sup>185</sup> The Secretary also explains the impracticality of the *Taylor* court's decision, since the DOL has never established a system for reviewing all FMLA settlements. In order for the DOL to comply with the *Taylor* court's ruling, the DOL would have to "allocate significant resources" to create a new system for reviewing settlement of "all FMLA complaints that are not pending in court."<sup>186</sup> Moreover, the Secretary notes that the requirement that the DOL or a court supervise all FMLA settlements will "harm employees" because their cases will not be resolved without long delays.<sup>187</sup> The EEOC and Chamber of Commerce agree:

[N]o process for obtaining supervision by DOL currently exists, and indeed would overwhelm the resources of the agency if it did. Accordingly, employees will endure lengthy delays even if a release has been negotiated with the assistance of competent private counsel and regardless of whether the dispute even involves an FMLA claim.<sup>188</sup>

As has been shown above, the Fifth Circuit's interpretation of § 825.220(d) is not only the correct interpretation of the regulation, sup-

182. Joseph P. Harkins & Gary D. Shapiro, *Leave it Out? Family and Medical Leave Act Claims May No Longer Be Waived by a General Release*, ASAP (Littler Mendelson, P.C., S.F., Cal.), Aug. 2005, at 2.

183. David K. Haase & John W. Drury, *Court Finds a Trap Hidden in Separation Agreements: The 4th Circuit Says Employees Cannot Waive Any FMLA Claims*, NAT'L L. J., Jan. 9, 2006.

184. *Id.*; Harkins & Shapiro, *supra* note 182, at 2.

185. Brief for the Secretary of Labor, *supra* note 119, at 4 (emphasis added).

186. *Id.* at 14–15.

187. *Id.* at 15.

188. Brief for the Equal Employment Advisory Council, *supra* note 180, at 5–6.

ported by the DOL itself, but it is also the interpretation that leads to the better result. Public policy supports and encourages the enforcement of private settlements of employment disputes. Indeed, the freedom to contract is a fundamental right in the United States and has been for longer than one can remember. The *Taylor* court's decision interferes with this right and does so for no good reason. Employers and employees should be able to reach settlements without a big brother figure looking over their shoulders, as they have been with respect to ADEA, Title VII, and FMLA claims before the Fourth Circuit's "erroneous" decision came into play.

#### CONCLUSION

The Fifth Circuit correctly concluded that 29 C.F.R. § 825.220(d), a regulation issued pursuant to the Family and Medical Leave Act of 1993, bars only the prospective waiver of substantive rights under the FMLA and does not apply to the post-dispute release or settlement of FMLA claims. Subsequently, the Fourth Circuit alternatively concluded that § 825.220(d) prohibits the prospective and retrospective waiver or release of both the substantive and proscriptive FMLA rights except where prior approval from a court or the DOL is obtained. The DOL itself laid the Fourth Circuit's "erroneous" interpretation of § 825.220(d) to rest by acknowledging that the regulation bars only the prospective waiver of FMLA rights, not the private settlement of past FMLA claims.

The *Taylor* court's holding may end up being short lived because the Fourth Circuit vacated its initial opinion and decided to rehear the case. If upon rehearing the case, the Fourth Circuit does not depart from its initial judgment, the consequences of its decision will be significant for many employers. Employers will have no guarantee that the releases signed by their employees, for which the employers have provided valuable consideration, are enforceable with respect to FMLA claims. However, if allowed to stand, the *Taylor* court's decision won't be one to discriminate; it is sure to harm employees as well. Since the DOL does not currently have the resources, or any process for obtaining supervision for all FMLA settlements in place, employees would face lengthy delays, even when their release has been negotiated by competent private counsel.

For the many reasons articulated in this comment, the Fourth Circuit should reach the correct result upon rehearing the *Taylor* case. If this does not happen, the Supreme Court should step in and resolve this circuit split in favor of the Fifth Circuit's *Faris* decision before the damaging results of the Fourth Circuit's *Taylor* decision escalate.