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**U. S. Supreme Court Declines to Hear FMLA Waiver Case:  
DOL Proposes New Regulation Clarifying FMLA Waiver**

The U. S. Supreme Court recently denied certiorari in Progress Energy, Inc. v. Taylor, 128 S. Ct. 2931 (June 16, 2008) (Appeal from 4<sup>th</sup> Cir.) (Docket No. 07-359), declining to address the question of whether an employee may waive claims under the Family and Medical Leave Act (“FMLA”) without approval of the waiver or release by the U. S. Department of Labor (“DOL”) or a court. Last year, the Fourth Circuit Court of Appeals interpreted a DOL regulation, 29 C.F.R. § 825.220(d), to prohibit an employee’s waiver of FMLA claims based on past violations, unless the waiver receives DOL or court approval. Taylor v. Progress Energy, Inc., 493 F. 3d 454 (4<sup>th</sup> Cir. 2007). See, Smith O’Callaghan & White’s Client Alert dated March 11, 2008. Thus, in the Fourth Circuit, releases or waivers of past alleged FMLA violations, such as those contained in a typical severance or settlement agreement, are deemed unenforceable without DOL or court approval.\*

The U. S. Supreme Court declined to hear the appeal in Progress Energy following its receipt of the U. S. Solicitor General’s amicus brief. The brief recommended denial of cert based on the fact that the DOL proposed an amended regulation to clarify 29 C.F.R. § 825.220(d), in light of the Fourth Circuit’s decision. The DOL’s new regulation would effectively repeal the Fourth Circuit’s ruling in future disputes involving waivers of past FMLA violations.

The DOL’s proposed amended regulation clarifies that the limitation on the waiver of rights under the FMLA “was intended to apply only to the waiver of prospective rights.” 73 Fed. Reg. 7876, 7901 (Feb. 11, 2008). To further eliminate confusion, the DOL proposes the following revision to 29 C.F.R. § 825.220(d):

Employees cannot waive, nor may employers induce employees to waive, their prospective rights under [the] FMLA. For example, employees (or their collective bargaining representatives) cannot “trade off” the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee’s voluntary and uncoerced acceptance (not as a condition of employment) of a “light duty” assignment while recovering from a

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\* The Fourth Circuit’s decision conflicts with the Fifth Circuit, which allows the waiver of past FMLA violations (as distinguished from waiver of future FMLA violations). Faris v. Williams WPC-I, Inc., 332 F. 3d 316 (5<sup>th</sup> Cir. 2003). No other circuit court has directly addressed the issue. However, prior to the Fourth Circuit’s decision in Taylor, the Sixth and Ninth Circuits upheld FMLA waivers without comment or analysis of the issue. See, Halvorson v. Boy Scouts of America, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6<sup>th</sup> Cir. May 3, 2000); Schoenwald v. Arco Alaska, Inc., No. 98-35195, 1999 U.S. App. LEXIS 20955 (9<sup>th</sup> Cir. August 30, 1999).

serious health condition (*see* § 825.702(d)). **Nor does it prevent the settlement of past FMLA claims by employees without the approval of the Department of Labor or a court.** 73 Fed. Reg. at 7978. (Emphasis added).

### **Implications for Employers**

- The DOL stresses that the proposed revised regulation does not change the law “as it has never been the Department’s practice, since the enactment of the FMLA, to supervise such voluntary settlements.” 73 Fed. Reg. at 7901.
- The public comment period for the DOL’s proposed regulation is over and it currently awaits final analysis and approval by the Office of Management and Budget. The DOL hopes to have the final regulation in place before the end of 2008.
- Employers should no longer have uncertainty over the enforceability of FMLA waivers in severance and settlement agreements once the new DOL regulation is finalized. However, employers in the Fourth Circuit (encompassing Maryland, Virginia, West Virginia, North Carolina and South Carolina) should be aware that the Progress Energy ruling is still good law (at least until the new DOL regulation is in place), and could potentially limit an employee’s ability to waive a FMLA claim.

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