Comments

Waive FMLA Claims and Wave Goodbye to Statutory Protection: Allowing Employees to Waive the Right to Sue Takes the Teeth Out of the Family and Medical Leave Act

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Introduction†

IN 1993, CONGRESS ENACTED the Family and Medical Leave Act ("FMLA"),[1] federal legislation mandating certain employers provide unpaid leave to employees who need time off from work to care for a new child, a sick parent or child, or themselves. Once it became law, litigation resulted and required courts to interpret and apply the FMLA to a variety of situations. One of the most contested issues is whether the FMLA permits employees to waive their right to pursue a

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† One week before this Comment was published, the Department of Labor issued its final regulations interpreting the FMLA, available at 73 Fed. Reg. 68,083, 68,084 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825). These regulations clarify that while "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA," 29 C.F.R. § 825-220(d) (2007), section 825.220(d) "does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court." 73 Fed. Reg. at 68,084. This Comment does not address the issuance of the final regulations because of its proximity to this issue's publication date.

1. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2000)).

claim for a violation of the FMLA in a severance agreement, dispute release, or settlement with an employer.

Several courts have rendered conflicting decisions on this issue.[2] The first federal appellate court to tackle the employee waiver issue was the Fifth Circuit Court of Appeals, which ultimately ruled that employees can waive their right to pursue an FMLA claim.[3] Several years later, the Fourth Circuit Court of Appeals reached a contrary conclusion and held that the Department of Labor ("DOL") regulation interpreting the FMLA prohibits employee waivers of this kind.[4] A district court in Pennsylvania arrived at a decision that falls in the middle of these two circuit court opinions and concluded that employee waivers are permissible in limited contexts.[5] Because other courts will certainly face this issue in the future, it requires resolution.

This Comment argues that in order to fulfill the purposes of the Family and Medical Leave Act, courts should adopt a per se rule barring employer-employee agreements in which employees waive their right to pursue a claim alleging an FMLA violation. Completely barring waivers of the FMLA right to pursue a claim will achieve the statute's explicit policy goals to level the workplace playing field between men and women, ensure that workers can care for themselves and their families, and protect workers when they are the most vulnerable.[6] Furthermore, a per se rule will clarify the current court confusion, provide certainty, address unequal bargaining power between employees and employers, and deter employers' bad behavior.

This Comment analyzes the existing court opinions and provides a standard for future decisions. Part I explains the history and purposes of the FMLA, the DOL regulations instituted to implement it,

2. *Compare* Taylor v. Progress Energy, Inc., 493 F.3d 454 (*Taylor II*) (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) (prohibiting employee waiver of FMLA claims), *and* Brizzee v. Fred Meyer Stores, Inc., 2006 WL 2045857 (D. Or. July 17, 2006) (holding that employee waivers of FMLA claims are unenforceable without approval), *and* Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052 (N.D. Ill. 2002) (prohibiting employee waiver of FMLA rights and claims), *and* Bluitt v. Eval Co. of Am., Inc., 3 F. Supp. 2d 761 (S.D. Tex. 1998) (holding that the FMLA regulation prohibits employee waivers of FMLA claims), *with* Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003) (holding that employee waivers of FMLA claims are enforceable), *and* Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (permitting employee waiver of past FMLA claims as part of a severance agreement or settlement with the employer). The Fourth Circuit's decision in *Taylor II* reinstated the court's previous decision in Taylor v. Progress Energy, Inc. (*Taylor I*), 415 F.3d 364 (4th Cir. 2005) holding that FMLA waivers are unenforceable.

3. *See Faris*, 332 F.3d 316.

4. *See Taylor II*, 493 F.3d 454.

5. *See Dougherty*, 2007 WL 1165068.

6. 29 U.S.C. § 2601(b).

and the impact of both. Part I also scrutinizes the court opinions that interpret the FMLA and DOL regulations. Part II outlines two proposed solutions for the issue: allow all employee FMLA waivers and agreements that contain FMLA waivers, or use a balancing test to determine whether the employee's waiver was voluntary or coerced. This Comment analyzes the feasibility of the current proposals and possible outcomes and suggests a bright-line rule barring employee waivers under the FMLA as an alternate solution.

I. Background

A. Overview of the FMLA and Its Regulations

The FMLA requires employers with fifty or more employees[7] to provide up to twelve weeks of unpaid leave each year to eligible workers who have serious health conditions or need to take time off work to care for a newborn or adopted child, or a spouse, child, or parent with a serious health condition.[8] Congress promulgated this legislation in response to changing social conditions, including a sharp increase in the number of dual-income households and working parents.[9] The FMLA ensures that working parents can take time off from work to care for their families and not lose their jobs for doing so. The FMLA's delineated purposes are to aid work-life balance, strengthen families, provide job security for workers when they or their family members experience serious health conditions, and prevent gender discrimination in the workplace.[10]

Legislators worked for years to create the FMLA, and the statute is the product of compromise.[11] The final legislation is less generous than the original concept[12] because it provides only unpaid leave[13] and covers a limited class of workers.[14] Although not all encompass-

7. *Id.* § 2611(4)(A)(i).
8. *Id.* § 2612.
9. *Id.* § 2601(a).
10. *Id.*
11. The first version of the bill was introduced in 1985, but the final version did not pass until 1993. During this time, many changes were made to the proposed law due to political wrangling and compromise. *See* WILL AITCHISON, THE FMLA 10 (2003). President George H. W. Bush even vetoed the bill two times. Charles L. Baum, *Has Family Leave Legislation Increased Leave-Taking?*, 15 WASH. U. J.L. & POL'Y 93, 94 (2004).
12. *See* Family and Medical Leave Act of 1989, H.R. 770, 101st Cong. § 102 (1989).
13. 29 U.S.C. § 2612(c).
14. *Id.* § 2611(4)(A)(i). The current FMLA is more limited than prior drafts because it covers only employees who work for businesses employing fifty or more employees. Earlier versions applied to businesses with only thirty-five or more employees. *See* Family and Medical Leave Act of 1989, H.R. 770.

ing, the FMLA remains a meaningful statute because it enables workers to preserve their jobs while dealing with a drastic family change or health crisis. Moreover, the FMLA recognizes employees' dual natures—not only are employees workers, but they have family responsibilities outside of work that impact their work lives. For example, the FMLA allows covered employees to take up to four months leave from work to stay home and bond with a new baby or provide round-the-clock care for an ailing parent.

The FMLA provides employees both substantive and proscriptive rights. Its substantive rights include the right to take FMLA leave from work under certain circumstances[15] and the right to reinstatement when returning from this leave.[16] Its proscriptive rights protect employees from employer discrimination or retaliation for exercising their substantive FMLA rights.[17]

The FMLA states, "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."[18] In addition, the statute provides a self-described "[r]ight of action" and guarantees that "[a]n action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees."[19] As evidenced by its headings and language, the FMLA explicitly grants employees the right to sue their employers.[20]

The statute itself does not distinguish a "right" from a "claim" or "cause of action," yet some courts have created this false dichotomy.[21] These courts fabricate a distinction that does not exist in the statute's text[22] and use this distinction to justify allowing employees to waive their right to pursue an FMLA claim. Court-sanctioned employee waiver of the right to sue is inconsistent with the plain language of the statute.

Congress charged the DOL with creating regulations to implement the FMLA, which the DOL issued in 1995.[23] One regulation in

15. 29 U.S.C. § 2612.
16. *Id.* § 2614(a).
17. *Id.* § 2615.
18. *Id.* § 2615(a)(1).
19. *Id.* § 2617(a)(2).
20. *Id.*
21. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003); Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007).
22. 29 U.S.C. § 2617(a)(2).
23. 29 C.F.R. § 825.220 (2007).

particular, 29 C.F.R. § 825.220, is crucial to the issue of whether employees may waive their right to pursue an FMLA claim against an employer because the FMLA itself does not directly address this issue. The regulation states:

> The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections: (1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.[24]

Within the same section, the regulation further states, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."[25] Yet courts inconsistently interpret this regulation. "[C]ourts have spent thousands in trying to settle on its meaning. And the result has been a lack of consensus among the federal courts as to the correct interpretation of Section 825.220(d)."[26] As a result, courts have used a variety of approaches to address this issue and reached different conclusions.[27]

B. The Current Jurisdictional Split

1. Contradicting Interpretations of the Regulation

The language of the FMLA is silent on whether employees can waive the right to pursue a cause of action against an employer. The relevant question, then, is whether the DOL's regulation permits or prohibits employees to waive their FMLA right to pursue a claim against an employer. Today a jurisdictional split exists between the Fourth Circuit Court of Appeals, which rendered a decision that bans employee waivers of FMLA claims,[28] and the Fifth Circuit Court of Appeals, which held that employees can waive their right to sue in post-dispute settlements.[29] In addition, several district courts arrived at decisions similar to the Fourth Circuit by prohibiting employee waivers of FMLA claims.[30] One district court reached a conclusion comparable to the Fifth Circuit and held that employees can waive

24. *Id.* § 825.220(a)(1).
25. *Id.* § 825.220(d).
26. *Dougherty*, 2007 WL 1165068, at *1.
27. *See* cases cited *supra* note 2.
28. *Taylor II*, 493 F.3d 454, 463 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008).
29. Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322 (5th Cir. 2003).
30. *See, e.g.*, Brizzee v. Fred Meyer Stores, Inc., 2006 WL 2045857, at *11 (D. Or. July 17, 2006); Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052, 1056 (N.D. Ill. 2002); Bluitt v. Eval Co. of Am., Inc., 3 F. Supp. 2d 761, 764 (S.D. Tex. 1998).

and settle claims for past violations of the FMLA,[31] which further perpetuated the confusion. Courts, employers, and employees need a clear rule to follow.

This unsettled area of law has far-reaching implications, and a clear standard would allay many concerns. First, employers are anxious about the existing circuit split and uncertainty in jurisdictions where courts have not yet ruled on this issue.[32] Employers are unsure whether to offer severance agreements to employees in return for a waiver of FMLA claims, concerned that these employees may accept the severance money but later sue the employer for FMLA violations anyway.[33] If such agreements are legal in the employer's jurisdiction, the employer should know what procedural rules apply when seeking these agreements, whether they are severance agreements with releases or settlements.[34]

Second, in light of the current split, it is unresolved how far the FMLA's protection actually extends and what employees' rights are under the statute. It is unclear what is in an employee's best interest when an employer offers her a severance agreement that includes a release from all future claims, including FMLA claims. Should an employee who has taken FMLA leave retain an attorney immediately when offered such an agreement to determine whether to sign or retain the right to sue by not signing? This unresolved issue also affects employers' interests. For example, in the event that an employee signs an agreement releasing the employer from all claims, does this agreement conflict with the FMLA and can courts find it unenforceable? If so, the employee could pursue an FMLA claim, even though the employer believed that the matter was settled because the employer paid a lump sum for the signed release.

Third, court interpretations of the regulation directly affect employees and their families, and the statute requires a consistent interpretation that furthers rather than conflicts with the FMLA's goals. These goals are work-life balance, stronger families, employee job security, and eradication of gender discrimination in the workplace.[35]

31. *See Dougherty*, 2007 WL 1165068, at *7.

32. *See* David K. Haase & John W. Drury, *Court Finds a Trap Hidden in Separation Agreements: The Fourth Circuit Says Employees Cannot Waive FMLA Claims*, NAT'L L.J., Jan. 9, 2006, at S2 (2006).

33. *Id.* at S4.

34. *Id.* (noting that the Fourth Circuit currently permits only court or DOL-approved waivers of employee FMLA claims).

35. 29 U.S.C. § 2601(a) (2000).

Courts' interpretations determine whether the FMLA's express purposes and goals are implemented.[36]

2. Courts That Limit Employees' FMLA Rights

i. The Fifth Circuit Court of Appeals Limits Employees' FMLA Rights by Permitting Waiver of Claims

The Fifth Circuit Court of Appeals issued the first decision on this issue. In *Faris v. Williams WPC-I, Inc.*,[37] the Fifth Circuit heard an interlocutory appeal on behalf of an employer defendant against a suit brought by an employee alleging that the employer fired her in retaliation for asserting her FMLA rights.[38] The district court ruled against the employer and issued summary judgment in favor of the plaintiff employee.[39] The plaintiff employee argued that her employer's termination release, which waived her right to pursue any and all claims (although the release did not specifically mention the FMLA), was unenforceable under 29 C.F.R. § 825.220(d).[40]

In its *de novo* review of the district court's grant of summary judgment, the Fifth Circuit first analyzed the plain language of the regulation that states, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."[41] The court focused on the definition of the word "employee" and found it ambiguous in the FMLA.[42] The court then examined the entire section of the regulation and found that the term "employee" in this context refers only to current employees and not terminated employees.[43] Without affirmatively resolving the issue, the court implied that, because the defendant had already decided to fire the plaintiff, she was a terminated employee. Therefore, the regulation did not apply to the plaintiff or any other employee who signed a termination release.[44]

The court then addressed the employer's argument that the regulation applied only to substantive FMLA rights, including the rights to leave and reinstatement, but did not apply to an employee's cause of

36. *Id.*
37. 332 F.3d 316 (5th Cir. 2003).
38. *Id.* at 318.
39. *Id.*
40. *Id.*
41. 29 C.F.R. § 825.220(d) (2007).
42. *Faris*, 332 F.3d at 319–20 ("Once it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous." (citing Robinson v. Shell Oil Co., 519 U.S. 377, 343–44 (1997))).
43. *Id.* at 320.
44. *Id.* at 322.

action.[45] The court concluded that "the regulation never refers to the cause of action for damages as a right under FMLA."[46] By examining the word "right" in context of the FMLA, the court drew a bright line between "right" and "claim" and concluded that a claim is not a substantive right in and of itself.[47] "The cause of action for retaliation . . . is a *protection for* FMLA rights, the waiver of which is not prohibited by the regulation."[48] The court further divided substantive FMLA rights from causes of action by stating, "A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims."[49] According to the court's reasoning, employees are free to sign releases preventing them from pursuing FMLA claims because a cause of action for an FMLA violation is not a substantive right guaranteed by the statute.[50]

However, this is a false dichotomy. Rights and claims are interdependent and cannot operate without the other. The *Faris* court's holding dismisses the grave importance of causes of action, which are the enforcement mechanism of substantive rights. The court ignored the clear implication of its holding—substantive rights are worthless if individuals cannot enforce them. Without a mechanism to enforce a right (the claim or cause of action), in effect there is no right—it remains purely theoretical. The court's conclusion misinterpreted the regulation and reduced the inherent protection of substantive FMLA rights and the statute as a whole. Permitting employees to waive their FMLA claims ultimately erodes the FMLA's substantive rights.

The court's final analysis considered public policy. The Fifth Circuit has allowed waivers of the right to sue under the Age Discrimination in Employment Act ("ADEA")[51] and Title VII,[52] two anti-discrimination statutes.[53] It found that these waivers do not violate public policy because public policy favors voluntary settlement of employment discrimination claims.[54] The court stated, "We know, how-

45. *Id.* at 320.

46. *Id.* at 320–21.

47. *Id.* at 321 n.5 (citing Chaffin v. John H. Carter Co., 179 F.3d 316, 319 (5th Cir. 1999)).

48. *Id.* at 321.

49. *Id.*

50. *Id.*

51. 29 U.S.C. § 621 (2000).

52. 42 U.S.C. § 2000e (2000).

53. Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir. 2003); *see also* EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987); Rogers v. Gen. Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986).

54. *Faris*, 332 F.3d at 321.

ever, of no good reason . . . why the government would proscribe waiver for FMLA retaliation claims and yet favor waiver of claims for age discrimination under ADEA and for civil rights violations under title VII."[55] Here, the court incorrectly analogized the FMLA only to anti-discrimination statutes.[56]

ii. The Eastern District of Pennsylvania Also Limits Employees' FMLA Rights

A Pennsylvania district court issued a decision that also limits employees' rights under the FMLA. In *Dougherty v. Teva Pharmaceuticals USA, Inc.*,[57] the court came to the same conclusion as the *Faris* court when it held that the regulation permits employees to waive and settle their claims for past FMLA violations.[58] However, the *Dougherty* court's reasoning differed from the Fifth Circuit's analysis in *Faris*.

In *Dougherty*, the employee plaintiff filed suit against the defendant employer for FMLA violations.[59] The plaintiff signed a severance agreement that included a general release requiring the plaintiff to waive her right to pursue any claims against her employer. However, the release did not specifically name the FMLA.[60] The defendant argued the regulation barred only the prospective waiver of rights and not the retrospective waiver of claims.[61] The defendant also argued that the DOL's own interpretation of the regulation did not bar the settlement of claims, and that this interpretation deserved deference because it emanated from the very agency promulgating the regulation.[62]

To analyze the DOL's interpretation, the court employed a traditional standard of review set forth in the iconic case *Chevron, USA, Inc., v. Natural Resources Defense Council, Inc.*[63] The court stated, "The initial inquiry under *Chevron*, therefore, is whether Congress, in enacting the FMLA, explicitly provided for or precluded the waiver of claims."[64]

55. *Id.* at 322.
56. *See* discussion *infra* Part II.C.
57. 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007).
58. *Id.* at *7.
59. *Id.* at *1.
60. *Id.* at *1 n.3. The release stated: "'DOUGHERTY does hereby REMISE, RELEASE AND FOREVER DISCHARGE TEVA . . . of and from any and in all manner of actions, causes of action, suits, debts, claims and demands arising from or relating in any way to her employment with TEVA.'" *Id.* (alternation in original) (citation omitted).
61. *Id.* at *3.
62. *Id.*
63. 467 U.S. 837 (1984).
64. *Dougherty*, 2007 WL 1165068, at *4.

The court concluded Congress did not expressly address the issue.[65] The following step in the *Chevron* analysis was to determine if the DOL's interpretation of the regulation was reasonable. If so, it would be entitled to the court's deference.[66] The court examined the argument that persuaded the Fifth Circuit—that a meaningful distinction exists between a "claim" and a substantive "right,"[67] and rejected it, stating:

> The net effect being that the employee would still have substantive rights under the FMLA but no way to enforce them. Section 825.220(d) does not permit this type of agreement, however. The regulation prohibits the waiver of *any* right under the FMLA . . . . To read the regulation in that manner would be introducing a distinction that the text does not support.[68]

In a footnote, the court rejected the maxim "where there is a right, there is remedy."[69] It cited a United States Supreme Court case that held state employees do not have a private remedy against state employers for Fair Labor Standards Act violations, and the basis for this decision was a separation of powers argument.[70] Although the *Dougherty* decision does not rest on this footnote, this Comment explicitly challenges the extension of this analysis to the FMLA context. Courts should not apply this idea to FMLA litigation against private employers because this case was limited to state employers. Additionally, the FMLA is different because it specifically provides employees a cause of action against state employers.[71]

The *Dougherty* court recognized that an employee's ability to bring a cause of action is a right and thus rejected the Fifth Circuit's reasoning for barring employee waivers.[72] Nevertheless, the court asserted that an employee's cause of action is not a right under the FMLA.[73] The court stated that "the decision to bring a claim (i.e. *exercise* one's proscriptive rights) is not a separate right under the [FMLA]."[74] The FMLA provides both substantive rights, including the right to FMLA leave, and proscriptive rights, like an employee's right

65. *Id.*
66. *Id.*
67. *Id.* at *5 ("[P]roperly understood, these are distinct concepts.").
68. *Id.*
69. *Id.* at *5 n.16.
70. *Id.* ("It is not always the case that there exists a private remedy (i.e. an individual cause of action) for the violation of one's rights.").
71. 29 U.S.C. § 2611(4)(B) (2000).
72. *Dougherty*, 2007 WL 1165068, at *5–6.
73. *Id.* at *6.
74. *Id.*

to sue for a violation.[75] The court introduced a third category, the employee's *decision* to sue, and stated that the FMLA does not provide the right to sue because the FMLA does not mandate employees bring causes of action.[76] The court reasoned that only when an employer violates the FMLA does an employee decide whether to pursue a claim, and therefore the FMLA does not guarantee the right to sue.[77]

The court created a distinction between the right to sue and an individual's decision to exercise that right. Ultimately, the court found that even if an employee settles a past FMLA claim, thus giving up her decision to exercise the right to sue, the employee retains all of her FMLA rights because she is still entitled to take FMLA leave and has all FMLA remedies available to her.[78] In other words, the court divorces the right to sue from an individual's decision to exercise the right to sue. This reasoning is unpersuasive. Practically speaking, there is no difference between having the right to bring a cause of action and making the decision to do so. Further, the court's reasoning renders the ability to pursue a cause of action meaningless. If the FMLA does not guarantee employees the decision to sue, then why does the FMLA provide the remedy at all?[79]

The *Dougherty* court concluded its *Chevron* analysis by finding the DOL's interpretation of the regulation reasonable.[80] Therefore, the court decided employees may waive FMLA claims as part of a settlement or severance agreement with an employer.[81] To support its decision, the court cited other cases in which employees were permitted to waive past claims for violations of anti-discrimination statutes. The court stated that it knew of "no good reason" why the FMLA should be different.[82] As discussed *infra*, this Comment argues that there is a significant difference between the FMLA and federal anti-discrimination statutes like Title VII and the ADEA.

Recently, the court issued a subsequent decision in the same case,[83] in which the court reaffirmed its prior holding based on the

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See Taylor II*, 493 F.3d 454, 459 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) (discussing the *Dougherty* court's confusion of an employee's decision to exercise the right to sue with a waiver of this right).

80. *Dougherty*, 2007 WL 1165068, at *6.

81. *Id.*

82. *Id.* at *5.

83. Dougherty v. Teva Pharm. USA, Inc., 2008 WL 508011 (E.D. Pa. Feb. 20, 2008).

distinction between a current and former employee.[84] The court stated:

> An employee who *remains employed* with the same employer after entering into a *settlement* agreement continues to enjoy the protections of the FMLA vis-à-vis that employer. And thus the employee can bring suit in the future for any later violations of the FMLA on the part of that employer. But one who enters into a severance agreement (which includes a waiver of past FMLA claims) is no longer an employee and enjoys no FMLA protections against a former employer.[85]

The court found that the plaintiff's FMLA claim had accrued and the release within the severance agreement waived that claim.[86] Consequently, the court granted the defendant's motion for summary judgment and dismissed the plaintiff's claim.[87]

3. The Fourth Circuit Court of Appeals Protects Employees' FMLA Rights

The leading case prohibiting employee waiver of FMLA claims is *Taylor v. Progress Energy, Inc.*[88] Issued by the Fourth Circuit Court of Appeals, the *Taylor* opinion is one of four decisions protecting employees' rights to bring a claim under the FMLA.[89] Upon hearing this case for the first time,[90] the Fourth Circuit concluded that 29 C.F.R. § 825.220(d) "prohibits both the prospective and retrospective waiver of any FMLA right unless the waiver has the prior approval of the Department of Labor or a court."[91] The defendant requested a rehearing en banc, and subsequently, the Fourth Circuit vacated its first decision while it heard arguments against the *Taylor I* decision.[92] Ulti-

84. *Id.* at *4.
85. *Id.*
86. *Id.*
87. *Id.* at *9. An interesting issue, which exceeds the analysis of this Comment, is that the court's decision was also partly based on a finding that the release itself was enforceable. *Id.* The court employed a multi-factor test to determine whether the plaintiff signed the release knowingly and voluntarily, although this test was based on analogizing the FMLA to anti-discrimination statutes. *Id.* at *4–9. This analysis applied some of the same factors that Carol Wong suggests courts use to determine whether a release is knowing and voluntary. *See* Carol Wong, Note, *The Family and Medical Leave Act: To Waive, Or Not To Waive,* 2007 U. ILL. L. REV. 1567, 1595 (2007); *see also* discussion *infra* Part II.B.
88. 493 F.3d 454 (4th Cir. 2007), *cert. denied,* 128 S. Ct. 2931 (2008).
89. *See generally* Brizzee v. Fred Meyer Stores, Inc., 2006 WL 2045857 (D. Or. July 17, 2006); Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052 (N.D. Ill. 2002); Bluitt v. Eval Co. of Am., Inc., 3 F. Supp. 2d 761 (S.D. Tex. 1998).
90. *Taylor I,* 415 F.3d 364 (4th Cir. 2005).
91. *Taylor II,* 493 F.3d at 456.
92. *Id.*

mately, however, the Fourth Circuit was not persuaded and reinstated its original decision in *Taylor II*.[93] Through this procedural posture, the *Taylor* case provides a useful guide in analyzing the arguments against allowing a waiver of employee rights under the FMLA.

First, the court analyzed the regulation itself. The court reasoned that the FMLA provides three types of rights: substantive (the right to take FMLA leave), proscriptive (the right not to be retaliated or discriminated against), and remedial (the right to bring a claim and recover damages).[94] The court stated, "The regulation, by specifying 'rights under FMLA,' therefore refers to *all rights* under FMLA, including the right to bring an action or claim for a violation of the Act."[95] The court looked to the enforcement section of the FMLA, which makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, *any right* provided under [the FMLA]."[96] The court concluded the right to bring a claim is a right provided under the FMLA, and therefore an employee cannot waive the right to sue.[97] The court did not find a distinction between right and claim, and instead stated that the relevant regulation language is the word "waive."[98] Because many courts, including the United States Supreme Court, repeatedly use the word "waive" to include both past and future claims, the court concluded the regulation prohibiting waiver applies to settlements of past claims.[99]

Next, the court focused on the DOL's argument in support of its interpretation of the regulation. The DOL asserted the regulation only applies to proscriptive FMLA rights (the right not to be retaliated or discriminated against) and not to settlement of FMLA claims.[100] The court expressly rejected this argument and highlighted the DOL's shifting arguments to the Fourth Circuit and to the *Dougherty* court.[101] In its brief to the *Dougherty* court, the DOL conceded that the right to assert a claim is a right under the FMLA.[102] In its amicus brief to the Fourth Circuit, however, the DOL argued that a claim is distinct

93. *Id.* at 463.
94. *Id.* at 457.
95. *Id.*
96. 29 U.S.C. § 2615(a)(1) (2000) (emphasis added).
97. *Taylor II*, 493 F.3d at 458.
98. *Id.*
99. *Id.* at 459.
100. *Id.* at 458.
101. *Id.* at 458–59.
102. *Id.* at 458.

from a right and therefore not protected from waiver by the regulation.[103]

The court also analyzed the DOL's intent when drafting the regulation and found the DOL specifically rejected a proposal to expressly allow waivers of FMLA claims in settlements and severance agreements.[104] The DOL rejected the proposal at that time, stating, "The Department has given careful consideration . . . 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 [Fair Labor Standards Act]."[105] Therefore, the *Taylor* court concluded, the DOL intended to prohibit waivers of all FMLA rights when it *originally* created the regulation, and thus the court did not adopt the current DOL's interpretation of the regulation.[106] This analysis was correct because the DOL's recent arguments are inconsistent with each other and conflict with the expressly stated intent of the regulation when it was adopted.[107] The DOL's position is a poor tool for interpreting the regulation or the FMLA because it is subject to change and political whim. Therefore, courts should reject it when addressing this issue.

The *Taylor* court next examined the policy implications of allowing employees to waive FMLA claims. The court stated:

> [P]rivate settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards. To avoid these problems, [the regulation] . . . prohibits the waiver of all FMLA rights.[108]

103. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc at 4–7, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525), *available at* https://www.dol.gov/sol/media/briefs/Taylor(A)-07-16-2007.pdf; Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc at 3–6, Taylor v. Progress Energy, Inc., 415 F.3d 364 (4th Cir. 2005) (No. 04-1525), *available at* https://www.dol.gov/sol/media/briefs/taylor-08-16-2005.pdf.

104. *Taylor II*, 493 F.3d at 461.

105. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).

106. *Taylor II*, 493 F.3d at 461–62.

107. *Id.*

108. *Id.* at 460 (citation omitted).

The court further supported its conclusion by citing a United States Supreme Court opinion holding "settlement or waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate.'"[109]

The court rejected comparing the FMLA to anti-discrimination statutes, reasoning the FMLA is more like the Fair Labor Standards Act ("FLSA"), which is a wage and hour statute.[110] Ultimately, the court held that "29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act."[111] Interestingly, the court provided one caveat to this rule at the end of its opinion. Because the court found that Congress modeled the FMLA after the FLSA, which permits the waiver or release of claims with prior DOL or court approval,[112] the court held that the FMLA also allows these supervised settlements.[113]

C. The FMLA is Both an Anti-Discrimination Statute and a Wage and Hour Statute

Courts diverge on the issue of upholding employee waivers of FMLA claims and on another fundamental fault line: how to characterize the FMLA and use such characterization as a basis for determining whether to permit waivers of the right to pursue an FMLA claim.[114] As outlined above, some courts have analogized the FMLA to anti-discrimination statutes and found that, because anti-discrimination statutes generally allow waivers, so too should the FMLA.[115] Other courts and the DOL have analogized the FMLA to the FLSA, a wage and hour statute.[116] Because the FLSA does not permit waivers, those courts reason that the FMLA should also prohibit waivers.[117]

109. *Id.* (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945)). The FMLA's policies are to aid work-life balance, strengthen families, provide job security for workers when they or their family members experience serious health conditions, and prevent gender discrimination in the workplace. 29 U.S.C. § 2601(a) (2000).

110. *Taylor II*, 493 F.3d at 461.

111. *Id.* at 463.

112. *Id.* at 462.

113. *Id.* at 462–63.

114. *See id.* at 462; *Taylor I*, 415 F.3d 364, 371 (4th Cir. 2005); Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321–22 (5th Cir. 2003).

115. *See Faris*, 332 F.3d at 321–22; Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007).

116. *Taylor II*, 493 F.3d at 462; *Taylor I*, 415 F.3d at 371.

117. *Taylor II*, 493 F.3d at 459–60.

Both of these analogies, however, are inherently flawed because the FMLA cannot be properly analogized to either anti-discrimination statutes or the FSLA. In fact, the FMLA is a hybrid statute that is partly like an anti-discrimination statute and partly like a wage and hour statute. The FMLA's remedies section mirrors that of the FLSA, a wage and hour statute.[118] The FLSA and the FMLA both provide similar employee protections and share a similar enforcement scheme.[119] Yet the FMLA also contains an anti-discrimination provision,[120] which the FLSA does not.

It is an unnecessary distraction to determine whether the FMLA is more like an anti-discrimination statute or more similar to a wage and hour statute, however, because it contains elements of both.[121] To analogize the FMLA in this manner improperly places the focus on other statutes rather than on the FMLA itself. Courts should instead focus on the consequences of a particular interpretation of the FMLA and determine whether that interpretation furthers the FMLA's explicit policy goals.

II. Suggested Rules and Approaches to Employee Waiver of FMLA Claims

The circuit split established two different rules: the Fifth Circuit and its ilk allow employees to waive post-dispute FMLA claims in settlements and severance agreements,[122] while the Fourth Circuit and district courts following its approach ban these waivers absent explicit court or agency approval.[123] The following section will analyze these varying approaches along with a middle ground approach suggested in a critique of these court decisions. Finally, this section will propose

118. *Taylor I*, 415 F.3d at 371; *see also* 29 U.S.C. § 216(b)–(c) (2000) (listing FLSA penalties, including an employee's right to bring an action for unpaid wages and liquidated damages); *id.* § 2617 (listing the FMLA enforcement provisions, including an employee's right to bring an action against an employer and an employer's liability for lost wages and liquidated damages).

119. *Taylor I*, 415 F.3d at 371.

120. 29 U.S.C. § 2615(a)(2).

121. *See* JONATHAN C. WILSON & HELEN THIGPEN, HAYNES & BOONE, LLP, RECENT DEVELOPMENTS IN THE FMLA (2000), *available at* http://www.haynesboone.com/FILES/tbl_s12PublicationsHotTopics/PublicationPDF60/228/05_11_2000_Wilson-Thigpen.pdf.

122. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322 (5th Cir. 2003); Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068, at *4 (E.D. Pa. Apr. 9, 2007).

123. *See Taylor II*, 493 F.3d 454, 463 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008); *Taylor I*, 415 F.3d at 375 (4th Cir. 2005); Brizzee v. Fred Meyer Stores, Inc., 2006 WL 2045857, at *11 (D. Or. July 17, 2006); Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052, 1055–56 (N.D. Ill. 2002); Bluitt v. Eval Co. of Am., Inc., 3 F. Supp. 2d 761, 763–64 (S.D. Tex. 1998).

a per se rule banning employee waivers of FMLA claims to resolve the current uncertainty.

A. Allow Employees to Waive FMLA Claims

The notion that public policy favors settlement underpins the *Faris* court's decision allowing employees to waive FMLA claims.[124] The *Faris* court expressly stated that public policy supports waivers, releases, and voluntary settlements of employment discrimination claims.[125] The court's decision rested on a dubious assumption that settlement is good not only for the particular parties in *Faris* but also for employment discrimination cases in general.[126] By applying this assumption to the FMLA context, the court extended the public policy justification that private settlement is in the public's interest to any and every statutory employment claim.[127] However, no legal precedent exists for this extension in the employment context. Congress has not enacted a statute or mandate that expressly espouses this policy. In fact, the *Faris* court cited only to prior Fifth Circuit decisions holding that settlements and releases of employment *discrimination* claims do not violate public policy. The court did not cite to any further authority to support extending this finding to FMLA cases.[128] To justify its conclusion, the court relied on a vague notion of public policy grounded in the general belief that settlement reduces court congestion, is faster and more efficient, and therefore is in the public's interest.[129]

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124. *Faris*, 332 F.3d at 321.

125. *Id.*

126. *Id.* ("Waivers of the right to bring suit under the Age Discrimination in Employment Act . . . are enforced by this court and are not void as against public policy.").

127. *Id.* ("Our reading of the regulation is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts."); *see generally Taylor I*, 415 F.3d at 373 ("We agree . . . that there is a general public policy favoring the post-dispute settlement of claims."); Muniza Bawaney, Comment, *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*, 82 CHI.-KENT L. REV. 525 (2007) (discussing the general public policy favoring post-dispute settlement of claims from a purely economic perspective, positing that litigation is socially wasteful and waiver is a net gain.).

128. *See Faris*, 332 F.3d at 321–22. Although the court concedes that the analogy between anti-discrimination statutes and the FMLA is not automatic, it ultimately rejected any differentiation, stating: "We know, however, of no good reason—nor has [plaintiff] Faris suggested one—why the government would proscribe waiver for FMLA retaliation claims and yet favor waiver of claims for age discrimination under ADEA and for civil rights violations under [T]itle VII." *Id.* at 322.

129. *Id.* at 321–22.

Strangely, the *Dougherty* court mentioned but did not challenge the DOL's assertion that "prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy,"[130] issued when the DOL originally promulgated the regulation. Yet the *Dougherty* court's holding allows employees to waive FMLA claims.[131] A primary reason for this decision was the DOL's position articulated in its amicus brief.[132] The court stated, "the DOL has elected to treat the settlement of FMLA claims as being no different from the settlement of other federal employment claims,"[133] and suggested that the regulation actually encourages private settlement of FMLA claims.[134] Even in the face of the DOL's original unequivocal statement that *prohibiting* employee waivers is good public policy, the court was persuaded by the Department's surprise change in position.[135] The court's unquestioned acceptance of the generalized notion that public policy favors private settlements in employment law underlies its reasoning.

Unfortunately, when courts permit employees to waive their right to FMLA claims, they strip employees of the ability to use the mechanism to enforce their substantive statutory rights. As a result, courts render the FMLA toothless. Congress created the FMLA not only to outline employer responsibilities and employee rights, but also to deter employers from engaging in bad behavior and illegal conduct.[136] If courts allow employees to waive post-dispute FMLA claims through private settlements with employers, the deterrent to wrongful employer behavior no longer exists. Settlement does not address wrongful or illegal employer actions, nor does it impose penalties on employers for not complying with the FMLA. The rule allowing employees to waive FMLA claims gives employers the power to terminate employees for exercising their FMLA rights.

Under this rule, employers simply offer an employee who believes her FMLA rights were violated a severance package with a general claims release and a one-time payment in order to resolve the dispute

130. Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068, at *2 n.10 (E.D. Pa. Apr. 9, 2007) (emphasis removed).

131. *Id.* at *7.

132. The Department of Labor issued its *Dougherty* viewpoint fourteen years after the regulation's original promulgation. Its dramatically different position could be the result of the change from a Democratic administration to a Republican administration.

133. *Id.* at *6.

134. *Id.*

135. *Id.* at *4–6.

136. *See* 29 U.S.C. §§ 2601(a)(6)–(b)(5), 2615, 2617 (2000).

and terminate the problem employee. Consequently, it is cheaper for employers to terminate employees than comply with the FMLA. The employer can easily and inexpensively fire an employee for taking FMLA leave and hire a new employee who does not have a health condition or family situation that warrants FMLA leave at the same wage. It is less expensive for employers to pay lump sum severance package compensation than allow employees to take the FMLA leave to which they are entitled. Thus, the rule encouraging private settlement of FMLA disputes defeats the purpose of the statute, which sets a job protection floor.[137]

Proponents of this approach argue that settlements provide finality and certainty.[138] As seen from the cases discussed above, however, settlements are neither automatically final nor certain. A court may find the settlements unenforceable for a variety of reasons under contract law or statutory employment law. In addition, employees may sign these waiver agreements without being aware that they have claims against their employers. After consulting with counsel, they may pursue litigation even though they signed releases.

Additionally, proponents argue that settlements benefit employees because they receive compensation quickly as opposed to enduring a long process of court approval or litigation.[139] However, the danger with private settlement is that the compensation may not be fair to the employee. A private agreement may not provide payment equal to the amount the employer owes the employee in back wages. Furthermore, an employer-created severance package payment is likely to provide much less compensation than the amount of money the employee would receive upon winning at trial or from litigation settlement, even accounting for litigation risk reduction. Even more alarming is the likelihood that employees are not aware of their rights or violations of these rights when offered a settlement releasing an employer from all claims. In nearly every one of the above cases, the employer's settlement or severance package included only a general release and did not specifically mention the FMLA.[140]

A final argument supporting waivers and settlement agreements is the contract law concept of encouraging and enforcing free con-

137. *See* WILSON & THIGPEN, *supra* note 121, at 4.

138. *See* Bawaney, *supra* note 127, at 547.

139. *Id.*

140. *See Taylor I*, 415 F.3d 364, 367 (4th Cir. 2005); Faris v. Williams WPC-I, Inc., 332 F.3d 316, 318 (5th Cir. 2003); Dougherty v. Teva Pharm. USA, Inc., 2008 WL508011, at *2 n.3 (E.D. Pa. Feb. 20, 2008); *Dougherty*, 2007 WL 1165068, at *1 n.3.

tracting among parties. This perspective, however, ignores the inherent imbalance of power between the parties in the FMLA context. Because employers subject to the FMLA must employ at least fifty employees,[141] they are likely to be large and powerful employers with access to significant resources. The employees, on the other hand, are particularly vulnerable when the FMLA is applicable.[142] It is easy to imagine that an employee who was retaliated against because of her FMLA leave would accept immediate payment in a severance package, in part due to the incredible demands on her time, energy, and finances as a result of the situation that led her to take FMLA leave in the first place. To assume that employers and employees have equal bargaining power in the FMLA context is a mistake. For this and the above reasons, the rule allowing waivers of FMLA claims is contrary to the statute and to public policy. Therefore, courts should not adopt it.

B. Proposed Middle Ground Approach: A Waiver Guideline for Courts

In light of the potential conflict between employers and employees regarding releases of FMLA claims, commentator Carol Wong proposes a middle ground solution.[143] In her article, *The Family and Medical Leave Act: To Waive, Or Not To Waive,*[144] Wong asserts that courts should allow parties to settle some FMLA claims.[145] She suggests amending the FMLA to provide a waiver guideline that balances employer and employee interests.[146] Wong suggests that the Older Workers Benefit Protection Act ("OWBPA")[147] serve as the model.[148] The OWBPA is a hybrid anti-discrimination and wage and hour statute that modified the ADEA.[149] Using the OWBPA as a model is an

141. 29 U.S.C. § 2611.

142. Employees who take FMLA leave are vulnerable because they are dealing with significant financial and emotional stress stemming from the cause of their FMLA leave (i.e., a serious medical condition, a family member with a serious medical condition, or a new addition to the family).

143. Wong, *supra* note 87, at 1595.

144. *Id.* at 1567.

145. *Id.* at 1595.

146. *Id.*

147. 29 U.S.C. §§ 621, 623, 626, 630 (2006).

148. Wong, *supra* note 87, at 1595 ("Congress should create a statutory solution modeled on the OWBPA to resolve the current state of disorder surrounding releases under the FMLA.").

149. 29 U.S.C. § 621.

appropriate analogy, though, considering that the FMLA contains elements of both anti-discrimination and wage and hour statutes.[150]

The OWBPA requires "knowing and voluntary" releases and contains an eight-factor test for waivers.[151] Wong states:

> Under the OWBPA, courts do not uphold a waiver of rights and claims . . . as "knowing and voluntary" unless: (1) it is written in plain language, (2) it specifically refers to [the statute], (3) the employee does not waive rights or claims that may arise after the waiver is executed, (4) there is consideration in addition to anything of value the individual is already entitled to, (5) the employee is advised to consult with an attorney, (6) the individual is given a specified period of time to consider the agreement, (7) there is a seven day revocation period, and (8) if there is a termination program or exit incentive program, it includes additional information about those employees affected.[152]

Wong's proposal aims to create a rule that is fair and balanced for both employees and employers; however, a balancing test such as this would create considerable uncertainty and is unlikely to reduce litigation. First, neither employer nor employee will know prior to litigation and a subsequent court ruling whether a particular agreement constitutes a "knowing and voluntary waiver" that binds the parties. This proposed rule is unpredictable because employees could sign an agreement, later decide that the agreement did not fulfill all of the "voluntary and knowing waiver" requirements, and then sue the employer for violating the FMLA in spite of the agreement. Uncertainty and a lack of finality are primary critiques of the current jurisdictional split,[153] and the proposed balancing test does not allay these problems. Instead, the balancing test would most likely generate more litigation as courts would have to determine on a case-by-case basis whether a particular agreement fulfilled each prong of the eight-part test. A balancing test leaves excessive room for differing court interpretations and results, and inserts more confusion and uncertainty into an already confounding issue.

Additionally, Wong's proposed guideline adds another layer of compromise favoring employers to a statute that is itself the result of compromise. For example, one of the first versions of the FMLA applied to smaller employers (those employing thirty-five or more em-

150. *See supra* Part I.C.

151. 29 U.S.C. § 626(f).

152. Wong, *supra* note 87, at 1593 (citing the Age Discrimination in Employment Act, 29 U.S.C. § 626(f) (2005)).

153. *See generally* Bawaney, *supra* note 127, at 547.

ployees),[154] while the version enacted into law only applies to employers with fifty or more employees.[155] Undoubtedly, the change exempting smaller employers was adopted to alleviate the fear that the FMLA would negatively impact small businesses, although that has not proven to be true.[156]

Wong's rule offers another concession to employers because it allows employers to craft enforceable FMLA waivers but does not resolve the power imbalance between employers and employees. For example, one element of the "knowing and voluntary" waiver test requires that "the employee is advised to consult with an attorney."[157] It merely requires waivers to include language advising the employee to consult an attorney rather than require the employee to actually consult an attorney. The rule does not go far enough to balance the power between employees and employers. In addition, employers can easily bury this advisory language among other legal provisions that the employee does not understand within the waiver. In so doing, the advisory language is hidden and inconspicuous. As a result, the "knowing and voluntary" requirement's attempt to empower the employee does not fulfill its purpose. Therefore, Wong's waiver test does not safeguard of employee rights.

Moreover, the DOL already rejected an attempt to give employers more power regarding FMLA waivers by modifying the regulations.[158] The DOL invited the public to comment on the proposed FMLA regulations when they were initially created.[159] A number of employers and industry advocates suggested a modification to explicitly permit employees to waive post-dispute claims, but the DOL refused, citing public policy.[160] Furthermore, neither Congress nor the DOL

154. Family and Medical Leave Act of 1989, H.R. 770, 101st Cong. (1989).

155. 29 U.S.C. § 2611(4)(A)(i).

156. *See* Barbara Presley Noble, *We're Doing Just Fine, Thank You*, N.Y. TIMES, Mar. 20, 1994, at F25 (noting that the FMLA has had "little negative impact," especially on small businesses).

157. Wong, *supra* note 87, at 1593 (citing the Age Discrimination in Employment Act, 29 U.S.C. § 626(f)).

158. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).

159. *Id.*

160. *Id.* The DOL stated: "Nationsbank Corporation (Troutman Sanders), Southern Electric International, Inc (Troutman Sanders), and Chamber of Commerce of the USA expressed concerns with the 'no waiver of rights' provisions included in paragraph (d) of this section. They recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example) . . . . 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 consti-

amended the FMLA or the regulations to comply with this suggestion.[161] If courts were to interpret the regulation as permitting FMLA claim waivers, courts would go beyond the statute and regulation and give employers more force. This would directly conflict with the statute's legislative intent and its plain language that, "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA."[162] Thus, Wong's guideline would further erode the statute's employee protection, and courts should reject it.

The "knowing and voluntary" requirement also fails to implement the FMLA's public policy goals of "increasing FMLA compliance and promoting the interests of families."[163] The rule allows private settlements that never become part of the public record. As a result, employees working for an employer who settled an FMLA dispute with another employee may never know about the violation or the settlement.[164] "This limited knowledge may dissuade remaining employees from asserting their own [FMLA] rights"[165] because they may remain unaware that they have the right to FMLA leave, that their FMLA rights were also violated, or that they have a cause of action.

C. Prohibiting Employee Waivers of FMLA Claims Best Protects Employee Rights

This Comment proposes a new rule that aligns with the FMLA's legislative intent,[166] plain language,[167] and spirit: courts should prohibit all employee waivers of FMLA claims. This solution most closely mirrors the *Taylor* decision but omits the inefficient *Taylor* exception

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tute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.*

161. The Family and Medical Leave Act of 1993, 71 Fed. Reg. 69,504, 69,509–510 (Dec. 1, 2006) (seeking "input on whether a limitation should be placed on the ability of employees to settle their past FMLA claims"). The Department included notice that it "filed an amicus brief in the Fourth Circuit on rehearing arguing that the regulation should be interpreted solely to bar the waiver of prospective rights." *Id.* at 69,509 n.4. *But see* Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550 (June 28, 2007) (omitting any discussion of waiver and the pertinent regulation, 29 C.F.R. § 825.220(d) (2007)).

162. 29 C.F.R. § 825.220(d).

163. Jessica Snorgrass, Comment, *Waiving the Effectiveness of the FMLA: The Anti-Waiver Approach to Enforceability of FMLA Severance Agreement Waivers*, 45 SAN DIEGO L. REV. 163, 208 (2008).

164. *Id.*

165. *Id.*

166. *See supra* Part I.A.

167. *See supra* Part I.A.

permitting court or DOL-approved settlements.[168] This rule also rejects the arbitrary distinction that some courts have created between substantive FMLA rights and the right to bring a claim for a violation of the statute.[169] This rule would provide every FMLA right, no matter how defined, to employees.

This rule best implements the statute's public policy goals, including: (1) leveling the playing field for women workers; (2) addressing work/family conflict and balance; (3) preserving family integrity and stability; and (4) ensuring workers' jobs are protected while they care for their families.[170] Employees are guaranteed recourse if an employer violates any of their FMLA rights. Thus, this rule protects employees' choices to care for themselves or family members when the need arises, which ultimately provides family integrity and job security for employees nationwide.

Noticeably absent from most court opinions about employee waivers is an evaluation of the impact the court's decision will have on the FMLA's overall goals.[171] Some courts have even ignored the FMLA's express purposes altogether in favor of a generalized argument that private settlement is in the public's interest.[172] However, this freedom of contract argument has no basis in statutory authority. A court decision solely based on legal principle and theory without examining its practical effects on employees as a whole is limited. Instead, courts should issue decisions that further the FMLA's express goals and public policy aims.

A *per se* rule banning employee waivers of FMLA claims is clear and easy for courts to follow and implement. It provides certainty for employees and employers because there is only one outcome: the waiver is invalid. This rule ensures that employers will comply with the FMLA, or else they will face consequences. Employers will know with certainty that noncompliance results in statutory penalties and remedies such as equitable relief and monetary damages, including back

168. *See Taylor II*, 493 F.3d 454, 462 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008); *Taylor I*, 415 F.3d 364, 374 (4th Cir. 2005). Court approval of an FMLA waiver is inefficient because it likely requires court review of the agreement. David K. Haase, *supra* note 32, at S4 (citing Lynn's Food Stores Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982)).

169. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 320–21 (5th Cir. 2003).

170. 29 U.S.C. § 2601(b) (2000).

171. *See Taylor II*, 493 F.3d 454; *Taylor I*, 415 F.3d 364; *Faris*, 332 F.3d 316; Dougherty v. Teva Pharm. USA, Inc., 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007).

172. *See Taylor I*, 415 F.3d at 373; *Faris*, 332 F.3d at 321; *see also* Bawaney, *supra* note 127, at 525.

wages, double liquidated damages, interest, and attorney's fees, which operate as a strong deterrent to illegal employer conduct.[173]

Furthermore, a rule prohibiting employee waiver of FMLA claims ensures equal bargaining power between employees and employers and a fair outcome. Banning waivers encourages employees to consult attorneys, who serve as advocates and enable employees to make well-informed choices about their legal options. Employees will also benefit from court oversight during the litigation process because it removes any element of coercion. This rule does not foreclose employers from initiating or negotiating settlements with employees, but settlement occurs *after* employees exercise their right to sue and equalize the bargaining power between the parties.[174] Finally, the rule incentivizes employers to comply with the FMLA because settlement agreements are more likely than severance packages to require an employer to modify wrongful conduct.[175]

III. Conclusion

The FMLA was designed to protect employees and, by extension, their families. Congress enacted the statute so employees can take leave from work to care for themselves and their families and retain their jobs upon return. The FMLA exists to help employees balance the competing demands of work and family and to aid workers when they are financially and emotionally vulnerable.

Courts favoring private settlement and employee waivers because of freedom of contract principles do not properly implement the FMLA. These courts ignore the inherent power inequity between employers and employees, focusing on efficiency instead of employee protection and security. Courts that permit employees to waive FMLA claims ultimately strip the FMLA of its statutory protection for employees and leave employees without a mechanism to enforce their substantive FMLA rights.

To preserve the integrity of the statute, employees must be able to exercise all of their FMLA rights, including the right to sue. Therefore, courts should adopt a per se rule prohibiting employee waiver of FMLA claims so that employees have a mechanism for recourse when their FMLA rights are violated. This rule aligns with both the FMLA

173. 29 U.S.C. § 2617.

174. Snorgrass, *supra* note 163, at 208–09 (discussing the differences between a waiver and a post-complaint settlement).

175. *Id.* at 209 (citing Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 486 (2001)).

regulation's plain language, and it comports with the DOL's assertion that employee waiver of claims is not in the public's best interest.

A bright-line rule such as this is easy for courts to apply, and it clarifies this unresolved issue for employers and employees. Ultimately, prohibiting employee waivers equalizes the power imbalance between employees and employers. A per se rule does not entirely preclude settlement, but rather safeguards employees by ensuring they are fully apprised of their statutory rights before choosing to litigate, settle, or forgo a claim altogether. Prohibiting employee waiver of FMLA claims not only protects the individual employee and her family, but it also guarantees that the FMLA fulfills its purpose by protecting employees as a class and encouraging employer compliance nationwide.