Drafting Enforceable Separation Agreements and Releases under the FMLA

By Tracey K. Jaensch,[i] FordHarrison LLP

Executive Summary: Can you ask employees to waive FMLA rights? Depending on whether those rights are "prospective" or not, the answer might be "Yes," at least in Eleventh Circuit. The Eleventh Circuit recently issued a decision interpreting, for the first time, the meaning of the term "prospective" as applied to the Family and Medical Leave Act's (FMLA's) prohibition of the waiver of prospective FMLA rights. In the past, when clients would ask about having an employee waive their FMLA rights in a separation agreement or settlement agreements, we would tell them, "Yes…but…you would arguably have to have it approved by the Department of Labor (DOL) or a court" for the release to be truly valid and not subject to being voided.

FMLA's Prohibition on Waivers of Prospective Rights

The FMLA permits eligible employees to take up to 12 weeks of unpaid leave during a 12-month period for certain specified reasons and requires employers to reinstate to their prior position employees who take protected leave. It also prohibits employers from interfering with an employee's exercise of FMLA rights and from retaliating against employees who exercise or attempt to exercise these rights.

The DOL has issued regulations interpreting the FMLA. One of those prohibits the waiver of FMLA rights. To resolve a split among the federal appeals courts over the meaning of this regulation, the DOL amended the regulation in 2009 to specifically prohibit the waiver of an employee's "prospective" rights under the FMLA. The regulation also states that this prohibition "does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the [DOL] or a court.'"

"Safe Answers"

Because of this regulation and the ambiguity of what "past employer conduct" might mean if the employee had never requested FMLA leave, most employment attorneys took the position that all waivers of FMLA which could impact unexercised but potential future FMLA claims were not exempt from the prohibition on waivers of FMLA rights.

The Eleventh Circuit Provides Guidance on "Past Conduct"

The Eleventh Circuit in *Paylor v. Hartford Fire Insurance Co.*, 748 F.3d 1117 (11th Cir. 2014), recently held that this provision only means that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur. Because the conduct of which the former employee complained in *Hartford* happened before she signed the agreement waiving her FMLA rights, the court held that the waiver was valid and affirmed the lower court's decision in favor of the employer on her FMLA claims.

Background

While Paylor was employed by Hartford, she requested FMLA leave at some in point in late August or early September 2009. Hartford acknowledged her request in an email, which it claimed constituted approval of the leave. Paylor argued that the email was only an acknowledgment of the request, not an approval of the leave. On September 11, 2009, Paylor was issued an unsatisfactory performance review. On September 16, 2009, Paylor's supervisor met with her and gave her the option of accepting a one-time offer of 13 weeks' severance benefits in exchange for signing a severance agreement waiving any FMLA claims or agreeing to a performance improvement plan (PIP) under which she had to meet various performance benchmarks or face termination. Paylor signed the severance agreement on September 17.

Paylor's FMLA Lawsuit

After her employment ended, Paylor filed a lawsuit in federal court, claiming Hartford violated the FMLA when it terminated her. She also claimed that the severance agreement was invalid and that she did not waive her FMLA rights because an employee cannot waive prospective rights under the FMLA. The federal trial court ruled in favor of Hartford, and Paylor appealed.

The Eleventh Circuit affirmed the lower court's decision and, for the first time, decided the meaning of the word "prospective" as it concerns FMLA rights.

The Eleventh Circuit rejected Paylor's argument that prospective rights mean "the unexercised rights of a current eligible employee to take FMLA leave and to be restored to the same or an equivalent position after the leave." The court held that such an interpretation proves too much, noting that all eligible employees possess an "unexercised" right, in the abstract, to FMLA leave.

The court held that a prospective waiver is a "waiver of something that has not yet occurred," such as offering all new employees a one-time cash payment in exchange for a waiver of any future FMLA claims. That waiver would be "prospective," and therefore invalid under the FMLA, because it would allow employers to negotiate a freestanding exception to the law with individual employees.

In this case, however, the court found that the severance agreement Paylor signed did not ask her to agree to a general exception to the FMLA, but rather to a release of the specific claims she might have based on past interference or retaliation. The Eleventh Circuit held that it is clear that the right to sue under the FMLA is based on the employer's conduct, not some "free-floating set of 'unexercised' FMLA rights." The court further noted that the DOL's regulation specifically contemplates the settlement of claims based on past employer conduct. Thus, the court held that the FMLA's prohibition of the prospective waiver of rights only means that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur.

Applying this interpretation to the facts of the case, the Eleventh Circuit found that the conduct about which Paylor complained all happened before she signed the severance agreement. That allegedly unlawful conduct (asking Paylor to choose between the PIP and the severance agreement) occurred, at the latest, on September 16, 2009. But Paylor signed the severance

agreement on September 17, 2009, “thereby wiping out any backward-looking claims she might have had against her employer.” The court held that in signing the agreement and accepting her severance benefits, Paylor settled claims “based on past employer conduct.” Accordingly, the Eleventh Circuit affirmed the lower court’s conclusion that the agreement was valid and that it entitled Hartford to judgment as a matter of law.

Conclusion

By adopting a common-sense interpretation of the term “prospective,” the Eleventh Circuit’s decision affirms the ability of employers to settle and obtain a waiver from employees of FMLA claims based on conduct that occurred prior to the signing of the waiver. This is good news for employers in the Eleventh Circuit and provides a much-needed clarification to uncertainty regarding the waiver of FMLA claims in the absence of a known claim.

---

[i] If you have any questions about enforceable separation agreements under the FMLA, please free to contact Tracey K. Jaensch, (813) 261-7815 or tjaensch@fordharrison.com.