

THE FAMILY AND MEDICAL LEAVE ACT: TO WAIVE, OR NOT TO WAIVE

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The Family and Medical Leave Act (FMLA), passed in 1993, was one of the first federal laws in the United States that addressed family and medical leave. Congress vested the Secretary of Labor (Secretary) with the authority to prescribe regulations necessary to carry out this legislation. Pursuant to this authority, the Secretary issued a regulation that purported to prohibit employees from waiving their rights under the FMLA. Although this regulation is valid, the question of whether an employee can waive her FMLA claims as part of a severance agreement has led to inconsistent results.

In this note, Carol Wong asserts that parties should be permitted to settle their FMLA claims and then asks what standard should be applied to determine the validity of such waivers. In order to answer this question, Wong scrutinizes employees' ability to release their claims under other federal employment statutes and ultimately proposes that Congress amend the FMLA to include a clear and comprehensive guideline for waivers modeled on provisions of the Older Workers Benefit Protection Act. Such guidelines adequately balance competing tensions between the costs and benefits of waivers, serve both the employer's and employee's interests, and reflect the interrelationship between all employment statutes.

I. INTRODUCTION

Several years after passage of the Family and Medical Leave Act (FMLA or Act) in 1993, courts began to face a challenging issue when they addressed the release of FMLA claims in the context of a private settlement agreement between individual employees and their employ-

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ers.¹ Courts have repeatedly emphasized that, in the employment context, parties should have the freedom to settle their claims if certain conditions and safeguards are satisfied.² However, courts have also recognized that a lawfully promulgated regulation stating otherwise may overcome this freedom.³ Although prohibiting releases could potentially impede the freedom of employees and employers to contract with one another, allowing waivers could possibly defeat the purpose and intent of the FMLA. At issue is whether the courts should permit the release of FMLA claims, and, if so, to what degree.

This note attempts to resolve the question of whether individual employees can waive their FMLA claims in the context of a private settlement agreement with their employers. Even assuming that parties could privately settle their FMLA claims, the question remains what standard courts should use in evaluating the validity of such releases. Part II explains the legislative history and purpose behind the FMLA, the primary provisions of the statute itself, and the Department of Labor (DOL or Department) regulation at issue. Furthermore, Part II explores the various court opinions addressing the issue of waivers under the FMLA and the practical ramifications stemming from these conflicting decisions for employees and employers alike. Part III asserts that parties should be able to settle their FMLA claims. Then, Part III compares the ability of employees to waive their claims under other federal employment statutes such as the Fair Labor Standards Act (FLSA), the Equal Pay Act (EPA), Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Older Workers Benefit Protection Act (OWBPA) to the FMLA. These comparisons both demonstrate and evaluate different approaches to the waiver issue and suggest possible solutions to the current dilemma. Finally, Part IV proposes a solution based on the OWBPA because its statutory requirements clarify the waiver standard for courts.

1. FMLA waivers arising in the context of collective bargaining agreements like those in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997), and *Granados v. Harvard Maintenance, Inc.*, No. 05 Civ. 5489 (NRB), 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006), are beyond the scope of this note. In addition, while some commentators and courts have differentiated between the terms "waiver" and "release," this note will use them interchangeably because most courts do. See Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Right Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 84 (2005) ("[A] release is generally considered a contract and thus subject to the rules of contract law. Under the rules of contract law, a contract is formed as long as the parties manifest assent to its terms, even if they do not actually assent. In contrast, an effective waiver requires that the party intend the waiver.").

2. *E.g.*, *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003) (recognizing that public policy favors the enforcement of waivers and that they are allowed under other employment statutes).

3. *E.g.*, *Bluitt v. Eval Co. of Am.*, 3 F. Supp. 2d 761, 763-64 (S.D. Tex. 1998) (analyzing 29 C.F.R. § 825.220(d) under *Chevron*).

II. BACKGROUND

A. *The Family and Medical Leave Act*

1. *Before and After the FMLA's Passage*

After nearly a decade of negotiation and compromise, Congress passed the FMLA in 1993.⁴ The FMLA was one of the first federal laws in the United States to address family and medical leave.⁵ Prior to the Act's passage, "the United States had no national family and medical leave legislation, making the Nation an outlier among other industrialized countries."⁶ Although some employees had access to family and/or medical leave through various state statutes, union contracts, or employer policies, these provisions were seldom as complete as those under the FMLA.⁷

Prior to the FMLA's passage, about sixty-nine percent of employers indicated they had some form of family and medical leave.⁸ Of those, sixty-eight percent permitted intermittent leave, eighty-six percent gave female employees leave for the birth of a child, fifty-nine percent gave male employees leave for the birth of a child, and thirty-five percent noted that leave was available for the illness of a significant other.⁹ After years of patchwork coverage, Congress finally recognized that "[p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society."¹⁰ Because lawmakers felt that the private sector was not responding quickly enough to the rapidly changing demographics of the American workforce, Congress passed the FMLA to provide a national minimum standard for family and medical leave.¹¹ Immediately following passage

4. Kelly N. Honohan, Note, *Remedying the Liability Limitation Under the Family and Medical Leave Act*, 79 B.U. L. REV. 1043, 1043 (1999). Subsequent legislative efforts to expand coverage and benefits under the FMLA have so far failed. N. PETER LAREAU ET AL., LABOR AND EMPLOYMENT LAW § 162.06 (2005).

5. Jane Waldfogel, *Family Leave Coverage in the 1990s*, MONTHLY LAB. REV., Oct. 1999, at 13, 13. The first was the Pregnancy Discrimination Act of 1978. *Id.*

6. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17, 17.

7. *Id.*

8. LAREAU ET AL., *supra* note 4, § 162.05.

9. *Id.*

10. *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1082 (9th Cir. 2002) (quoting S. REP. NO. 103-3, at 4 (1993)).

11. H.R. REP. NO. 103-8, pt. 1, at 21-22 (1993); Caitlyn M. Campbell, Note, *Overstepping One's Bounds: The Department of Labor and the Family and Medical Leave Act*, 84 B.U. L. REV. 1077, 1079 (2004). For example, studies performed prior to the passage of the FMLA indicated a steady increase in the number of women participating in the work force over the past forty years, an increase in the number of households headed by single parents (particularly women), and an aging population requiring home care by family members. S. REP. NO. 103-3, at 5-7 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 7-9.

of the Act, data suggested that family leave coverage increased, which, in turn, positively affected employees.¹²

As for the effect of the FMLA on employers, a study performed several years after the Act's passage revealed that "the FMLA had a positive effect or no noticeable effect on employers' productivity, profitability and growth."¹³ In both the DOL's 1995 and 2000 surveys, "90 percent of covered employers said that complying with the FMLA brought either no, or just a small, increase in their administrative costs."¹⁴ On average, employees who used the FMLA leave took it infrequently and for relatively brief periods of time; the median length of leave was ten days and most only took one interval of leave during an eighteen-month period.¹⁵ Thus, for a majority of cases, Congress successfully balanced the interests of employers and employees while still achieving the Act's underlying purposes and objectives.

2. *The FMLA's Purposes and Provisions*

In its findings, Congress cited an increasing number of working parents, a current lack of employment policies to assist them, a potential for employers to discriminate against women who tend to bear the primary responsibility for caretaking, and inadequate job security for those employees with serious health conditions.¹⁶ As a result, Congress passed the FMLA "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers."¹⁷ The Act also sought to minimize the potential for employment discrimination based on sex by making sure leave was available on a gender-neutral basis and encouraging equal employment opportunity for both sexes.¹⁸ In order to achieve these purposes, "Congress enacted the FMLA to allow workers flexibility in scheduling time off to deal with family and medical problems and alleviate some of the tension created by the competing demands of work and family in modern society."¹⁹

12. Waldfogel, *supra* note 5, at 13; Waldfogel, *supra* note 6, at 17.

13. FAMILY SUPPORT AMERICA, WORK AND FAMILY ARTICLES RESOURCES LABOR DEPARTMENT STUDY: FMLA WORKS FOR FAMILIES AND EMPLOYERS, http://www.familysupportamerica.org/content/corp_dir/work_fam?work_fam_index.html (last visited Oct. 17, 2006) (summarizing a Department of Labor study that updated a 1995 study by the bipartisan Commission on Family and Medical Leave).

14. *Id.*

15. *Id.*

16. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)(1), (3)–(5) (2000).

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

18. FMLA of 1993, 29 U.S.C. § 2601(b)(4)–(5); *see also* H.R. REP. NO. 103-8, pt. 1, at 29 (1993) ("A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. H.R. 1, by addressing the needs of all workers, avoids such a risk.").

19. *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1082 (9th Cir. 2002).

Under the Act, “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period” for the birth or adoption of a child, for the care of an immediate family member with a serious health condition, or for the employee’s own serious health condition.²⁰ Employers can grant unpaid leave or substitute paid leave in certain instances.²¹ In order to protect an employee’s FMLA rights, it is a prohibited act “for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”²² Furthermore, “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”²³ Congress vested the Secretary of Labor (Secretary) with the authority to “prescribe such regulations as are necessary to carry out” the Act,²⁴ and unless those regulations are arbitrary, capricious, or contrary to the statute, they are given considerable weight.²⁵

Pursuant to this statutory authority, the Secretary issued regulations to protect employees against the unlawful interference and restraint of their FMLA rights by their employers. The regulation at issue, 29 C.F.R. § 825.220(d), states that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.”²⁶ Although courts have agreed that § 825.220 constitutes a validly promulgated regulation, they have disagreed on its proper interpretation and application in the context of releases concerning FMLA claims.²⁷ Consequently, when courts examined the question of whether an employee can waive her FMLA claims as part of a severance agreement, “the results have not been entirely consistent.”²⁸ Courts that have considered the issue have either prohibited the waiver of FMLA rights or permitted it. Of those courts that permitted waivers, some courts analyzed the issue under § 825.220(d) while others used grounds independent of the regulation. The courts proscribing waivers used a more consistent analysis, but even

20. 29 U.S.C. § 2612(a)(1). The FMLA defines an eligible employee as someone who has been employed for at least twelve months and has performed at least 1250 hours of service for the employer during the previous twelve-month period. *Id.* § 2611(2)(A)(i)–(ii). An employer “means any person engaged in commerce . . . who employs 50 or more employees . . . during each of 20 or more calendar workweeks in the current or preceding calendar year.” *Id.* § 2611(4)(A)(i). If an employer does not meet the fifty-person threshold at a single location, an employee is still eligible for the benefits under the Act if the employer employs at least fifty people within a seventy-five-mile radius. *Id.* § 2611(2)(B)(ii).

21. *Id.* § 2612(c)–(d).

22. *Id.* § 2615(a)(1).

23. *Id.* § 2615(a)(2).

24. *Id.* § 2654.

25. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002).

26. 29 C.F.R. § 825.220(d) (2006). The portion of the regulation regarding “light duty” assignments will not be addressed in this note. *See id.*

27. *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2006 WL 2529632, at *5 (E.D. Pa. Aug. 30, 2006), *vacated*, *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 9, 2007).

28. *Id.*

between these courts, there are some variations. This situation has considerable consequences for parties who wish to settle any potential FMLA claims and for employees who want to file suit against their former employers.²⁹

B. The Disagreement Amongst the Courts Regarding Waivers Under the FMLA

1. Courts Permitting the Waiver of FMLA Claims

a. Faris v. Williams WPC-I, Inc. and 29 C.F.R. § 825.220(d)

The Fifth Circuit's decision in *Faris v. Williams WPC-I, Inc.* is the leading case permitting the waiver of postdispute FMLA claims under § 825.220(d). In *Faris*, the defendant terminated the plaintiff and offered her additional compensation in exchange for signing a release that purported to waive all claims "arising under any other federal, state or local law or regulation."³⁰ The release did not specifically mention the FMLA by name.³¹ After *Faris* signed the release, she kept the payment and initiated suit against her former employer.³² In the suit, she alleged that the defendant fired her in retaliation for asserting her FMLA rights.³³ The court ultimately held "that the proper reading of [§ 825.220(d)] is that it does not apply to postdispute claims for damages under the FMLA."³⁴

First, the Fifth Circuit examined the plain language of the regulation.³⁵ Although the term "employee," as used in the regulation, appeared ambiguous, the court concluded that there were strong indications that § 825.220(d)'s language referred to current employees, rather than former ones like *Faris*.³⁶ Next, the court found that "the phrase 'rights under FMLA' . . . limits the regulation to prospective waivers of rights under the statute."³⁷ The statute and regulation use the terms

29. But compare *McRae v. Master Craft Engineering, Inc.*, No. 7:04-CV-91(HL), 2005 U.S. Dist. LEXIS 41372, at *3 (M.D. Ga. Nov. 3, 2005), which found the prominent cases on each side of this issue to be inapplicable because the proposed settlement in *McRae* was not part of a severance package. In *McRae*, the settlement was reached only after the plaintiff had properly enforced her rights under the FMLA by filing suit against her former employer. *Id.* Thus, the settlement did not require court approval. *Id.* at *4; see also *Carvajal v. Johnson Controls, Inc.*, No. 8:05-cv-1738-T-24 EAJ, 2006 U.S. Dist. LEXIS 49490, at *1 (M.D. Fla. July 18, 2006) (holding that court approval of the parties' settlement agreement was not required).

30. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 318 (5th Cir. 2003).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 319.

35. *Id.*

36. *Id.* at 320 ("Section 825.220(c) prohibits employers 'from discriminating against employees or prospective employees who have used FMLA leave.' By distinguishing between 'employees' and 'prospective employees,' the regulation implies that 'employee' describes only those that are currently employed. Looking back to § 825.220(d), we see that examples immediately following the statement of nonwaivability both concern current employees.").

37. *Id.*

“rights under the law” or “rights under FMLA” to refer to substantive rights like those set forth in 29 U.S.C. §§ 2612–2614, rather than those for damages, retaliation, or discrimination.³⁸ The court noted that “[t]he cause of action for discrimination . . . is never described as an FMLA right itself.”³⁹ Therefore, “[a] plain reading of the regulation is that it prohibits prospective waiver of rights, not the postdispute settlement of claims.”⁴⁰ In other words, “an agreement bargaining away the right to take leave or be reinstated thereafter would be prohibited, [whereas] one exchanging the right to sue for retaliation or discrimination for some consideration would not.”⁴¹

Finally, the Fifth Circuit concluded that its holding “is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts,” like Title VII and ADEA.⁴² Although the court acknowledged that there are differing protections and interpretations under Title VII, ADEA, and the FMLA, it knew “of no good reason . . . why the government would proscribe waiver for FMLA retaliation claims and yet favor waiver of claims” under the other two employment statutes.⁴³ Thus, the regulation did not prohibit Faris’ release.⁴⁴ Furthermore, she ratified it.⁴⁵ Under the doctrine of ratification,

even if a release is tainted by misrepresentation or duress, it is ratified if the releaser retains the consideration after learning that the release is voidable. A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration.⁴⁶

Even though Faris did not contend duress, she ratified the release by not returning the consideration she had received for signing it.⁴⁷

38. *Id.* at 320–21. Under the FMLA, courts have distinguished between causes of action for retaliation and those for substantive rights under the FMLA. *Id.* at 321; *see also* Sutherland v. Goodyear Tire & Rubber Co., 446 F. Supp. 2d 1203, 1208 (D. Kan. 2006) (citing *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002)) (referring to the two causes of action arising under 29 U.S.C. § 2615a(1) and a(2) as the entitlement/inference theory and the retaliation/discrimination theory, respectively).

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

40. *Id.*

41. *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2006 WL 2529632, at *6 (E.D. Pa. Aug. 30, 2006), *vacated*, *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 9, 2007).

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

43. *Id.* at 321–22.

44. *Id.* at 322.

45. *Id.* at 322–23.

46. *Id.* at 322 (citation omitted); RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981) (discussing ratification).

47. *Faris*, 332 F.3d at 322–23.

b. Courts Permitting Waivers on Grounds Independent of 29 C.F.R. § 825.220(d)

In addition to the *Faris* court's analysis, several other courts have allowed FMLA releases based on grounds independent of § 825.220(d). However, these courts have used different analyses to reach similar conclusions. First, several courts have analogized FMLA waivers to those under Title VII and other federal employment discrimination laws. For example, in *Kujawski v. U.S. Filter Wastewater Group, Inc.*, the court, "guided by basic rules of contract construction . . . appl[ied] the 'knowing and voluntary' standard in light of its use in Title VII cases."⁴⁸ The court examined factors such as "(1) the language of the release; (2) the presence of legal counsel; and (3) the presence of exceptional circumstances, such as fraud, duress, or other inequitable conduct."⁴⁹ The court ultimately found the release valid on its face.⁵⁰ The clarity of the language, active presence of counsel, and plaintiff's competency demonstrated Kujawski signed the contract "knowingly and voluntarily."⁵¹ Like the plaintiff in *Faris*, he also ratified the agreement by accepting the defendant's settlement payment.⁵² The court in *Poppelreiter v. Straub International Inc.*,⁵³ also followed an analysis similar to the one used by the *Kujawski* court. The court applied a federal totality of the circumstances test that evaluated seven factors in order to determine whether the plaintiff executed his release "knowingly and voluntarily."⁵⁴ Several other courts have also imported variations of Title VII's totality of the circumstances approach into the FMLA context.⁵⁵ Although these courts all purported to use the "knowing and voluntary" standard, each court examined a different set of factors. Moreover, even if factors overlapped, each court

48. *Kujawski v. U.S. Filter Wastewater Group, Inc.*, No. CIV. 00-1151DWF AJB, 2001 WL 893918, at *4 (D. Minn. Aug. 7, 2001) (citations omitted); *see also* discussion *infra* Part III.B.3-4 (discussing the "knowing and voluntary" standard under Title VII and the ADA).

49. *Kujawski*, 2001 WL 893918, at *4.

50. *Id.* at *5.

51. *Id.* at *5-6.

52. *Id.* at *6.

53. *Poppelreiter v. Straub Int'l Inc.*, No. 99-4122-SAC, 2001 WL 1464788 (D. Kan. Oct. 30, 2001).

54. *Id.* at *12-13 (examining factors such as "(1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek or in fact received the benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law").

55. *See, e.g., Halvorson v. Boy Scouts of Am.*, No. 99-5021, 2000 U.S. App. LEXIS 9648, at *6 (6th Cir. May 3, 2000) (holding circumstances show the agreement was signed knowingly and voluntarily and later ratified by retention of consideration); *Bittner v. Blackhawk Brewery & Casino, LLC*, No. 03-CV-02274-MSK-PAC, 2005 WL 1924499, at *3 (D. Colo. Aug. 9, 2005) (examining seven factors to determine if plaintiff executed a "knowing and voluntary" waiver of her FMLA rights); *Riddell v. Med. Inter-Ins. Exch.*, 18 F. Supp. 2d 468, 471-72 (D.N.J. 1998) (applying, on the assumption that the parties could waive their FMLA claims, the principles governing releases under Title VII in evaluating whether the plaintiff knowingly and voluntarily waived her right to sue under the FMLA).

found certain factors more significant than the others. Thus, the utilization of the “knowing and voluntary” standard only illustrates the inconsistency and confusion surrounding releases under the FMLA.

Adding to the confusion, *Schoenwald v. Arco Alaska, Inc.*⁵⁶ pursued a slightly different approach from those courts that likened FMLA waivers to waivers under Title VII and other federal employment discrimination laws. In *Schoenwald*, the Ninth Circuit affirmed a lower court’s application of Alaska state contract law in evaluating whether the plaintiff ratified the release agreement with respect to his FMLA and state law claims.⁵⁷ The court found that Schoenwald “manifested an intent to ratify the release by his unequivocal conduct of accepting the special release payment with full knowledge of the facts entitling him to rescind the release.”⁵⁸ Although the doctrine of ratification here is nearly identical to that used in *Faris*, the use of state contract law in evaluating FMLA releases has the broader potential to impart an even greater variety of rationales to an area of law that already suffers from a lack of clarity. In sum, the courts permitting the waiver of FMLA claims do not agree on the proper rationale to support such a conclusion. Adding to the unsettled state of the law, several courts have unequivocally proscribed the waiver of FMLA claims.

2. Courts Prohibiting Waiver of FMLA Claims

As further indication of the confusion surrounding FMLA releases, the Fourth Circuit in a recently reinstated opinion disagreed with the Fifth Circuit’s opinion in *Faris*.⁵⁹ In a case factually similar to *Faris*,⁶⁰ the Fourth Circuit in *Taylor v. Progress Energy, Inc.* held that “[t]he regulation’s plain language prohibits both the retrospective and prospective waiver or release of an employee’s FMLA rights[,] . . . both substantive

56. *Schoenwald v. Arco Alaska, Inc.*, No. 98-35195, 1999 U.S. App. LEXIS 20955 (9th Cir. Aug. 30, 1999).

57. *Id.* at *4 n.1 (The plaintiff failed to challenge choice of law on appeal.).

58. *Id.* at *4.

59. *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2006 U.S. App. LEXIS 15744, at *1 (4th Cir. June 14, 2006) (granting rehearing and vacating the original opinion); *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 U.S. App. LEXIS 15846, at *3 (4th Cir. July 3, 2007) (reinstating the original opinion). In its most recent opinion, the court stated, “we remain convinced that the plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act. We therefore reinstate our opinion in *Taylor I.*” *Id.* In this opinion, the court also addresses and rejects the DOL’s arguments for an interpretation of § 825.220 that would permit employees to waive their FMLA claims. *Id.* at *6–22.

60. *Progress Energy, Inc. (Progress)* terminated Taylor’s employment and told her that she would receive additional benefits, including monetary compensation, if she signed a general release within forty-five days. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 367 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), *reinstated*, No. 04-1525, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007). Like the release in *Faris*, it did not mention the FMLA by name, but included “a catchall category for ‘other federal . . . law’ claims besides those specifically listed.” *Id.* After Taylor signed the release, she received a check, which she did not return upon filing suit against Progress in district court. *Id.*

and proscriptive (the latter preventing discrimination and retaliation) [, and so we] . . . agree with Taylor that § 825.220(d) renders the release unenforceable with respect to her FMLA rights.⁶¹ However, this does not mean that employees may never waive their FMLA claims. The court subscribed substantial weight to the DOL's intent that the FMLA's enforcement scheme duplicates that of the FLSA's.⁶² Under the FLSA, employees cannot waive their rights by private agreement without judicial or DOL supervision.⁶³ Therefore, employees cannot release their FMLA rights without similar supervision and approval.⁶⁴

Despite the significant role the DOL's intent played in the court's decision, the Department has explicitly disagreed with the Fourth Circuit's reading of § 825.220(d).⁶⁵ According to the DOL, § 825.220(d)'s text only regulates the prospective release of FMLA *rights* and “not the retrospective settlement of FMLA *claims*.”⁶⁶ Although the Fourth Circuit has reinstated the original panel's opinion,⁶⁷ this new decision may nonetheless fail to properly address or resolve the broader controversy surrounding FMLA releases. Notwithstanding its stated position, the DOL appears to recognize this concern because it has recently sought public “input on whether a limitation should be placed on the ability of employees to settle their past FMLA claims.”⁶⁸ Furthermore, other jurisdictions, resting on *Taylor* itself or its underlying rationales, have also taken the position that employees should not be permitted to enter into private settlement agreements concerning their FMLA claims.

While it is tempting for the defendant's bar to brush off the Fourth Circuit's decision as an anomaly, several other courts have also concluded that § 825.220(d) constitutes a valid regulation that prohibits the

61. *Id.* at 368.

62. *Id.* at 371; *see also* FMLA, 29 U.S.C. § 2617(b)(1) (2000) (directing the Secretary to “receive, investigate, and attempt to resolve complaints . . . in the same manner” as under the FLSA); H.R. REP. NO. 103-8, pt.1, at 47 (1993) (“H.R. 1's enforcement scheme is modeled on the enforcement scheme of the FLSA . . . Thus, the FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor.”).

63. *Taylor*, 415 F.3d at 371.

64. *Id.* at 374.

65. Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (No. 04-1525); Supplemental Brief on Panel Rehearing for the Secretary of Labor as Amicus Curiae, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (No. 04-1525). For a response to the DOL's stance, *see generally* Amici Curiae Brief of the National Employment Lawyers Ass'n and North Carolina Academy of Trial Lawyers in Support of Plaintiff-Appellant's Answer to Defendant-Appellee's Petition for Rehearing En Banc, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (No. 04-1525) (arguing in support of the panel's decision).

66. Brief for the Secretary of Labor, *supra* note 65, at 4 (emphasis added). For the Fourth Circuit's response to this argument, *see Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 U.S. App. LEXIS 15846, at *6-8 (4th Cir. July 3, 2007) (reinstating the original opinion).

67. *Taylor v. Progress Energy, Inc.*, No. 04-1525, 2007 U.S. App. LEXIS 15846, at *3 (4th Cir. July 3, 2007) (reinstating the original opinion).

68. Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006).

waiver of FMLA claims.⁶⁹ Specifically, courts continued to adhere to *Taylor's* reasoning even before the Fourth Circuit reinstated its original opinion.⁷⁰ In *Dougherty v. Teva Pharmaceuticals USA*, the plaintiff, like Faris, received a release agreement that purported to waive a series of employment law claims as well as “any and all other federal, state or local statutory claims or claims under common laws.”⁷¹ Also like Faris, Dougherty retained the money paid to her under the release.⁷² However, unlike the Fifth Circuit, the *Dougherty* court concluded that § 825.220(d) prohibited the plaintiff from waiving her rights under the FMLA.⁷³ After the court engaged in a thorough analysis of both the *Taylor* and *Faris* opinions, it ultimately found the Fourth Circuit’s reasoning more persuasive than the Fifth’s.⁷⁴ The *Dougherty* court found the *Taylor* court’s examination of the DOL’s response to comments pertaining to the proposed version of § 825.220(d) particularly compelling.⁷⁵ Because the Department considered and rejected a proposal that would have explicitly allowed postdispute releases, it was clear that the regulation was not restricted to prospective applications.⁷⁶ Therefore,

[t]his exchange of comments indicates that the DOL, and concerned employers, realized the impact that § 825.220(d) would have on release agreements All parties appeared to acknowledge that § 825.220(d) would prohibit soon-to-be-former employees from waiving their right to recover for violations of the FMLA that occurred during their employment.⁷⁷

69. See, e.g., *Bittner v. Blackhawk Brewery & Casino, LLC*, No. 03-CV-02274-MSK-PAC, 2005 WL 1924499, at *5 n.2 (D. Colo. Aug. 9, 2005) (citing *Taylor* and expressing doubt as to whether a waiver of an FMLA claim could be enforceable); *O’Brien v. Star Gas Propane, L.P.*, L-680-03, 2006 WL 2008716, at *8, *15 (N.J. Super. Ct. Law Div. July 20, 2006) (citing *Taylor* and concluding that the release of the plaintiff’s FMLA claim was invalid).

70. *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2006 WL 2529632, at *6 (E.D. Pa. Aug. 30, 2006), *vacated*, *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 9, 2007) (“While *Taylor* has recently been vacated for rehearing by the Fourth Circuit for unspecified reasons, we find that its core reasoning is, nonetheless, persuasive.”). Even though the original opinion in *Dougherty* was ultimately vacated, the two opinions taken together further demonstrate the uncertainty surrounding this area of law.

71. *Id.* at *2.

72. *Id.* at *4.

73. *Id.* at *7.

74. *Id.* at *5–6.

75. *Id.* at *6.

76. *Id.*; *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 370–71 (4th Cir. 2005), *vacated*, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), *reinstated*, No. 04-1525, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007) (discussing Employee Protections and Prohibited Acts, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) (to be codified at 29 C.F.R. § 825.220), which stated that while some commentators were “concern[ed] with the ‘no waiver of rights’ provisions included in paragraph (d) [and] recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims as part of a severance package (as allowed under Title VII and ADEA claims, for example) The Department has given careful consideration to [these] comments . . . 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 . . . the FLSA”).

77. *Dougherty*, 2006 WL 2529632, at *7. Furthermore, the court noted that other courts have also prohibited employment agreements that limit the amount of time an employee can bring his or her FMLA claims. *Id.*; see also *Grosso v. Fed. Express Corp.*, No. 05-6128, 2006 U.S. Dist. LEXIS

Furthermore, the *Dougherty* court also found the doctrine of ratification inapplicable to remedial statutes such as the FMLA.⁷⁸ This contradicts the conclusion of courts in *Faris* and *Schoenwald*, which found ratification applicable to situations involving the waiver of FMLA claims.⁷⁹

Another court in *Brizzee v. Fred Meyer Stores, Inc.* also found the *Taylor* court's "thorough analysis and reasoning" more convincing than the *Faris* court's.⁸⁰ Therefore, it subscribed to the *Taylor* court's holding that waiver of an FMLA claim is unenforceable absent DOL or court approval.⁸¹ Thus, other courts have found *Taylor*'s reasoning persuasive.

Both the *Dougherty* and *Brizzee* courts also found *Taylor*'s analysis of § 825.220(d) under the Supreme Court's two-pronged *Chevron* analysis convincing.⁸² Other courts have also undertaken a similar analysis. Under the *Chevron* test, a court

reviews an agency's construction of the statute which it administers First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁸³

While courts addressing the regulation have concluded that under step one of *Chevron*, Congress did not directly address the issue of waiver in the FMLA,⁸⁴ "courts have differed somewhat in their interpretation of

91604, at *11 (E.D. Pa. Dec. 19, 2006) (six-month contractual limitation clause not controlling); *Conway v. Stryker Med. Div.*, No. 4:05-CV-40, 2006 WL 1008670, at *1-2 (W.D. Mich. Apr. 18, 2006) (holding that a six-month limitation on filing suit interfered with FMLA rights and furthermore, it ran afoul of § 825.220(d) since it was presented as a condition of employment that altered FMLA rights); *Woods v. DaimlerChrysler, Corp.*, No. 4:02CV834CDP, 2003 WL 24196898, at *4 (E.D. Mo. Dec. 2, 2003) (finding that a six-month contractual limitation in which an employee must bring an employment suit interferes with his FMLA rights and citing § 825.220(d)'s prohibition against waivers as support); *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769, 772-73 (E.D. Mich. 2002) (finding that imposing a contractual six-month statute of limitations on potential FMLA claims where that statute of limitations is actually two or three years wrongfully interferes with an employee's FMLA rights). *But see* *Fink v. Guardsmark, LLC*, No. CV 03-1480-BR, 2004 U.S. Dist. LEXIS 16970, at *8 (D. Or. Aug. 19, 2004) (holding that Oregon law permits the enforcement of contractual limitations).

78. *Dougherty*, 2006 WL 2529632, at *7 (citation omitted).

79. *See supra* Part II.B.1.

80. *Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at *11 (D. Or. July 17, 2006). The court has stayed appellate proceedings pending a ruling from the Fourth Circuit in *Taylor*'s rehearing. *Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST (D. Or. Sept. 13, 2006) (order granting stay).

81. *Brizzee*, 2006 WL 2045857, at *11.

82. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 369, 372-75 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006); *Dougherty*, 2006 WL 2529632, at *5; *Brizzee*, 2006 WL 2045857 at *10-11.

83. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

84. *Dougherty*, 2006 WL 2529632, at *5 (citing *Taylor*, 415 F.3d at 369).

the actual meaning of that section.”⁸⁵ Hence, several courts have found an interpretation of § 825.220(d) proscribing waivers a permissible construction of the FMLA under *Chevron*.

For instance, in *Bluitt v. Eval Co. of America*, the court found that the regulation, on its face, seemed to rebut the defendant’s allegations that Bluitt had waived her right to sue under the FMLA.⁸⁶ It then proceeded to analyze the regulation under *Chevron*.⁸⁷ Under step one of the *Chevron* analysis, the court found that the Act’s provision prohibiting employers from interfering with an employee’s exercise of her FMLA rights, “provide[d] strong, albeit not definitive, support for the Secretary of Labor’s prohibition on waivers of FMLA rights.”⁸⁸ Even assuming Congress’s failure to address waivers, the court found that the provision provided enough support to satisfy step two of the *Chevron* inquiry.⁸⁹ Just because Congress failed to address waivers in the FMLA “is an insufficient basis for the Court to declare the regulation to be an impermissible construction of the statute.”⁹⁰ The court in *Dierlam v. Wesley Jessen Corp.*, also agreed with *Bluitt’s* reasoning and concluded that § 825.220(d) constituted a permissible construction of the statute under *Chevron*.⁹¹ Thus, courts have found that interpreting § 825.220(d) as a prohibition on an employee’s ability to waive her FMLA rights an acceptable reading under *Chevron*.

3. *Consequences for Employees and Employers Resulting from the Courts’ Disagreement*

Although some courts have interpreted § 825.220(d) as a valid prohibition on waivers, other courts have found an equally valid interpretation permitting waivers. The two readings of the regulation, as well as the varying rationales for permitting or prohibiting waivers, have presented significant practical ramifications for both employees and employers across the country. To reduce the risks and costs of potential litigation, employers frequently enter into postemployment severance agreements consisting of a general release.⁹² Often, “[e]mployers . . . offer severance benefits to discharged employees in exchange for a release of any and all claims.”⁹³ Now that several jurisdictions prohibit the private settlement of FMLA claims, employers may offer to settle for less or refuse to settle at all because parties often join FMLA claims with other

85. *Id.* (comparing *Faris to Taylor*).

86. *Bluitt v. Eval Co. of Am., Inc.*, 3 F. Supp. 2d 761, 763 (S.D. Tex. 1998).

87. *Id.*

88. *Id.*; see also FMLA, 29 U.S.C. § 2615 (2000).

89. *Bluitt*, 3 F. Supp. 2d at 763.

90. *Id.*

91. *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052, 1055–56 (N.D. Ill. 2002).

92. E.g., David E. Nagle, *Fourth Circuit: Waiver of FMLA Rights Requires DOL or Court Approval*, 17 VA. EMP. L. LETTER, Aug. 2005.

93. David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, NAT’L L. J., Oct. 23, 2006, at 16.

claims arising under other employment discrimination laws.⁹⁴ The disagreement amongst courts has inevitably thrown employment practitioners into a state of confusion about what to advise their clients.⁹⁵ Courts interpreting § 825.220(d) as a prohibition on the waiver of FMLA claims renders a private settlement agreement virtually unenforceable if a plaintiff later sues on an FMLA claim.⁹⁶ Furthermore, many state family and medical leave statutes incorporate the federal FMLA's regulations.⁹⁷ Thus, employers may face additional liability if an employee chooses to bring both federal and state claims, even with a release to the contrary. Consequently, decisions forbidding the release of FMLA claims jeopardize many future releases of employment-related disputes and call into question all the releases that parties have already executed nationwide.⁹⁸

III. ANALYSIS: FMLA WAIVER IN LIGHT OF THE OTHER EMPLOYMENT STATUTES

At issue is whether individual employees can privately settle their FMLA claims with their employers via a contractual release and, if so, to what degree. A general overview of federal employment law supports the proposition that waivers under the FMLA should be allowed. Even so, the question remains what standard the courts should use in evaluating the validity of such a release. An examination of the underlying policies and the treatment of waivers under other employment statutes suggests several possible solutions.

In employment law, there are many other approaches to analyzing releases, and an exploration of those procedures and their underlying considerations may suggest different ways of approaching FMLA waivers. While courts have recognized that each of the employment statutes

94. Judy Greenwald, *Decision Limiting FMLA Waivers Creates Employer Headaches*, BUS. INS., Aug. 8, 2005, at 1, 31.

95. See, e.g., Haase & Sullivan, *supra* note 93, at 16 (stating that as a result of cases like *Dougherty* and *Taylor*, "an employee may be able to collect severance pay and nonetheless bring an FMLA claim, regardless of how well the release agreement is drafted."); Sid Steinberg, *Eastern District Judge Invalidates Waiver of FMLA Claim*, LEGAL INTELLIGENCER, Oct. 11, 2006 (suggesting that employer handling of employee issues may be one way of insulating themselves against future FMLA claims).

96. See Theodore A. Olsen, *Unsupervised Release Cannot Bar FMLA Claim*, HR MAG., Oct. 2005, at 121, 121 (noting that the *Taylor* court's interpretation of 29 C.F.R. § 825.220(d) now "makes it virtually impossible for an employer (and a willing ex-employee) to enter into an effective release of FMLA claims").

97. See, e.g., CAL. CODE REGS. tit. 2, § 7297.10 (2006); see also *Chang v. Inst. for Pub.-Private P'ships, Inc.*, 846 A.2d 318, 329 (D.C. 2004) (concluding that since the FMLA and the District of Columbia FMLA "were enacted for the same policy reasons," the court can apply the federal regulations to a DCFMLA claim). But see *Brizze v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at *11-12 (D. Or. July 17, 2006) (declining to use the FMLA as guidance in interpreting a similar, but not identical, provision in Oregon's version of the FMLA).

98. See Brief Amici Curiae of The Equal Employment Advisory Council, et al. in Support of Defendant-Appellee's Petition for Rehearing En Banc at 5-6, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005) (No. 04-1525).

encompass differing protections and interpretations,⁹⁹ all strive to protect employees in positions of unequal bargaining power. A comparison of the differing approaches to FMLA waivers with those under other employment statutes will demonstrate two points. First, it reveals the weaknesses in the courts' various approaches to the waiver issue. Second, it suggests and evaluates possible solutions based on established case law in other related areas of employment law.

A. The Fair Labor Standards Act

Although some courts relied heavily on the FLSA to support banning FMLA releases, an examination of the FLSA's purposes demonstrates that that reliance may be misplaced. Arguably, the FLSA is the most protective act of employees' rights. The FLSA, among other things, sets minimum wages and maximum hour levels for employees who fall within the statute.¹⁰⁰ In passing the FLSA, Congress explicitly found "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" interfered with commerce.¹⁰¹ Furthermore, the legislative history demonstrated Congress's intent to protect certain groups from substandard pay and excessive hours.¹⁰² The FLSA recognized that due to the unequal bargaining power between employers and employees, legislation was required to prevent private contracts that would jeopardize national health, efficiency, and the movement of goods in commerce.¹⁰³ Unlike the other employment statutes discussed below, "Congress designed the FLSA with an eye towards an inflexible protection of the employee's right to unpaid wages [T]he FLSA contemplated an 'all or nothing gamble,' in which the employee, for his own protection, is prevented from bargaining away his legal claim to disputed wages."¹⁰⁴

Although an examination of the FLSA's prohibition against releases may demonstrate a similar protective intent behind the FMLA, it is questionable whether this similarity is enough to justify prohibiting all waivers under the FMLA without considering other circumstances. Furthermore, other employment statutes, which generally favor postdispute releases,¹⁰⁵ embody an overarching protective intent as well. As the following Supreme Court cases demonstrate, the FMLA and FLSA have

99. *E.g.*, *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321–22 (5th Cir. 2003).

100. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 206–207 (2000).

101. FLSA, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 202(a)).

102. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945).

103. *Id.* at 706–07.

104. *DiMartino v. City of Harford*, 636 F. Supp. 1241, 1246 (D. Conn. 1986) (quoting *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946)), *superseded by statute*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)).

105. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 322 (5th Cir. 2003).

differing policy rationales. Whereas the FLSA strives to protect certain vulnerable segments of the population from exploitation by unprincipled employers, the FMLA primarily seeks to balance work and family while furthering equal employment opportunities for both sexes.

In *Brooklyn Savings Bank v. O'Neil*,¹⁰⁶ the Supreme Court addressed an issue analogous to the one contested in the cases dealing with the release of FMLA claims. The *O'Neil* Court examined whether, in the absence of a bona fide dispute as to liability, an employee's waiver of his right to liquidated damages under the FLSA would later bar an action to recover those damages.¹⁰⁷ The Court ultimately held that the release did not bar the employee's subsequent claim.¹⁰⁸ In addition to the FLSA's legislative history discussed above, the Court stated that "[n]o one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages."¹⁰⁹ In *D.A. Shulte, Inc. v. Gangi*,¹¹⁰ the Court, using the same rationale employed in *O'Neil*, held that employers and employees cannot bargain away liquidated damages by settling bona fide disputes about the FLSA's coverage.¹¹¹ The same threats to public policy that existed in *O'Neil* also existed here.¹¹² Without the prohibition against freely bargained for waivers, employers could undermine the FLSA and its purpose.¹¹³

Despite the arguable overlap between the FLSA and the FMLA, the policies underlying the prohibition of waivers under the FLSA are not present in the FMLA. It would defeat the goals of the FLSA if employees were permitted to bargain away their FLSA rights.¹¹⁴ For example, if employees could waive their right to minimum wages or overtime pay, it would nullify the FLSA's purposes and legislative policies.¹¹⁵ This same concern is not present in the FMLA. Cases interpreting the EPA amendment to the FLSA also throw a shadow upon analogizing the FMLA to the FLSA.¹¹⁶ An analysis of the FMLA in light of the EPA and other employment discrimination statutes that permit waivers demonstrates that allowing releases would not undermine the purposes of the FMLA in the same way as it would undermine the FLSA.

106. *O'Neil*, 324 U.S. 697.

107. *Id.* at 702-03.

108. *Id.* at 704.

109. *Id.* at 707.

110. 328 U.S. 108 (1946).

111. *Id.* at 114.

112. *Id.* at 115.

113. *Id.* at 114-16 (reiterating the policy and purposes of the FLSA discussed in *O'Neil*).

114. *See id.*

115. *See Barrentine v. Ark.-Best Freight Sys. Inc.*, 450 U.S. 728, 740 (1981).

116. *See Harris v. City of Harvey*, 992 F. Supp. 1012, 1013 (N.D. Ill. 1998).

B. The Equal Pay Act

Like the FMLA, the EPA has an underlying antidiscrimination policy and may serve as a better model for FMLA releases than the FLSA's strict prohibition against them. Congress amended the FLSA with the passage of the EPA in 1963.¹¹⁷ The EPA prohibits employers from discriminating

between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are preformed under similar working conditions . . .¹¹⁸

The EPA "sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it."¹¹⁹ Thus, the EPA directs employers to provide equal pay for equal work, subject to a few exceptions.¹²⁰ In recognition of the statute's antidiscrimination focus, administrative and enforcement responsibilities were later transferred from the DOL to the Equal Employment Opportunity Commission (EEOC).¹²¹

Although the EPA was physically added to the FLSA, the EPA, like Title VII discussed below, aims to prohibit gender discrimination in the workplace and in compensation.¹²² Moreover, "courts have held that the Equal Pay Act, in essence, is a blood sibling of, and conceptually interfaces with, the employment discrimination statutes . . . rather than of the Fair Labor Standards Act which it was physically added to."¹²³ Although the EPA and the FMLA both have a statutory relation to the FLSA, both share a common purpose with other employment discrimination statutes as well. Congress explicitly intended for the FMLA to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis; and . . . to promote the goal of equal employment opportunity for

117. Equal Pay Act (EPA) of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2000)).

118. EPA § 3, 29 U.S.C. § 206(d).

119. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970).

120. 29 U.S.C. § 206(d) (Exceptions include payments made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . .").

121. *LAREAU ET AL.*, *supra* note 4, § 176.02. The DOL administers and enforces federal laws such as FLSA (wages and hours), OSHA (workplace safety and health), workers' compensation programs, ERISA (employee benefit security), and the FMLA. U.S. Department of Labor, A Summary of Major DOL Laws, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited May 19, 2007). The EEOC enforces federal laws such as Title VII, EPA, ADEA, and the ADA. U.S. Equal Employment Opportunity Commission, Federal EEO Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Aug. 8, 2007).

122. EPA § 2.

123. *Harris v. City of Harvey*, 992 F. Supp. 1012, 1013 (N.D. Ill. 1998).

women and men.”¹²⁴ Whereas the *Faris* court correctly recognized the shared purpose between the FMLA and the other employment discrimination statutes,¹²⁵ other courts that prohibited the waiver of FMLA claims failed to discuss it thoroughly. Furthermore, courts have allowed unsupervised waivers under the EPA even though the EPA, as an amendment to the FLSA, is physically closer to the FLSA than the FMLA. Thus, applying the reasoning of EPA cases to situations involving FMLA releases demonstrates that employees should be able to waive their claims to some degree.

The reasoning of the court in *Morris v. Penn Mutual Life Insurance Co.*¹²⁶ analogously supports an argument for permitting unsupervised waivers of FMLA claims. In *Morris*, the defendant terminated Morris and provided her with a separation agreement, which she revised and signed.¹²⁷ The agreement stated that Morris released the defendant from “any and all claims of discrimination (including but not limited to those based on sex).”¹²⁸ The plaintiff later alleged that her former employer violated the EPA.¹²⁹ The district court, “[i]n considering a release to a claim arising under the Equal Pay Act, . . . refer[red] to the treatment of releases of FLSA claims in general.”¹³⁰ The court then examined *Brooklyn Savings Bank v. O’Neil* and *D.A. Schulte, Inc. v. Gangi*, discussed above, which prohibited settlements of claims arising under the FLSA.¹³¹ In *Morris*, the district court concluded that “a release of claims grounded in a *bona fide dispute over factual issues, not a dispute over legal issues* such as the statute’s coverage or applicability, is not precluded under the FLSA.”¹³² The judge in *Morris* distinguished *Gangi* because that Supreme Court case prohibited settlements concerning the FLSA’s coverage, a legal issue.¹³³ Because Morris based her claim on a factual dispute, regardless of whether her former employer actually violated the EPA, her release was found valid.¹³⁴ Other courts have upheld similar waivers

124. FMLA, 29 U.S.C. § 2601(b)(4)–(5).

125. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321–22 (5th Cir. 2003).

126. *Morris v. Penn Mut. Life Ins. Co.*, No. 87-7063, 1989 U.S. Dist. Lexis 1690 (E.D. Pa. Feb. 21, 1989).

127. *Id.* at *1–2 (Morris’ position with the defendant was Vice President for Acquisition and Property Management. She possessed the agreement for two and a half weeks, consulted with her attorney, consulted with her husband who was also an attorney, and made changes to the agreement before signing it.).

128. *Id.* at *2 n.1.

129. *Id.* at *1.

130. *Id.* at *10.

131. *See id.* at *10–12.

132. *Id.* at *12 (emphasis added).

133. *Id.* In *D.A. Schulte v. Gangi*, 328 U.S. 108 (1946), under threat of suit, the petitioner employer paid overtime compensation owed to several employees and obtained a release from them. *Id.* at 111–12. The employees then brought suit for liquidated damages due under the FLSA. *Id.* at 112. The Court held that “the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over coverage.” *Id.* at 114; *see also supra* Part III.B.1.

134. *Morris*, 1989 U.S. Dist. LEXIS 1690, at *14. The court also cites *Runyan v. National Cash Register Corp.*, which held that an experienced labor lawyer knowingly signed a waiver of his ADEA

of EPA claims without engaging in the detailed reasoning of the *Morris* court.¹³⁵

Another appellate court also noted that the Supreme Court's decisions in *Gangi* and *O'Neil* involved "only the release of claims concerning the *rights* granted by the FLSA, and not the release of claims grounded in factual disputes"¹³⁶ Hence, courts have differentiated between waivers of legal rights (prohibited under the FLSA) and factual ones (permitted under the EPA and possibly the FLSA). Because a release concerning FMLA claims may involve a factual dispute (such as whether an employer violated a plaintiff's substantive and proscriptive FMLA rights), an application of *Morris*' holding by analogy would support *Faris*' conclusion permitting the release of FMLA claims.

The EPA cases permitting waivers of factual issues call into question a strict prohibition against them in the FMLA context. The EPA and the FMLA are related to the FLSA, as well as to the other employment discrimination statutes. Thus, one can use the EPA cases permitting waivers to support an argument for waivers under the FMLA. When evaluating the validity of EPA releases themselves, courts often look to Title VII's waiver requirements for guidance.¹³⁷ This reliance further underscores the close relationship between the EPA and Title VII and, by extension, the FMLA and Title VII.

C. Title VII of the Civil Rights Act of 1964

Courts have universally permitted waivers under Title VII. Because Title VII and the FMLA share a similar antidiscrimination purpose, an examination of the rationale allowing waivers under Title VII supports

claim and that a bona fide factual dispute existed. 787 F.2d 1039, 1044 (6th Cir. 1986), *superseded by statute*, Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)). The court then states that "[l]ike Runyan, *Morris* is not a member of that segment of the workforce needing protection from substandard wages and excessive hours which the FLSA as a whole was enacted to effect." *Morris*, 1989 U.S. Dist. LEXIS 1690, at *14. These were factors that the *O'Neil* and *Gangi* courts found important. *Id.*

135. See, e.g., *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1467 (10th Cir. 1992) ("The plain language of the release bars only equal pay claims that had *accrued* prior to the date the release was executed. Accordingly, even though Ms. Kenworthy could not recover for discriminatory wages she received before 1981 [the date of the settlement agreement], the jury could properly consider whether Conoco violated the Act after 1981."); *Anderson v. Univ. of N. Iowa*, 779 F.2d 441, 442 (8th Cir. 1985) (barring a plaintiff's EPA claim based on her participation in a prior class action settlement against her employer).

136. *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988), *superseded by statute*, OWBPA, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)).

137. *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 532 (7th Cir. 1996) ("It is clear that a plaintiff may waive a claim under Title VII (and, by extension, under the Equal Pay Act) as part of a voluntary settlement, provided that her consent to the release was voluntary and knowing."); *Dominguez v. BCW, Inc.*, 99 F. Supp. 2d 1155, 1158-61 (D. Ariz. 2000) (using Title VII's "knowing and voluntary" standard to determine whether there existed a disputed issue of material fact regarding whether the parties' agreement released plaintiff's potential Title VII and EPA claims).

the argument for also permitting them under the FMLA. However, because the actual tests for determining the validity of releases under Title VII are in a state of confusion, the specific methods for determining the validity of waivers under Title VII should not be imported into the FMLA.

Title VII, like the FMLA, aims to promote equality between the sexes in the workplace. In Title VII, Congress made it unlawful for employers “to discriminate against any individual with respect to his . . . privileges of employment, because of such individual’s race, color, religion, *sex*, or national origin.”¹³⁸ Thus, both Title VII and the FMLA share a common goal of eliminating sex-based discrimination in employment. An examination of waivers under Title VII demonstrates that courts generally favor releases in employment discrimination law if they meet certain qualifications. Courts have permitted releases in regards to an employee’s Title VII rights if the waiver is “knowing and voluntary.”¹³⁹ Nevertheless, courts have used different and sometimes contradictory criteria to ascertain whether a release qualifies as “knowing and voluntary.”¹⁴⁰ As discussed above, courts that have attempted to apply the Title VII model to FMLA releases have encountered the same problem. A majority of circuits utilize the totality of the circumstances approach when addressing waivers under Title VII.¹⁴¹ An examination of this approach to waivers will demonstrate a good faith, albeit flawed attempt at balancing the considerations of both employees and employers.

The Fifth Circuit case of *Rogers v. General Electric Co.*¹⁴² illustrates the totality of the circumstances approach to the “knowing and voluntary” standard. In *Rogers*, the defendant offered bonus payments if employees signed a release that purported to discharge General Electric of any claims the employee may have arising under, but not limited to, Title VII.¹⁴³ In addition, the release stated that the undersigned had the right to consult with an attorney and had signed knowingly and voluntarily.¹⁴⁴ After signing the release, Rogers filed suit against General Electric alleging that the release violated public policy, was obtained by deception, and was written ambiguously.¹⁴⁵ In holding for the defendant, the court stated that “[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.”¹⁴⁶ That said, an employee cannot waive his prospective Title VII

138. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

139. *E.g.*, *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986).

140. See generally O’Gorman, *supra* note 1, at 73–108, for an overview of approaches used by courts in ascertaining whether a Title VII release is “knowing and voluntary.”

141. *Id.* at 74–76.

142. *Rogers*, 781 F.2d 452.

143. *Id.* at 453.

144. *Id.* at 454.

145. *Id.*

146. *Id.* (citation omitted).

claims.¹⁴⁷ This Fifth Circuit conclusion is similar to the circuit's holding in *Faris* several years later.

Although not barred per se, the release of retrospective claims must qualify as both "knowing and voluntary."¹⁴⁸ In the instant case, Rogers's release waived only those claims arising on or before the date of the agreement, so it did not violate the prohibition against prospective waivers.¹⁴⁹ In deciding whether the release was "knowing and voluntary," the court examined several circumstances surrounding its execution.¹⁵⁰ Here, the clear labeling of the release, the advice that Rogers could consult an attorney, the active choice to opt for the bonus, and the fact that no one forced her to sign the release, taken together, supported the court's conclusion that the agreement satisfied the "knowing and voluntary" test for Title VII claims.¹⁵¹ A majority of circuits subscribe to the same totality of the circumstances standard for ascertaining whether a release of Title VII claims qualifies as "knowing and voluntary."¹⁵²

Courts have enunciated a series of factors that they examine when assessing the validity of a Title VII release under the totality of the circumstances. For example, courts have looked at:

- (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.¹⁵³

These factors, as well as similar lists, are not exhaustive, and the absence of one item is not dispositive.¹⁵⁴ Moreover, courts should not treat the factors as a checklist, nor should they rigidly adhere to them.¹⁵⁵ As with any totality of the circumstances inquiry, courts have a great deal of

147. *Id.*; see also *Richardson v. Sugg*, 448 F.3d 1046, 1054 (8th Cir. 2006) ("A number of other circuits have also held . . . that persons may not contract away prospective claims under Title VII." (citation omitted)).

148. *Rogers*, 781 F.2d at 454.

149. *Id.* at 455.

150. *Id.* at 456.

151. *Id.*

152. *E.g.*, *Cuchara v. Gai-tronics Corp.*, 129 F. App'x 728, 731 (3d Cir. 2005); *Myers v. W.-S. Life Ins.*, 849 F.2d 259, 261 (6th Cir. 1988).

153. *Smith v. Amedisys, Inc.*, 298 F.3d 434, 441 (5th Cir. 2002) (quoting *O'Hare v. Global Natural Res.*, 898 F. 2d 1015, 1017 (5th Cir. 1990) (listing factors examined in assessing the validity of ADEA waivers predating the passage of OWBPA in 1990)). Other courts have also formulated their own list of factors. See, e.g., *Puentes v. United Parcel Serv. Inc.*, 86 F.3d 196, 198 (11th Cir. 1996); *Dominguez v. BCW, Inc.*, 99 F. Supp. 2d 1155, 1159 (D. Ariz. 2000); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adcock*, 176 F.R.D. 539, 544 (N.D. Ill. 1997); *Evans v. Waldorf-Astoria Corp.*, 827 F. Supp. 911, 913 (E.D.N.Y. 1993); *Morris v. Penn Mut. Life Ins. Co.*, No. 87-7063, 1989 U.S. Dist. LEXIS 1690, at *4-5 (E.D. Pa. Feb. 21, 1989).

154. O'Gorman, *supra* note 1, at 88.

155. *Id.*

flexibility in deciding whether to uphold or to strike a release. Notwithstanding this uncertainty, most courts permit the retrospective waiver of Title VII claims as long as, under the totality of the circumstances, they satisfy the “knowing and voluntary” requirement.¹⁵⁶

Despite sharing a similar antidiscrimination purpose with the FMLA, Title VII’s “knowing and voluntary” standard may not serve as the best model for waivers under the FMLA. Commentators have observed that whereas most circuits examine the totality of the circumstances in order to determine whether a Title VII release qualifies as “knowing and voluntary,” a minority have applied ordinary contract principles.¹⁵⁷ Even those circuits subscribing exclusively to the totality of the circumstances approach have failed to clearly define what “knowing and voluntary” means.¹⁵⁸ They have also disagreed about whether to adhere to a purely subjective inquiry into the employee’s state of mind or to use objective factors (like the fairness of the process) as well.¹⁵⁹

Because courts disagree about what standard to use when evaluating Title VII waivers, the various tests under this statute only lead to more confusion and disagreement about the appropriate criterion for waivers if they are adopted under the FMLA. Even the courts that have tried to apply the Title VII tests to determine whether an FMLA release was “knowing and voluntary” have not agreed on the proper standard to utilize.¹⁶⁰ Thus, when courts attempt to apply Title VII’s approach to FMLA waivers, the resulting inquiry has the potential to lead to contradictory conclusions even if courts are presented with the exact same facts.

156. *Id.* at 90.

157. *Id.* at 75–77; *see also* LEX K. LARSON ET AL., EMPLOYMENT DISCRIMINATION § 95.02 (2006) (“In contrast to the totality of the circumstances test, some of the circuits have used a contract approach and focused on the clarity of the settlement language with respect to waiver.”).

158. O’Gorman, *supra* note 1, at 93–95. For example, courts have described “knowing” as having a full understanding of the release’s terms, understanding the legal consequences of her actions, or executing the release purposefully. *Id.* at 93–94. At least one court has merged the terms, characterizing “voluntary” as understanding the rights being waived. *Id.* at 94. Courts have also used some factors to ascertain the fairness of the procedure leading up to the release; however, just because the procedure was “unfair” does not mean the employee’s consent was unknowing or involuntary. *Id.* at 94–95.

159. *Id.* at 95–99.

160. *Compare* Kujawski v. U.S. Filter Wastewater Group, Inc., No. CIV. 00-1151DWFAJB, 2001 WL 893918, at *4–5 (D. Minn. Aug. 7, 2001) (examining several factors such as the language of the release, the presence of counsel, and the presence of exceptional circumstances like fraud, duress, or in this case, competency, and stating that whether the plaintiff “fully grasped the legal ramifications of the Agreement is irrelevant for purposes of assessing the validity of the release” (citations omitted)), *with* Riddell v. Med. Inter-Ins. Exch., 18 F. Supp. 2d 468, 471 (D.N.J. 1998) (examining “(1) ‘the clarity and specificity of the release language’; (2) ‘the plaintiff’s education and business experience’; (3) ‘the amount of time plaintiff had for deliberation about the release before signing it’; (4) ‘whether plaintiff knew or should have known his rights upon execution of the release’; (5) ‘whether plaintiff was encouraged to seek, or in fact received benefit of counsel’; (6) ‘whether there was an opportunity for negotiation of the terms of the Agreement’; and (7) ‘whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law’” (quoting Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1998))).

D. The Americans with Disabilities Act

Courts have also favored private settlements under the ADA. The ADA's coverage and antidiscrimination purpose closely relate to the FMLA's. Nevertheless, the ADA's treatment of waivers is subject to the same criticism as that aimed at Title VII because courts interpret waivers under both statutes in the same manner. Like Title VII, the ADA seeks to eliminate discrimination in the workplace.¹⁶¹ Some have even called the ADA "the most sweeping anti-discrimination measure passed by Congress and signed into law since the Civil Rights Act of 1964."¹⁶² Under Title I of the ADA, an employer that falls within the scope of the ADA cannot "discriminate against a qualified individual with a disability because of the disability of such individual in regard[s] to job application procedures . . . and other terms, conditions, and privileges of employment."¹⁶³ The ADA also overlaps with the FMLA; the ADA covers qualified individuals with a disability,¹⁶⁴ while the FMLA provides leave for individuals with a "serious health condition."¹⁶⁵ For example, an employee may receive coverage under both acts if she suffers an illness or injury on the job, requires time away from work, and then subsequently returns with a permanent disability.¹⁶⁶ Because the same underlying facts often lead to liability under both the FMLA and the ADA, an examination of releases under the ADA may give an additional perspective on the current confusion regarding FMLA waivers.

Courts often use one employment statute to aid in interpreting another, and the use of Title VII in illuminating the issue of waivers under the ADA is no exception.¹⁶⁷ Courts interpret waivers under the ADA in the same manner as those under Title VII.¹⁶⁸ An example of the totality of the circumstance approach as applied to an ADA case is *Rivera-Flores v. Bristol-Myers Squibb Caribbean*.¹⁶⁹ In *Rivera-Flores*, the plaintiff sued the defendant under the ADA and other employment statutes.¹⁷⁰ Then,

161. Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 331 (codified as amended at 42 U.S.C. § 12112(a) (2000)).

162. LAREAU ET AL., *supra* note 4, § 136.01 (summing up statements by members of Congress and testimony made before congressional committees).

163. 42 U.S.C. § 12112(a).

164. *Id.*

165. FMLA, 29 U.S.C. § 2612(a)(1)(D) (2000).

166. S. Elizabeth Wilborn Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We Be Friends?*, 41 BRANDEIS L.J. 821, 821 (2003). *See generally id.* (discussing the FMLA's and ADA's overlapping provisions).

167. *See Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another.").

168. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002) ("Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability.").

169. 112 F.3d 9 (1st Cir. 1997).

170. *Id.* at 10.

Bristol-Myers countered with a waiver Rivera-Flores had executed in exchange for employment benefits.¹⁷¹ The court ultimately held “that the general principles for evaluating such waivers and releases . . . for claims arising under other employment statutes, appl[ies] to the ADA as well: ADA waivers and releases must be knowing and voluntary, as evidenced by the totality of the circumstances.”¹⁷²

The court reasoned that releases provided in exchange for extra benefits have typically been upheld in the employment law context.¹⁷³ Significantly, when Congress wanted to ensure certain procedural protections for employees, it did so in acts such as the OWBPA amendments to the ADEA.¹⁷⁴ Because Congress did not specify such protections in the ADA, there was no intent to extend them.¹⁷⁵ The ADA also encourages private dispute resolution throughout its provisions and states that its enforcement provisions shall be the same as Title VII’s.¹⁷⁶ Moreover, the legislative history demonstrates an intent to permit waivers under the ADA because prohibiting them would perpetuate the same stereotypes and attitudes that the statute was supposed to combat.¹⁷⁷

In determining whether a waiver qualifies as “knowing and voluntary,” the court endorsed a totality of the circumstances approach encompassing six factors similar to those used in examining waivers under Title VII.¹⁷⁸ Additionally, the court recommended examining Congress’s intent to protect the rights waived.¹⁷⁹ It noted that whereas heightened judicial scrutiny may be required for the release of ADA claims because “certain claimed disabilities may inherently raise a question about whether the employee has the capacity to give a knowing and voluntary waiver,” this was not such an instance.¹⁸⁰ Although the court pointed out this difference between the examination of waivers under Title VII and waivers under the ADA, the ultimate question remained whether the employee had executed the release “knowingly and voluntarily” given the totality of the circumstances. Other circuits addressing ADA releases also have a standard similar to the one utilized in *Rivera-Flores*.¹⁸¹

171. *Id.*

172. *Id.*

173. *Id.* at 11–12 (citing examples from race and gender discrimination cases, ADEA, and ERISA).

174. *Id.* at 12.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (“The six factors are: (1) plaintiff’s education and business sophistication; (2) the respective roles of employer and employee in determining the provisions of the waiver; (3) the clarity of the agreement; (4) the time plaintiff had to study the agreement; (5) whether plaintiff had independent advice, such as that of counsel; and (6) the consideration for the waiver.”).

179. *Id.*

180. *Id.*

181. *See, e.g., Jones v. City of Columbia*, 74 F. App’x 683, 685 (8th Cir. 2003) (“But assuming, without deciding, that the district court should have applied a knowing-and-voluntary standard in determining whether the release at issue barred Jones’s ADA Title II claims against Columbia, we conclude that Jones has failed to produce sufficient facts showing that execution of the release was not

Cases interpreting waivers under the ADA, like Title VII, demonstrate a judicial policy favoring such settlements. However, because the ADA utilizes the same “knowing and voluntary” standard as Title VII, it also falls to the same criticism. *Rivera-Flores* mentioned the OWBPA as an instance where Congress specified additional procedural protections for employees.¹⁸² Although the ADA does not contain such provisions, an examination of ADEA and the OWBPA may suggest another way of examining the issue of waivers under the FMLA.

E. The Age Discrimination in Employment Act and the Older Workers Benefit Protection Act

The state of waivers under ADEA, before passage of the OWBPA, resembled that under Title VII. The passage of the OWBPA resolved an earlier circuit split and its resulting clarity serves as the best model on which to base the FMLA’s waiver standard. In passing ADEA, Congress found that, in comparison to younger workers, older workers were disadvantaged in retaining and regaining employment and had higher rates of unemployment.¹⁸³ Older individuals also experienced a greater duration of unemployment than their younger counterparts did and, hence, more severe economic consequences.¹⁸⁴ In addition to the individual’s economic costs, there are emotional, physical, and societal costs inflicted when an older worker is unemployed.¹⁸⁵ Furthermore, Congress found that it had become common practice for employers to set arbitrary age limits.¹⁸⁶ As a result, the purpose of ADEA was “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from impact of age on employment.”¹⁸⁷ Thus, when Congress passed ADEA, “it had in mind not only to provide benefits to victims of discrimination, but also to create incentives for companies to obey they [sic] law.”¹⁸⁸

The findings and purposes enunciated by Congress under ADEA reflect those under the FMLA and the other employment discrimination statutes discussed above. In language echoing Title VII and the ADA, under ADEA, employers cannot:

knowing and voluntary.”); *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 819 (11th Cir. 1998) (“The Supreme Court has stated that an employee can waive his ‘cause of action under Title VII as part of a voluntary settlement agreement’ if ‘the employee’s consent to the settlement was voluntary and knowing.’ . . . The same principles should be equally applicable to waiver of rights under Title II of the ADA.” (citation omitted)).

182. *Rivera-Flores*, 112 F.3d at 12.

183. Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621(a)(1), (3) (2000).

184. LARSON ET AL., *supra* note 157, § 120.02 (examining recent employment statistics and statistics from 1974).

185. *Id.*

186. 29 U.S.C. § 621(a)(2).

187. *Id.* § 621(b).

188. *Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d 307, 319 (S.D.N.Y. 1998).

(1) . . . 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; [or] (2) . . . classify his employees in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee . . . [because of his age].¹⁸⁹

Just as a demographic shift brought the plight of older workers to the forefront of employment legislation in the late sixties,¹⁹⁰ a changing American workforce also spurred the passage of the FMLA in the early nineties.¹⁹¹ The FMLA also shares other similarities with ADEA. Like the FMLA, Congress also incorporated many of the FLSA's protective procedures into ADEA.¹⁹² Thus, in both statutes, Congress recognized a need to protect a vulnerable segment of the American workforce.

In 1990, Congress amended ADEA with the OWBPA,¹⁹³ which specifically addressed releases. The purpose of the OWBPA was to "make[] clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful," and to "ensure[] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA."¹⁹⁴ Prior to enactment of the OWBPA, courts generally found ADEA waivers permissible as long as they met a "knowing and voluntary" standard.¹⁹⁵ However, during the pre-OWBPA period, courts disagreed as to what constituted a "knowing and voluntary" release under ADEA.¹⁹⁶ Some courts held that ordinary state contract law controlled, whereas others elected a totality of the circumstances test similar to the one currently used under Title VII.¹⁹⁷ Although this debate still plagues Title VII releases, the passage of the OWBPA clarified the waiver standard for postdispute settlements under ADEA.

Before the passage of the OWBPA, Congress recognized that "court decisions [were] confusing and even conflicting as to when unsupervised waivers should be allowed. . . . The lower court decisions also cannot be reconciled in terms of what protections must be accorded to

189. 29 U.S.C. § 623(a)(1)-(2). ADEA only protects those individuals who are over the age of forty. *Id.* § 631(a).

190. See LARSON ET AL., *supra* note 157, § 120.02 (noting that the population of individuals forty and over is increasing at a faster rate than that of younger individuals). ADEA's effective date was June 12, 1968. *Id.* § 118.02.

191. Campbell, *supra* note 11, at 1078-79.

192. H.R. REP. NO. 101-664 (1990).

193. LARSON ET AL., *supra* note 157, § 142.01.

194. Long v. Sears Roebuck & Co., 105 F.3d 1529, 1534 (3d Cir. 1997) (quoting S. REP. NO. 101-263, at 2 (1990)).

195. *Id.* at 1535.

196. *Id.* at 1538.

197. *Id.* at 1538 nn.14-15 (prior to the passage of the OWBPA, the Fourth, Sixth, and Eighth Circuits had used state contract law principles to ascertain whether a waiver qualified as "knowing and voluntary," while the Second, Third, and Fifth Circuits had adopted a totality of the circumstances test).

employees in an unsupervised context.”¹⁹⁸ Lawmakers then held hearings to examine, among other issues, possible legislative solutions that would clarify the area of law surrounding waivers under ADEA.¹⁹⁹ Congress ultimately enacted the OWBPA, which mandated that “knowing and voluntary” ADEA releases contain certain minimum information.²⁰⁰ Under the OWBPA, courts do not uphold a waiver of rights and claims under ADEA as “knowing and voluntary” unless: (1) it is written in plain language, (2) it specifically refers to ADEA, (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.²⁰¹ Courts have applied these factors differently than those factors used under Title VII’s and the ADA’s totality of the circumstances test.

Several years after passage of the OWBPA, the Supreme Court addressed the issue of waivers under ADEA. In *Oubre v. Entergy Operations, Inc.*, the plaintiff, as part of a severance agreement, signed a release of all claims against her former employer.²⁰² Oubre then received six installments of severance pay as consideration, which she retained after filing suit under ADEA.²⁰³ The Court held that since the agreement did not comply with the statutory requirements under the OWBPA, it did not bar the plaintiff’s ADEA claim.²⁰⁴ After examining the language of the statute, the Court concluded that “[t]he statutory command is clear: An employee ‘may not waive’ an ADEA claim unless the waiver or release satisfies the OWBPA’s requirements The OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word.”²⁰⁵ Since the OWBPA set up its own system for evaluating the validity of waivers under ADEA, it displaced common law contract doctrines such as ratification.²⁰⁶ Because of the Supreme Court’s decision in *Oubre*, courts now strictly enforce the requirements listed under the OWBPA.²⁰⁷

198. H.R. REP. NO. 101-664, at 26–27 (1990) (emphasis removed).

199. *Id.*

200. *Am. Airlines v. Cardoza-Rodriguez*, 133 F.3d 111, 117 (1st Cir. 1998).

201. ADEA, 29 U.S.C. § 626(f) (2005).

202. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 423 (1998).

203. *Id.* at 423–24.

204. *Id.* at 424.

205. *Id.* at 426–27.

206. *Id.* at 425–27.

207. *E.g.*, *Syverson v. Int’l Bus. Machs. Corp.*, 472 F.3d 1072, 1076 (9th Cir. 2007); *Thomforde v. Int’l Bus. Machs. Corp.*, 406 F.3d 500, 503 (8th Cir. 2005); *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 167 (2d Cir. 1998); *Suhy v. AlliedSignal*, 44 F. Supp. 2d 432, 436 (D. Conn. 1999).

For example, in *Kruchowski v. Weyerhaeuser Co.*,²⁰⁸ the Tenth Circuit held that in order to comply with the OWBPA, a release of ADEA claims in connection with a reduction in force program had to notify terminated employees about certain information used by the employer in making its decision about who to terminate.²⁰⁹ Because “[t]he absence of even one of the OWBPA’s requirements invalidates a waiver,” the court found the releases unenforceable.²¹⁰ In another case involving a release of both Title VII and ADEA claims, the Second Circuit upheld the Title VII waiver as “knowing and voluntary” under the totality of the circumstances test, while simultaneously striking the ADEA waiver for not complying with the OWBPA’s requirements.²¹¹

Thus far, a statutory solution based on the factors listed in the OWBPA suggests the best solution for the FMLA waiver issue. In accordance with the OWBPA’s language and purpose, courts in a post-*Oubre* world rigorously enforce the requirements listed under the OWBPA for a “knowing and voluntary” waiver. Even though one of Congress’s main concerns in passing the OWBPA was the protection of employees subject to group termination programs where employers would condition participation on signing a waiver,²¹² the statute has also resolved the former split among courts as to what constituted a “knowing and voluntary” waiver under ADEA. Instead of evaluating waivers on a case-by-case basis, the OWBPA limited waivers to certain situations, delineated clear standards to govern those situations, halted a trend towards increased litigation in the area, and clarified an unresolved area of law.²¹³ At least one commentator has speculated that although Congress enacted the OWBPA pursuant to ADEA, it “might have intended to define ‘knowing and voluntary’ for all federal employment discrimination statutes Almost all of the OWBPA requirements are general in nature and could be applied to a waiver of an employment discrimination claim.”²¹⁴ Hence, Congress could also apply the OWBPA’s provisions to the current situation concerning FMLA waivers.

208. 446 F.3d 1090 (10th Cir. 2006).

209. *Id.* at 1095.

210. *Id.* (quoting *Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998)).

211. *Tung v. Texaco Inc.*, 150 F.3d 206, 208–09 (2d Cir. 1998).

212. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997) (quoting S. REP. NO. 101-79, at 9 (1989)).

213. See H.R. REP. NO. 101-664 (1990).

214. Jan W. Henkel, *Waiver of Claims Under the Age Discrimination in Employment Act After Oubre v. Entergy Operations, Inc.*, 35 WAKE FOREST L. REV. 395, 420 (2000). Moreover, in the wake of the temporary circuit split between the Fourth and the Fifth Circuits, practitioners have also suggested that employers follow OWBPA in drafting their releases. Rita M. McKinney, *Fourth Circuit Doesn't Allow Unsupervised FMLA Waiver*, 13 S.C. EMP. L. LETTER, Sept. 2005 (telling employers to follow the guidance of the OWBPA by using clear language, referring to the specific statutes waived by name, providing consideration beyond what the employee may be entitled to, and outlining the timeframe for the employee to consider the release).

IV. RESOLUTION AND RECOMMENDATION

After taking into consideration the various policy considerations underlying the FMLA, Congress should create a statutory solution modeled on the OWBPA to resolve the current state of disorder surrounding releases under the FMLA. The Fifth Circuit in *Faris* explicitly recognized the similarities in policy between the employment discrimination statutes and the FMLA.²¹⁵ Moreover, public policy favors the settlement of disputes through contractual agreement and negotiations as exhibited by the ability of employees to waive their rights under statutes such as Title VII and the ADA as long as the waiver qualifies as “knowing and voluntary.”²¹⁶

The FMLA relates to both the FLSA and employment discrimination statutes like Title VII.²¹⁷ Although it is tempting to try to classify the FMLA as either closer in relation to the FLSA or closer to Title VII, courts have already acknowledged the interrelationship between all the employment statutes.²¹⁸ One of the FMLA’s primary purposes is to ensure equal employment opportunities for all, and this objective is similar to the purposes enunciated in the other employment discrimination statutes like Title VII or the ADA. At the same time, the FMLA shares some elements with the FLSA. For example, the FMLA imports some of the FLSA’s enforcement mechanisms and constitutes a minimum labor standard²¹⁹ similar to the FLSA’s minimum wage provisions. Thus, the FMLA’s dual purposes should be taken into consideration when creating a resolution for the current disagreement.

Instead of assuming an extreme position on either end, Congress should amend the statute to permit waivers if they meet certain stringent statutory requirements. The requirements would be similar to those currently in force under ADEA’s amendment, the OWBPA.²²⁰ With a few slight modifications, Congress could write a clear and comprehensive guideline for waivers under the FMLA modeled on the OWBPA’s provisions. The proposed amendment would prohibit courts from upholding a release of FMLA claims as “knowing and voluntary” unless: (1) it is written in plain language, (2) it specifically refers to the FMLA, (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

215. See *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 322 (5th Cir. 2003).

216. See *id.* at 312.

217. See LAREAU ET AL., *supra* note 4, § 162.02 (noting that Congress even modeled several of the FMLA’s clauses after Title VII and the FLSA).

218. See *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1308–10 (10th Cir. 2005) (discussing the similarities between ADEA, Title VII, ADA, and FLSA in determining how to construe EEOC charge filing requirements).

219. S. REP. NO. 103-3, at 3 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 6–7.

220. OWBPA, 29 U.S.C. § 621(f) (2000).

consider the agreement, and (7) there is a seven day revocation period.²²¹ This regime, like the OWBPA, would displace the use of common law contract doctrines and/or other “knowing and voluntary” standards currently used to evaluate FMLA releases. Ultimately, this statutory solution balances the competing tensions between the costs and benefits of waivers. This resolution would also safeguard the FMLA rights of employees and carry out the statute’s legislative intent, while simultaneously allowing parties to achieve finality and freedom in their settlements. Moreover, this recommendation would ultimately resolve the current confusion surrounding the private settlement of FMLA claims.

Although some may argue that the relationship between the FMLA and the OWBPA is too attenuated, courts have repeatedly used the provisions of one employment discrimination statute to aid in the interpretation of another.²²² Furthermore, the OWBPA’s requirements are general in nature, and Congress can readily apply them in other employment discrimination contexts.²²³ Some may criticize the OWBPA’s requirements as too strict and formalistic, but its conditions serve both the employer’s and employee’s interests. Courts have interpreted the OWBPA’s statutory requirements as an initial threshold inquiry, followed by an evaluation of nonstatutory facts and circumstances to determine if a waiver of ADEA rights is “knowing and voluntary.”²²⁴ Hence, courts retain the flexibility to address novel situations and circumstances as they arise while avoiding the vagueness and unpredictability under a true totality of the circumstances test. Furthermore, the proposed statutory amendment would reduce litigation by clarifying the waiver standard for courts, as the OWBPA did for ADEA. At the same time, it balances the interests of both parties by taking a series of carefully chosen factors into consideration. Most importantly, it offers finality for both employees and employers; the executed release either complies with the proposed amendment’s provisions or it does not.

Finally, this amendment would allow Congress and the courts to acknowledge the interrelationship between all the employment statutes. The purpose of each of these statutes is to prevent and remedy unjust

221. Because group termination programs are not as much a concern under the FMLA as under ADEA, the OWBPA’s final factor has been omitted from the proposed amendment.

222. See, e.g., *supra* note 167 and accompanying text.

223. Henkel, *supra* note 214, at 420.

224. E.g., *Syverson v. Int’l Bus. Machs. Corp.*, 461 F.3d 1147, 1152 n.7 (9th Cir. 2006); *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373–74 (11th Cir. 1995); see also S. REP. NO. 101-263 (1990), as reprinted in 1990 U.S.C.C.A.N. 1509, 1537 (“Title II of the bill provides for the first time by statute that waivers not supervised by the EEOC may be valid and enforceable if they meet certain threshold requirements and are otherwise shown to be knowing and voluntary. . . . At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal. The individual also must have acted in the absence of fraud, duress, coercion, or mistake of material fact. The Committee expects that courts reviewing the ‘knowing and voluntary’ issue will scrutinize carefully the complete circumstances in which the waiver was executed.”); 29 C.F.R. § 1625.22(a)(3) (2006) (“Other facts and circumstances may bear on the question of whether a waiver is knowing and voluntary . . .”).

treatment that may result from a situation of unequal bargaining power. At the same time, employees under many statutes can choose to settle their retrospective claims against their former employers if the release meets certain requirements. By using the OWBPA as a model for amending the FMLA, Congress can pave the way for a uniform standard across all the employment acts that will safeguard the rights of employees while still maintaining their autonomy.

V. CONCLUSION

Amending the FMLA with waiver provisions based on the OWBPA's requirements strikes the proper balance between the interests of employers and employees. This solution would resolve the present confusion over waivers under the FMLA that has caused turmoil in the employment law arena. Several courts, resting on differing rationales, have permitted the release of postdispute claims, while others have prohibited the prospective and retrospective waiver of FMLA rights without judicial or DOL oversight. Because these contradictory opinions cause uncertainty for courts and practitioners, one can turn to the other employment acts to ascertain other related approaches to waivers. An examination of these related statutes suggests possible solutions to the current conflict amongst the courts.

After examining the strengths and weaknesses of releases in the context of the FLSA, the EPA, Title VII, the ADA, ADEA, and the OWBPA, a statutory solution modeled on the provisions delineated in the OWBPA offers the best solution for resolving the issue of waivers under the FMLA. By adopting the OWBPA's provisions, Congress would acknowledge the public policy reasons for allowing private settlements, the FMLA's underlying antidiscrimination rationale, and the Act's similarity to the FLSA. As demonstrated above, there is a state of disorder surrounding waivers under employment law. A statutory solution modeled on the OWBPA, would not just resolve the immediate situation. Rather, it would lead the way towards a uniform waiver standard that would protect the rights of employees, carry out the purpose of employment legislation, and allow parties to achieve freedom and finality in their releases.

