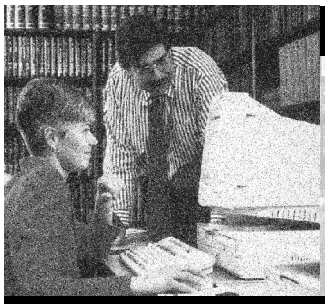

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management August 2005

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Signed Employee Release of FMLA Claims Unenforceable, Says Federal Appeals Court

The Family and Medical Leave Act ("FMLA") regulations state that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." (29 U.S.C. § 825.220(d).) In a recent case, a federal appeals court interpreted this regulation as invalidating any waiver or release of FMLA claims without prior approval by the Department of Labor ("DOL") or a court. *Taylor v. Progress Energy, Inc.*,___ F.3d ___, No. 04-1525, 2005 U.S. App. LEXIS 14650 (4th Cir., July 20, 2005),

Beginning in April 2000, the plaintiff in this case, Barbara Taylor, missed a significant amount of work due to severe pain and swelling in her legs. Her employer, Progress Energy, gave her a poor productivity rating because of the absences. Her requests for FMLA leave were also denied on numerous occasions. With a planned company layoff pending, Ms. Taylor asked that her performance evaluations be corrected to reflect that the absences qualified as FMLA leave. Those requests were also denied and, in May 2001, based on the poor evaluations, she was laid off as part of a reduction in force.

As a condition of receiving severance benefits, Ms. Taylor signed a general release that was intended to cover FMLA claims among other things. Approximately two years after signing the general release, and without returning any of her severance benefits, Ms. Taylor sued Progress for its alleged FMLA violations.

The bottom line is ...

In light of this case, employers should be aware that any private (non-DOL or court approved) release of FMLA claims is vulnerable to challenge.

Progress offered the release Ms. Taylor signed as a complete defense to the claims and requested summary judgment against the employee. However, the employee argued that the FMLA regulations, specifically 29 C.F.R. 825.220(d), barred the enforcement of the release. In granting summary judgment for the company, the trial court followed the reasoning of the U.S. Court of Appeals for the Fifth Circuit in another case holding that 29 C.F.R. 825.220(d) did not apply to the retrospective waiver or release of FMLA rights, or claims of discrimination or retaliation for exercising FMLA rights (*see Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003)).

The Fourth Circuit disagreed and reversed the lower court decision. Specifically, it held that:

> The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights. In addition, the regulation applies to all FMLA rights, both substantive and proscriptive (the latter preventing discrimination and retaliation). Finally, the DOL, by recognizing that the FMLA's enforcement scheme is analogous to that of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., has indicated that § 825.220(d) permits the waiver or settlement of FMLA claims only with the prior approval of the

Continued on next page

Signed Employee Release of FMLA Claims Unenforceable (continued)

DOL or a court.

In addition, the Fourth Circuit rejected Progress's argument that Ms. Taylor had ratified the release of her FMLA claims by retaining the consideration (i.e., severance benefits) that she received in exchange for her general release.

As the Fourth Circuit recognized, its decision in *Taylor* conflicts with the Fifth Circuit's similarly "plain reading" of §825.220(d) in *Faris*. In addition, both the Sixth and Ninth Circuits have upheld private releases of FMLA claims, but without any reference to §825.220(d). This issue has not been addressed by the other federal appellate courts or by any of the district courts with jurisdiction over New York.

In light of *Taylor*, employers should be aware that any private (i.e., non-DOL or court approved) release of FMLA claims is vulnerable to challenge under §825.220(d). Until this conflict between the federal appeals courts is resolved by legislation or the United States Supreme Court, employers seeking to settle potential claims under the FMLA should consider including the DOL in that process or including in their release agreements representations and warranties from the employee that he or she has received any and all FMLA entitlements. While such representations are not releases per se, they should provide some defense to any post-release FMLA claims.

Confidentiality Policy Violated Labor Law, Board Rules

On June 30, 2005, in a decision that affects unionized and non-unionized employers alike, the National Labor Relations Board (NLRB) held that a general confidentiality policy in an employee handbook violated the National Labor Relations Act (NLRA). The offending policy read as follows:

> We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters.

According to the NLRB, the language of this policy could potentially "chill" the employees' ability to discuss the terms and conditions of their employment with each other and union organizers. This right is protected by Section 7 of the NLRA, which gives employees the right to form or join a union or engage in other "concerted activities for their mutual aid and protection".

The NLRB reasoned that because the policy contained an "unqualified prohibition of the release of 'any information' regarding 'its [employees]'" it could be interpreted as illegally restricting employees' right to discuss their pay and other working conditions. The mere existence of a policy was considered illegal — even if it was never enforced — because it could be construed by employees as precluding them from discussing the terms and conditions of their employment.

The bottom line is ...

If an employer's confidentiality policy or agreement could be interpreted by employees to preclude a discussion of the terms and conditions of employment with other employees or with a union, the policy or agreement needs to be revised, regardless of whether the employees are represented by a union or not.

This is a significant expansion of well-established Board precedent which invalidates prohibitions on employees discussing their wages and other terms and conditions of employment.

However, it is important to note that policies clearly aimed at only protecting an employer's proprietary information (e.g., proprietary customer lists or trade secret information), have been found by the NLRB to be lawful.

In light of this decision, employers should review their confidentiality policies and agreements. If the policy or agreement could be interpreted by employees to preclude a discussion of the terms and conditions of employment with other employees or with a union, the policy or agreement needs to be revised, regardless of whether the employees are represented by a union or not.

Should you need assistance in reviewing or revising your confidentiality policies or agreements, please contact either Nicholas J. Fiorenza, Esq. or Michael L. Dodd, Esq., at 315-437-7600.

Federal Contractor Owes $850K to Rejected Job Applicants

The U.S. Department of Labor recently announced that Whirlpool Corp. has agreed to settle findings of discrimination against about 800 African-American job applicants. The company will pay a total of $850,000 in back wages as part of the settlement. In addition to the financial settlement in this case, 48 applicants will be getting jobs with the company

During a routine compliance evaluation, investigators from the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) found that Whirlpool's hiring practices had a "disparate impact" on African-Americans applying for entry-level assembler positions at the Tulsa manufacturing facility. In other words, based on a statistical evaluation of the demographics of the area, a disproportionately smaller number of African-Americans were being hired.

The consent decree settles the department's allegations that Whirlpool engaged in hiring discrimination from March 1, 1997 to February 28, 1998, although the company admits no liability.

Whirlpool, a manufacturer of household appliances, has contracts with the federal government. Part of the company's applicant screening process was the administration of the Test of Adult Basic Education (TABE) which disproportionately eliminated African-American applicants from job consideration. Although an employer can use a test as a screening tool, if the test disproportionately eliminates applicants in a protected group, such as females or minorities, then the employer must conduct a validity study to ensure that the test is job-related and consistent with company needs.

OFCCP, an agency of the U.S. Labor Department's Employment Standards Administration, enforces Executive Order 11246 and other laws that prohibit employment discrimination by federal contractors. The agency monitors federal contractors to ensure they provide equal employment opportunities without regard to race, gender, color, religion, national origin, disability or veterans' status.

Tuition Reimbursement Agreements Do Not Force Employees to Stay

A client recently emailed us the following questions:

> Can a company require an employee to work for it for a period of time after it reimburses the employee for college tuition? If the employee doesn't stay, would the company's only recourse be to sue the employee to recoup the money? For companies that require this, would they normally try to accommodate the employee's new skills (or degree) in a job transfer if they expect them to hang around after graduating?

As a threshold matter, no company can legally prevent an employee from leaving a job. However, most companies will give an employee an incentive to stay in this scenario by requiring the employee to sign a tuition reimbursement agreement (prior to paying the employee's tuition). Such an agreement should include a provision that states that the employee will repay the money spent on his/her tuition, if he/she leaves "too soon" after graduation.

To make it easier to collect from an employee under these circumstances, we also recommend having the employee sign a "confession of judgment" in addition to the reimbursement agreement. This document would allow the employer to simply collect any amount owed from the employee, if the employee breached the tuition reimbursement agreement, without incurring the significant expense of a protracted court battle. A confession of judgment would permit the employer, with permission from the court, to move directly to collect the money it is owed by the employee without a trial.

As for whether companies try to accommodate an employee's newly-acquired knowledge/skills by transferring the employee, we are not aware of any studies or surveys done on this. However, in our experience, we have seen companies do both, i.e., leave them in their same jobs and transfer them. It usually depends on where the company believes it will get the biggest return on its "tuition investment".

If you need assistance in drafting a tuition reimbursement agreement and/or a confession of judgment, please feel free to contact us at 315-437-7600.

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.** **Copyright 2005 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved.** Photocopying or reproducing this newsletter in any form in whole or in part is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 8 AM to 9 AM (with check-in at 7:45 AM) at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
September 8, 2005	You Can't Ask That! Employer's Guide Pre-Employment Inquiries
October 13, 2005	Drugs and Alcohol in the Workplace: The Employer's Dilemma
November 10, 2005	Employment Offer Letters and Contracts: Read Between the Lines
December 8, 2005	Employment Law: The Year in Review

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- ❑ A comprehensive audit of your HR policies, practices and procedures.
- ❑ Advice for complying with employment laws.
- ❑ More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/supervisors, including:

- ❑ Minimizing the Risk of Employment Litigation
- ❑ Preventing Workplace Harassment
- ❑ Leadership and Influence
- ❑ Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

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