

Emerging Issues

Enforceability of waivers of federal statutory employment rights

by Blackwell N. Shelley, Jr.

Employment severance agreements and settlement agreements arising out of employment disputes usually contain a broadly written waiver in which the employee releases all claims against the employer. These waivers are often boilerplate, and include releases of claims based on federal statutory employment rights, such as equal employment opportunity, minimum wage and overtime, medical leave, and benefit security. Some of these types of claims can be voluntarily released. Others, however, cannot be released, or can only be waived to a limited extent. To make matters more complicated, there are several splits of authority among the Circuit Courts of Appeal over which standards apply to releases of claims arising under various statutes, contradicting authority within the Fourth Circuit regarding the appropriate standard for certain releases, and a recently vacated Fourth Circuit opinion in a case that has been set for rehearing.

This snarl of contradicting authority does not allow for the statement of a single, uniform rule of thumb. Whether the release of a federal statutory claim is effective depends upon several factors: the language of the agreement, the type of claim being asserted (or reasserted), and the court reviewing the release. For example, claims that arise under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin, may be waived, but, in some circuits, such waivers may be subject to heightened scrutiny to examine, in effect, the employee's state of mind in making the waiver. Claims that arise under the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination, may be subject to the same heightened scrutiny. The same may be said of claims which arise under the Americans with Disabilities Act of 1991 (ADA). Age-based claims that arise under the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are

40 years of age or older, may also be knowingly and voluntarily waived, but the minimum conditions for such a waiver are created by statute, and the scope of the waiver is limited. Under the Employee Retirement Income Security Act of 1974 (ERISA), which governs pension and welfare plans in private industry, pre-existing claims may be waived, but prospective claims may not be waived. Claims that arise under the Fair Labor Standards Act (FLSA) may not be waived absent prior court or U.S. Department of Labor approval. That rule holds true for claims under the Family and Medical Leave Act of 1993 (FMLA), but whether the rule applies to all types of FMLA claims – or just some of them – is presently uncertain.

In order to assess whether an employee's claim has been released, the best place to start is with the language of the waiver. Such language may be as general as a release of any claim arising under "any and all federal, state or local laws," or a more specific provision that itemizes the particular statutes involved. Typically, waiver and release language appears like this:

GENERAL RELEASE OF CLAIMS. In consideration of severance payments made by the company, Craven Putty ("Employee") hereby releases Engulf & DeVour, Inc., its parent, affiliate, and subsidiary corporations ("E&D") from all claims and waives all rights Employee may have or claim to have relating to Employee's employment with E&D, including but not limited to, front pay, back pay, compensatory damages, punitive damages, injunctive relief, attorneys' fees and costs or any other remedy, arising under: (i) the Age Discrimination In Employment Act of 1967, as amended, ("ADEA"); (ii) the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"); (iii) Title VII of the Civil Rights Act of 1964, as amended; (iv) the Americans With Disabilities Act ("ADA"); (v) the Equal Pay Act of 1963 ("EPA"); (vi) the Fair Labor Standards Act ("FLSA");

(vii) the Family and Medical Leave Act of 1993 (“FMLA”); (viii) any wrongful termination claim under any state or federal law; (ix) claims for benefits under any employee benefit plan maintained by E&D related to service credits or other issues; (x) claims under the Older Workers Benefit Protection Act of 1990 (“OWBPA”); (xi) any federal, state or local law regarding the payment of taxes; and (xii) any and all other federal, state or local laws, rules, regulations, constitutions, ordinances, and any common law claims now or hereafter recognized.¹

Another factor to consider is the assignment of burdens of proof in determining whether a claim has been released. For purposes of practice and pleading, release or waiver is an affirmative defense. Fed. R. Civ. P. 8(c). Accordingly, it is the employer’s burden to prove that the release was effective. At a minimum, the employer must show that a dispute existed between the parties, that the parties signed the agreement to settle the dispute, and that some consideration was present.² Under certain circumstances, however, the employer may have to go an extra step and show that the waiver was “knowing and voluntary.” Depending upon the type of claim being asserted – and the standard being applied by the court – this may require the employer to offer proof of the employee’s mental state at the time the agreement was made, or prove that the agreement met certain minimum statutory conditions. If the employer can satisfy this heightened burden, then the burden will shift to the employee to show that the release is ineffective.

Finally, counsel should also examine the case law governing releases of the particular type of claim. Different standards apply to determine the effectiveness of the release, depending upon the particular statutory right that is being asserted. A catalog and review of all of the types of employment claims that may be the subject of a release is beyond the scope of this article, but what follows is a brief review of the types of claims that are most likely to appear.

Claims under Title VII, the ADA, and the EPA

A majority of federal circuit courts review the validity of a Title VII waiver under a “totality of the circumstances” standard.³ This standard requires the court to examine:

- the employee’s education and business experience;
- the respective roles of the employer and employee in determining the terms and conditions of the waiver;
- the clarity of the agreement;
- the time the employee had to study the agreement;
- whether the employee had the advice of counsel;
- whether the employer encouraged the employee to seek the advice of counsel and whether the employee had sufficient time to do so; and
- the waiver’s consideration.

This list of factors is non-exclusive and no single factor is controlling. In *Cassiday v. Greenhorne & O’Mara, Inc.*, 220 F. Supp. 2d 488, 493 (D. Md. 2002), *aff’d* 63 Fed. Appx. 169, the Fourth Circuit, in an unpublished decision, approved the use of the “totality of the circumstances” test to determine the validity of the employee’s waiver of Title VII claims.

Previously, though, in *O’Shea v. Commercial Credit Corp.*, 930 F.2d 358, 361-62 (4th Cir. 1991), the Fourth Circuit rejected the “totality” test for determining the validity of a release under the ADEA, and relied upon ordinary contract law principles to determine whether a release could be voided. Later, in *Kendall v. City of Chesapeake*, 174 F.3d 437, 441 n. 1 (4th Cir. 1999), the Fourth Circuit noted that the “precise ruling” of *O’Shea* had been superseded by statute, but that “courts can resolve interstitial questions of federal law either by formulating a federal common law rule or by adopting existing state law, and that they must choose between these two courses on a statute-by-statute, issue-by-issue basis.” Although this statement is *dictum*, it points out the Fourth Circuit’s reluctance to embrace the “totality” test.⁴

At least one District Court in Virginia has rejected the “totality” test in assessing the validity of a release of statutory employment claims. In *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857, 862 (W.D. Va. 2001), a case arising under the EPA, the court followed *O’Shea* and relied on Virginia contract law to assess whether the employee’s release was made knowingly and voluntarily. The court noted that *O’Shea* had been superseded by statute when Congress amended the ADEA, but stated that, “as the Equal Pay Act is silent as to the standard a court should use in assessing the validity of a waiver, this court finds no reason to deviate from the approach adopted in that case.”⁵ Accordingly, the court relied upon *Montagna v. Holiday Inns*, 221 Va. 336, 347, 269 S.E.2d 838, 844-45 (1980), for the proposition that a release of statutory employment claims must meet the same requirements as any contract in order to be valid.

As a matter of practice and pleading, the standard that the court chooses to apply has a substantial effect on the employer’s burden of proving the affirmative defense of waiver or release. If the court adopts the “contract” approach, all the employer needs to prove is the existence of a dispute and an agreement between the parties, supported by consideration, that resolved the issue.⁶ This may well be a matter no more complicated than offering up the written agreement itself. If, on the other hand,

the court adopts the “totality” approach, then the employer may only satisfy its burden by offering what is, in effect, parol evidence of the employee’s mental state in negotiating and agreeing to the release. The “contract” standard may present nothing more than a question of law, while the “totality” standard almost certainly will present questions of disputed fact.

O’Shea, which is a published decision, has greater dignity than *Cassiday*, which, being an unpublished opinion, has no value as precedent. Whether *Cassiday* is an anomaly, or an indicator of a change in direction for the court, remains to be seen. In either event, counsel should be aware that the court has spoken equivocally on the subject.

Age discrimination claims

The *O’Shea* decision, discussed above, was issued during a time in which there was a split of authority among the circuits over whether the appropriate test for a knowing and voluntary waiver of rights under the ADEA was the “totality of the circumstances” test or a resort to state law of contracts. In response to this split, Congress codified the “totality of circumstances” test and made it a part of the Older Workers Benefits Protection Act (OWBPA), which amended the ADEA. This amendment was made to address what Congress considered the troubling practice of securing waivers of ADEA claims from terminated employees.⁷

The Supreme Court reviewed the OWBPA amendment in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), and held that, to be effective, a release of claims based on age discrimination had to meet the new statutory requirements. Those requirements, which are set out at 29 U.S.C. §626 (f), describe the necessary terms for every waiver of claims under the ADEA. Under the statute, the employee’s waiver must be “knowing and voluntary.”⁸ In order to meet the statute’s definition of “knowing and voluntary,” the waiver must meet certain minimum, arbitrary conditions:

- The agreement that contains the waiver must be written; moreover, it must be “written in a manner calculated to be understood by [the employee], or by the average individual eligible to participate;”
- The agreement must specifically refer to rights or claims arising under the ADEA and the OWBPA;
- The agreement must not purport to waive rights or claims that may arise after the date the agreement is executed;
- The agreement must be supported by consideration that is in addition to anything of value to which the individual already is entitled;
- The agreement (or some other writing) must advise the employee to consult with an attorney prior to executing the agreement;

- Where the agreement is between the employer and one individual employee, the individual must be given a period of at least 21 days within which to consider the agreement.
- The agreement must provide a “cooling off” period of at least 7 days following the date of execution, during which time the employee may revoke the agreement, and the agreement may not become effective or enforceable until the revocation period has expired;
- If the agreement is made in connection with an exit incentive or other employment termination program offered to a group or class of employees, instead of 21 days, the employee must be given a period of at least 45 days within which to consider the agreement *and*, at the beginning of that period, the employer must inform the employee, in writing, in a manner calculated to be understood, of any class, unit, or group of employees covered by the program, any eligibility factors for the program, any time limits applicable to the program, and the job titles and ages of all individuals eligible or selected for the program, *and* the ages of all individuals in the same job classification or organizational unit who are *not* eligible or selected.

Even if the agreement satisfies these minimum conditions, the statute also provides that an employee’s waiver does not affect the powers of the EEOC to enforce the ADEA, nor does a waiver interfere with an employee’s right to file a charge with the EEOC or participate in an investigation. Further, these minimum conditions do not supplant other arguments – such as fraud or duress – that may be made to invalidate the release agreement.

A court called upon to review a release for compliance with the OWBPA minimum conditions has an easy checklist for such review contained in the statute. Counsel, in assessing whether an ADEA claim has been released, should make the same review. A poorly written release, or one which simply does not cover all the points listed in the statute, will very likely be ineffective.

ERISA claims

The Employee Retirement and Income Security Act of 1974 (ERISA) provides three sets of protection for an employee’s pension and welfare benefits. First, ERISA replaces and preempts state laws that govern the duties of pension and welfare plan fiduciaries. Second, ERISA establishes minimum standards for establishing and maintaining an employee benefit plan, including the requirement of a written plan document, a summary plan description written to be understood by an average participant, and specific disclosure requirements for the plan’s administrator. Third, plan participants and beneficiaries are provided with a remedial mechanism, including federal court access, for enforcing ERISA

claims for benefits or for seeking redress for retaliation against protected conduct.

Because ERISA broadly preempts state law, questions regarding the efficacy of a release of an ERISA claim are determined under federal law.⁹ With respect to cases arising in Virginia, the rule appears to be that an employee may voluntarily waive a “known” ERISA right, such as a present claim for health benefits,¹⁰ but may not validly waive a claim for prospective benefits, or an inchoate future claim for retaliation.¹¹ In this regard, a release which is limited to claims that arise up to the date of its execution is probably valid,¹² but one that releases all claims “from the beginning of time until the end of time” is probably not.

FLSA Claims

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. An employee may recover back wages, either administratively or through court action, if he or she has been underpaid in violation of the law. To encourage employees to enforce their FLSA rights in court, and thus to further the public policies underlying the FLSA,¹³ individual employees may sue for back wages and liquidated damages and receive reasonable attorney’s fees and costs.¹⁴ In addition, the Secretary of Labor may bring judicial enforcement actions under the Act.¹⁵

The U.S. Supreme Court’s decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee’s right to a minimum wage and to overtime pay under the Act. Thus, the Court has held that FLSA rights cannot be abridged by contract or otherwise waived because this would “nullify the purposes” of the statute and thwart the legislative policies it was designed to effectuate.¹⁶

Pursuant to 29 U.S.C. § 216(c),¹⁷ however, the DOL is authorized to supervise payment of back wages owed to employees. If an employee accepts the payment of back wages supervised by the DOL, the employee waives the right to bring suit for unpaid wages and liquidated damages, but in the absence of DOL approval, a private agreement between an employer and employee waiving the employee’s FLSA claims is not enforceable.

FMLA Claims

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, provides an employee with a substantive right to 12 weeks of unpaid leave to deal with a serious health condition, the right to take such leave on an intermittent basis, or on a reduced work schedule, when medically necessary, and the right to reinstatement following such leave. The FMLA also provides an employee with the proscriptive right not to be discriminated

or retaliated against for exercising the substantive FMLA rights. Title 29 of the Code of Federal Regulations, § 825.220(d),¹⁸ a Department of Labor (DOL) regulation, bars the waiver or release of FMLA rights.

In 2003, the Fifth Circuit held that the regulation applied only to waivers of substantive rights under the FMLA, rather than to claims for money damages that might arise from a violation of proscriptive rights.¹⁹ The Fifth Circuit concluded that “[a] plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.”²⁰

In 2005, the Fourth Circuit reviewed 29 C.F.R. §825.220(d), found it to be based on a permissible construction of the FMLA, and unequivocally held that an employee cannot waive his or her substantive or proscriptive rights under the FMLA, without prior approval from the court or the Department of Labor.²¹ Contrary to the Fifth Circuit’s conclusion, the Fourth Circuit stated, “[t]he regulation’s plain language prohibits both the retrospective and prospective waiver or release of an employee’s FMLA rights.”²² The Fourth and Fifth Circuits are thus at odds over the regulation’s plain language.

Following this holding, the appellee, Progress Energy, Inc., filed a petition for rehearing, *en banc*, and was joined by various *amici*, including, among others, the Secretary of Labor. In June 2006, the Fourth Circuit denied the petition for rehearing *en banc*, but granted a panel rehearing. Additionally, the court vacated its original judgment and opinion. On July 28, 2006, the matter was tentatively calendared for oral argument during the court’s October term.

Whether this unusual step signifies the court’s intent to retreat from its earlier position is anybody’s guess. Counsel should be aware, though, that *Taylor* is no longer good law in this Circuit and that, until the court issues a new opinion in the *Taylor* case, the enforceability of FMLA releases in this Circuit is an open question.

Conclusion

In almost all cases, a release of a federal statutory employment right will be valid if it is knowingly and voluntarily made by the employee, so long as the release is not contrary to an important policy behind the statute.²³ In this inquiry, however, the question whether the employee’s action was “knowing” and “voluntary” is a difficult one to answer. Courts have employed different tests. Congress has imposed additional requirements on some releases. In some instances, the courts and Congress have concluded that an employment right is just too important to be waivable. In the final analysis, the importance of these employment rights, and the uncertainty surrounding applicable authority, will make even a well thought-out release agreement vulnerable to attack.

Endnotes

1. This example of a release is a pastiche of several release provisions that have been the subject of litigation. It should not be used as a model for a valid or binding release.
2. See *Freedlander, Inc. v. NCNB National Bank of North Carolina*, 706 F. Supp. 1211, 1215 (E.D. Va. 1988), *aff'd*, 921 F.2d 272 (1990).
3. See Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. Pa. J. Lab. & Emp. L. 73 (2005). This article presents a helpful and scholarly review of the split of authority among the federal circuit courts on this subject and explains the theoretical foundations for the different analytical approaches.
4. See also *Blistein v. St. John's College*, 74 F.3d 1459, 1465 (4th Cir. 1996) (Holding that, in enacting OWB-PA, Congress codified "totality of the circumstances" test, rejecting application of ordinary state law contract principles in determining validity of ADEA release agreement.)
5. *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857, 862 (W.D. Va. 2001) 4 S. Rep. No. 101-263 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1510.
6. See *Freedlander, Inc. v. NCNB National Bank of North Carolina*, 706 F. Supp. at 1215.
7. S. Rep. No. 101-263 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1510.
8. §626 (f) (1).
9. See *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 n.3 (4th Cir. 1991) (holding that "to the extent... that contract principles are implicated, they are entirely preempted by ERISA"), *cert. denied*, 502 U.S. 859, 116 L. Ed. 2d 139, 112 S. Ct. 177 (1991).
10. See *District 29, United Mine Workers v. New River Co.*, 842 F.2d 734, 737 (4th Cir. 1988).
11. *Reighard v. Limbach Co.*, 158 F. Supp. 2d 730, 732-33 (E.D. Va. 2001) (holding that a release signed by an employee is not effective as to unknown, future ERISA claims).
12. See *Howell v. Motorola, Inc.*, 35 Employee Benefits Cas. (BNA) 2708, 2005 U.S. Dist. LEXIS 22137 (N.D. Ill. 2005).
13. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 709 (1945).
14. 29 U.S.C. § 216 (b).
15. 29 U.S.C. §§ 216 (c), 217.
16. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. at 709.
17. Section 216(c) provides: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section [206 or 207 of this title], and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages." 29 U.S.C. § 216(c).
18. 29 CFR 825.220 (d) provides, in part, as follows, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."
19. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 322 (5th Cir. 2003).
20. *Id.* at 321.
21. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 375 (4th Cir. 2005) ("We hold that, without prior DOL or court approval, 29 C.F.R. §825.220(d) bars the prospective and retrospective waiver or release of the FMLA's substantive and proscriptive rights.") .
22. *Id.* at 368.
23. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974).



Blackwell N. Shelley, Jr., is a trial attorney who works extensively in the law of discrimination and wrongful termination, and in other areas not related to fair employment practices, such as disputes arising out of covenants not to compete or solicit, and matters related to the protection of trade secrets and other confidential information. He also devotes a considerable portion of his practice to creditors' rights in bankruptcy. Mr. Shelley received his undergraduate degree from the University of Virginia and his law degree from Washington & Lee University. His firm is Shelley & Schulte in Richmond.