

C. FMLA 29 CFR 825.220(d)

*“Employees **cannot** waive, nor may employers induce employees to waive, their rights under FMLA”*

-Taylor v. Progress Energy, Inc., 415 F.3d 364 (4th Cir. 2005)(without prior DOL or court approval, §825.220(d) bars the prospective and retrospective waiver or release of FMLA’s substantive and proscriptive rights)

D. Other Title VII Protections ????

-Federal courts are split on this subject. 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).

-EEOC v. Frank’s Nursery & Crafts, Inc., 177 F. 3d 448 (6th Cir. 1999) (by filing a charge with the EEOC, an employee is not filing a complaint to seek relief but merely informs the EEOC of possible discrimination).

-EEOC v. Goodyear Aerospace Corp., 813 F. 2d 1539 (9th Cir. 1987)(the interests of the EEOC and aggrieved individual are not identical, EEOC has right to seek injunctive relief on behalf of individual; claim for back pay moot because individual freely contracted away her right to pay through settlement).

E. Various other statutory rights (state anti-discrimination/leave rights, workers’ compensation, unemployment benefits, OSHA/Whistleblower, ERISA, EPA, etc.)

-Todd v. Blue Ridge Legal Servs., 175 F. Supp. 2d 857, 862 (W.D. Va. 2001) (EPA is silent as to the standard a court should use in assessing the validity of a waiver, court finds no reason to deviate from applying state contract law to assess whether employee’s release was made knowingly and voluntarily).

III. EEOC Guideline

Understanding Waivers of Discrimination Claims in Employee Severance Agreements (www.eeoc.gov/policy/dosc/qanda_severance-agreements.html)

IV. Withdrawal of Charge

- A. 29 CFR 1601.10 (charges by individual person)
only by the person claiming to be aggrieved and only with Commission’s consent
- B. 29 CFR 1601.11 (charges by members of Commission)

V. Keys To Enforceable/Effective Release

- Educate your client
- Review applicable authority & meet any notice requirements
- Evaluate “knowing and voluntary”
- Choose language carefully
- Consider carving out the statutory right to file a claim/charge
- Ensure that language confirms all compensation remedy rights have been released
- Ensure that language sets out process for withdrawal and/or dismissal of charge or case
- Ensure that payment is contingent on such withdrawal/dismissal
- Consider spelling out specific remedies for breach of severance/settlement agreement