No. 07-539

# In the Supreme Court of the United States

PROGRESS ENERGY, INC., PETITIONER

*v.*

BARBARA TAYLOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE


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## QUESTION PRESENTED

Whether a Department of Labor regulation stating that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the Family and Medical Leave Act (FMLA)]," 29 C.F.R. 825.220(d), prohibits not only the prospective waiver of FMLA rights but also the private settlement of FMLA claims based on past employer actions.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. a. The Family and Medical Leave Act of 1993 (FMLA or the Act), 29 U.S.C. 2601 *et seq.*, provides eligible employees of covered employers the right to take up to 12 weeks of unpaid leave during any 12-month period for specified reasons, including the employee's own serious health condition. See 29 U.S.C. 2612(a)(1). The Act guarantees employees reinstatement to the same or an equivalent position after taking such leave. See 29 U.S.C. 2614(a)(1). In addition, the FMLA prohibits employers from interfering with an employee's exercise of rights under the Act and from retaliating or discriminat-

ing against an employee for opposing practices made unlawful under the Act. See 29 U.S.C. 2615. The Act also provides a private cause of action for employees whose FMLA rights have been violated. See 29 U.S.C. 2617(a).

b. The Secretary of Labor administers and enforces the FMLA. See 29 U.S.C. 2616(a), 2617(b) and (d). The Act directs the Secretary to "prescribe such regulations as are necessary to carry out" the FMLA's provisions. 29 U.S.C. 2654. Pursuant to that authority, and after notice-and-comment, the Department of Labor (DOL) promulgated detailed regulations under the FMLA. See 60 Fed. Reg. 2180 (1995) (final rule). The regulation relevant here states:

> Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

29 C.F.R. 825.220(d).

c. On February 11, 2008, DOL published a Notice of Proposed Rulemaking (Notice) proposing various revisions to the FMLA regulations. See 73 Fed. Reg. 7876. In relevant part, the Notice proposes to "clarify" the

language in Section 825.220(d) in light of the court of appeals' decision in this case. *Id.* at 7901. Specifically, the proposal would "make explicit in paragraph (d) that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court." *Ibid.*; see *id.* at 7978-7980 (text of proposed revision of Section 825.220(d)). The Notice emphasizes that "[t]he Department does not believe this is a change in the law," and observes that "it has never been the Department's practice, since the enactment of the FMLA, to supervise such voluntary settlements." *Id.* at 7901. The comment period on the proposed regulations closed on April 11, 2008. *Id.* at 7876. Final regulations have not yet been promulgated.

2. Respondent worked for Carolina Power & Light Company (CP&L), a subsidiary of petitioner. Pet. App. 23a.[1] In April 2000, respondent began experiencing health problems that continued for the remainder of the year and into the beginning of the following year. *Id.* at 23a-24a. During that time, respondent missed a number of days of work for medical testing and treatment related to her health condition, including occasions during which she missed five consecutive days of work. *Ibid.* Respondent ultimately had surgery for her health condition in December 2000, and was out of work for approximately six weeks. *Id.* at 24a.

Immediately after her first health-related absence, and on subsequent occasions, respondent asked a representative of CP&L's human resources department whether any of her absences qualified as FMLA leave. Pet.

[1] Because this case was decided on petitioner's motion for summary judgment, the facts are stated in the light most favorable to respondent, the non-moving party. Pet. App. 22a-23a.

App. 23a. The representative told respondent that her absences did not qualify because she had not been absent from work for more than five consecutive days at any one time. *Ibid.* After respondent's surgery in December 2000, she was told that her six-week absence qualified as FMLA leave, although she later discovered that only four of the six weeks had been credited as FMLA leave. *Id.* at 24a.

In February 2001, respondent received a poor performance evaluation for the prior year because of her health-related absences and was given a below-average pay raise. Pet. App. 24a. In May 2001, CP&L informed respondent that her employment was being terminated as part of a reduction in force. *Id.* at 24a-25a, 48a. The company advised her that, in addition to benefits under CP&L's transition plan, she would receive additional benefits, including monetary compensation, if she signed and returned a general release and severance agreement stating:

> In consideration of severance payments made by the company, employee hereby releases CP&L and its parent . . . from all claims and waives *all* rights employee may have or claim to have relating to employee's employment with CP&L . . . or employee's separation therefrom.

*Id.* at 25a. Although the release does not specifically mention the FMLA, it includes a "catchall" category for claims arising under "any other federal * * * law." *Id.* at 26a. In exchange for signing the release, respondent received approximately $12,000. *Ibid.*

3. Respondent sued petitioner in federal court for alleged violations of the FMLA. Pet. App. 46a. Petitioner moved for summary judgment, arguing that the

release respondent had signed provided the company a complete defense to respondent's suit. *Id.* at 46a, 53a. Respondent countered that Section 825.220(d)'s prohibition on the waiver of FMLA rights rendered the release invalid. *Id.* at 53a.

The district court granted petitioner's motion for summary judgment, holding that Section 825.220(d) does not render the release unenforceable. Pet. App. 58a-59a, 65a. Following the Fifth Circuit's decision in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316, 320-321 (2003), the district court concluded that the regulation precludes only "the prospective bargaining away of * * * substantive rights," and therefore "does not preclude the post-dispute settlement of a claim alleging that those substantive rights have been previously violated." Pet. App. 58a-59a. The district court noted that "[i]f the USDOL intended to bar all releases of such claims, it could have used language to make that clear. It did not." *Id.* at 59a. The court also stated that a contrary interpretation would render the FMLA unique in the area of federal employment law and would create "serious issues of judicial economy." *Id.* at 60a-61a.

4. a. The court of appeals reversed. Pet. App. 21a-44a (*Taylor I*). It concluded that Section 825.220(d)'s plain language prohibits both the prospective and retrospective waiver of any FMLA right, including the post-dispute settlement or release of FMLA claims. *Id.* at 31a. The court stated that its interpretation was supported by the preamble that accompanied the final regulation. *Id.* at 33a. The court read the preamble as "rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims," thereby "ma[king] clear

that § 825.220(d) was never intended to have only prospective application." *Id.* at 34a.

The court of appeals also reasoned that the reference in the preamble to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, incorporated into the regulation the FLSA's judicially-developed restriction on private settlements. Pet. App. 34a; see *id.* at 39a-40a ("[T]he FMLA's language, structure, and the congressional intent behind its enactment" indicate "that the FMLA was to be implemented in the same way as the FLSA."). The court stated that 29 U.S.C. 2617(b)(1), which provides that "[t]he Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of [the FLSA]," grants DOL "*statutory* authority to supervise and approve the settlement and waiver (or release) of FMLA claims." Pet. App. 41a. The court concluded that Section 825.220(d), as interpreted by the court, was a "permissible construction" of the FMLA under *Chevron*. *Id.* at 43a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)).

b. Petitioner requested rehearing en banc. Pet. App. 3a. DOL filed an amicus brief in support of the petition explaining that, contrary to the court of appeals' interpretation, Section 825.220(d) prohibits only the prospective waiver of FMLA rights, not the settlement of FMLA claims for past violations. *Ibid.* The court of appeals granted panel rehearing to consider DOL's interpretation and vacated its decision. *Id.* at 3a, 69a. The case was reargued, with DOL participating as amicus curiae. *Id.* at 3a.

c. On rehearing, the court of appeals reaffirmed and reinstated its original decision. Pet. App. 1a-20a (*Taylor II*).

The court first rejected DOL's interpretation of its own regulation as inconsistent with the plain text of the regulation. Pet. App. 4a-8a. The court stated that Section 2617(a) grants a "remedial" right under the FMLA to bring an action or claim, and that Section 825.220(d), "by specifying 'rights under FMLA,' therefore refers to *all rights* under the FMLA, including the right to bring an action or claim for a violation of the Act." *Id.* at 5a.

The court also rejected DOL's argument that its interpretation of Section 825.220(d) is consistent with the general public policy favoring the post-dispute settlement of employment law claims. Pet. App. 10a. The court reasoned that the FMLA is a labor standards law like the FLSA, and that "[t]he reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims." *Id.* at 10a-11a. The court further stated that Congress effectively indicated that the FLSA provides the best settlement model for the FMLA by making a cross-reference to the FLSA's enforcement scheme in Section 2617(b)(1). *Id.* at 12a-13a.

Finally, the court of appeals rejected DOL's interpretation of the regulation set out in its amicus brief because the court determined that it was inconsistent "with what the DOL said it intended the regulation to mean [in the preamble] at the time it was promulgated." Pet. App. 13a. Based on this perceived inconsistency, the court concluded that deference to DOL's interpretation of its own regulation was not appropriate. *Ibid.*

Judge Duncan dissented. Pet. App. 17a-20a. She stated that, once DOL filed an amicus brief setting out its interpretation of its regulation, the question "is no

longer whether the interpretation that we adopted in *Taylor I* was reasonable, but rather whether it is compelled by the language of the regulation." *Id.* at 19a. Judge Duncan concluded that it was not so compelled, stating:

> There are few words in the legal lexicon more ubiquitous and freighted than the term 'right.' * * * The mere fact that the statute creates a '[r]ight of action,' 29 U.S.C. § 2617(a)(2), and the regulation refers to 'rights under FMLA,' 29 C.F.R. 825.220(d), may suggest, but does not compel, an interpretation that the two uses of the word are coextensive.

*Ibid.* Given this ambiguity, Judge Duncan concluded that deference to DOL's interpretation of its own regulation is "appropriate" under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Pet. App. 19a. Judge Duncan also stated that she was not persuaded by "any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference to be accorded its present view." *Id.* at 20a (citing *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007)).

**DISCUSSION**

The court of appeals erred in rejecting the Department of Labor's interpretation of Section 825.220(d). That interpretation is consistent with the regulation's text, DOL's practice under the FMLA, and judicial precedent construing every federal employment statute other than the FLSA to permit private settlements of claims. The court of appeals' decision also casts doubt on the validity of FMLA releases routinely negotiated by employers and employees, and imposes an unauthorized burden on both DOL and the federal courts to su-

pervise such settlements. In addition, the court of appeals' holding directly conflicts with the Fifth Circuit's holding in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316, 321 (2003). The decision also conflicts with this Court's precedent requiring deference to an agency's permissible interpretation of its own regulation. Final promulgation of DOL's proposed amendments to the regulation, however, would resolve the issue on a prospective basis and obviates the need for this Court's review. Accordingly, the petition for certiorari should be denied.

1. a. The court of appeals erred in its interpretation of the DOL regulation. Under this Court's well-established precedent, an agency's permissible interpretation of its own regulation is entitled to controlling deference. See, *e.g.*, *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). As Judge Duncan noted in dissent, once DOL set forth its interpretation of Section 825.220(d) in an amicus brief, the question in this case became not whether the court of appeals' opinion in *Taylor I* represented a reasonable interpretation of the regulation, but rather whether the court's interpretation was "compelled by the language of the regulation." Pet. App. 19a.

The Fourth Circuit's interpretation was not compelled. To the contrary, the regulatory text supports DOL's interpretation as prohibiting only the prospective waiver of FMLA rights, not the settlement of FMLA claims based on allegations of past violations. The regulation, on its face, addresses only the waiver of FMLA *rights* and makes no mention of the settlement or release of *claims*. That language is predicated on an important and well-understood dichotomy: the ability of

an employee to settle disputes based on *past* employer misconduct (settlement of claims) versus the inability of an employee to agree to permit his employer to engage in *future* misconduct (waiver of rights). See, *e.g.*, *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir.) (The court of appeals corrected an error "in large part due to the conflation of the notion of a 'right' with the notion of an accrued 'claim.' A right to be free prospectively from certain forms of discrimination always is worth something; however, whether a person has accrued a claim based on a right depends entirely on what previously has occurred."), cert. denied, 516 U.S. 916 (1995).

The court of appeals cited the preamble published by DOL when Section 825.220(d) was adopted as support for its conclusion that the regulation prohibits the settlement of claims based on past conduct. Pet. App. 13a-16a. The preamble noted that certain business interests had "recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example)." 60 Fed. Reg. at 2218. DOL responded by stating only 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 other labor standards statutes such as the FLSA." *Ibid.* This preamble language is ambiguous. To the extent it is read as rejecting the comments it received, it lends support to respondent's position. But the preamble does not respond in terms to the comments requesting express allowance of the settlement of FMLA claims in a severance agreement, and its failure to do so is consistent with DOL's position that the regu-

lation and its use of the waiver of rights phraseology, rather than the settlement of claims language used to describe the comment, does not explicitly bar the retrospective compromise of claims. And, as in the regulation itself, the examples of prohibited waivers in the preamble address only the prospective waiver of "rights." *Id.* at 2219. In all events, a contemporary but ambiguous preamble does not trump a current and unambiguous interpretation of the regulation's operating text. A contrary rule would conflict with principles of *Auer* deference. See, *e.g.*, *Long Island Care*, 127 S. Ct. at 2349.

Moreover, the preamble's discussion of the permissibility of early-out retirement programs underscores the problem with equating the waiver of FMLA rights with the settlement of FMLA claims under Section 825.220(d). The preamble states that "an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer. Under these circumstances, FMLA rights would cease because the employment relationship ceases." 60 Fed. Reg. at 2219. If, as is implicit in the court of appeals' reasoning in this case, the phrase "rights under FMLA" in Section 825.220(d) encompasses the assertion of an FMLA claim based on past employer actions, then, by stating that FMLA *rights* cease with the employment relationship, DOL would have been indicating that an employee's ability to assert an FMLA *claim* also ends with the termination of her employment. DOL could not have intended such a result; rather, it was clearly referring only to an employee's future right to continue on FMLA leave and

return to her position, not to her filing of a claim based on past employer actions.[2]

Contrary to the Fourth Circuit's suggestion, DOL has never interpreted Section 825.220(d) as restricting the settlement of FMLA claims based on past conduct. Rather, based on longstanding judicial precedent encouraging the settlement of employment claims, see, *e.g.*, *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), DOL has interpreted Section 825.220(d) to bar only the prospective waiver of FMLA rights and not the retrospective settlement of FMLA claims. The only settlements of FMLA claims that DOL has ever reviewed are those involving complaints filed directly with and investigated by the Wage and Hour Division of DOL, in accordance with Section 2617(b)(1).[3]

In sum, because DOL's interpretation of its regulation reflects "the agency's fair and considered judgment on the matter in question," it is entitled to controlling deference. *Auer*, 519 U.S. at 462; see *Long Island Care*, 127 S. Ct. at 2349 (deferring to Secretary's interpretation of regulation because it reflected DOL's "considered views"). The court of appeals' failure to accord

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[2] Early-out retirement programs normally require employees to execute a general release of claims related to their employment. See S. Rep. No. 263, 101st Cong., 2d Sess. 60 (1990). The fact that DOL did not address the impact of Section 825.220(d)'s waiver prohibition on such releases in its discussion of those programs in the preamble further supports the conclusion that DOL viewed the settlement of FMLA claims as outside the prohibition.

[3] As Judge Duncan noted (Pet. App. 20a), even if DOL's interpretation of Section 825.220(d) had changed over time—and it has not—that would not lessen the deference to which the current interpretation is due. See *Long Island Care*, 127 S. Ct. at 2349 ("change in interpretation alone presents no separate ground for disregarding the Department's present interpretation").

such deference to DOL's interpretation of its own regulation contravenes this Court's well-established precedent.

b. DOL's interpretation of the regulation as barring only prospective waiver of FMLA rights is consistent with this Court's decisions in employment-law cases disfavoring prospective waivers of rights while encouraging the settlement of claims. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (recognizing that an employee may forgo his Title VII cause of action as part of a voluntary settlement, but cannot prospectively waive his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*). It is also consistent with court of appeals decisions construing virtually every other federal employment statute to encourage private settlements of claims, while prohibiting prospective waivers of statutory rights. See, *e.g.*, *United States* v. *North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (Title VII); *Rivera-Flores* v. *Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) (Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*); *Runyan* v. *National Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir.) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*), cert. denied, 479 U.S. 850 (1986).

The sole exception is for FLSA claims. The court of appeals stressed the FLSA analogy and followed decisions of this Court prohibiting private settlements of FLSA claims. Pet. App. 11a. That reasoning was erroneous.

First, the prohibition against private FLSA settlements is based on policy considerations unique to that statute. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc.* v.

*Gangi*, 328 U.S. 108, 114-115 (1946); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 (1945). The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay and was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. See *id.* at 706-707.

By contrast, the policy considerations underlying the settlement of FMLA claims are much more akin to those underlying Title VII, the ADA, and the ADEA, all of which have been construed to permit unsupervised settlement of claims. See *North Carolina*, 180 F.3d at 581; *Rivera-Flores*, 112 F.3d at 11; *Runyan*, 787 F.2d at 1043.[4] Like those statutes, the FMLA is not primarily focused on hourly-workers and their wages, but protects all segments of the workforce, from low-wage workers to highly paid professionals. Also, unlike the FLSA, almost all claims under the FMLA are individual claims, generally brought by employees who have been terminated or denied reinstatement and are seeking damages and equitable relief. Such individual claims are particularly well-suited to private settlement.

Second, the FMLA's reference in Section 2617(b)(1) to the FLSA's enforcement scheme provides the Secretary the authority to establish the same administrative

[4] When Congress decided to regulate settlements under the ADEA in 1990, it enacted a specific statutory provision for that purpose. See Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 201, 104 Stat. 983 (29 U.S.C. 626(f)). That provision delimited the elements necessary to establish a knowing and voluntary settlement of ADEA claims. Even after OWBPA, ADEA claims remain subject to unsupervised settlement, so long as the conditions set forth in Section 626(f) are met. The FMLA, which was enacted after the OWBPA amended the ADEA, is notably devoid of any statutory provision restricting the voluntary settlement of claims.

*complaint* procedure that she utilizes under the minimum wage and overtime provisions of the FLSA. It does not, however, require the Secretary to supervise all FMLA settlements—a unique requirement premised on judicially-imposed restrictions on private settlements under the FLSA. In 1949, after this Court's first decisions prohibiting releases or compromises of FLSA claims (see p. 13-14, *supra*), Congress amended the FLSA to authorize the Secretary to supervise settlements of FLSA claims. 29 U.S.C. 216(c). Congress did not enact a comparable provision in the FMLA; indeed, nothing in either the FMLA or its regulations authorizes the scheme of DOL and court supervision of private settlements contemplated by the Fourth Circuit. Even the ADEA, which includes an enforcement provision that expressly refers to the section of the FLSA that contains the FLSA's "supervised" settlement provision, see 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title."), has not been construed to prohibit unsupervised settlements. See *Runyan*, 787 F.2d at 1043.

Third, the court of appeals erred in reading DOL's general reference in the preamble to "other labor standards statutes such as the FLSA," 60 Fed. Reg. at 2218, as a statement of DOL's intent to engraft the FLSA's unique settlement restrictions onto the FMLA. As the district court in this case concluded, if DOL intended those restrictions to apply to FMLA claims, it would have referred *only* to the FLSA (and, more specifically, to its "supervised" settlement provision in Section 216(c)), as opposed to referring to "other labor standards statutes" generally. Moreover, DOL has never es-

tablished a system for reviewing FMLA settlements in which no administrative complaint has been filed, something it would have done had it intended Section 825.220(d) to require such supervision.

None of this is to say that the regulation or its preamble is free from ambiguity or could not be written more clearly. And, indeed, DOL has proposed clarifying regulations. See *supra*, pp. 3-4. This is to say, however, that the regulatory language does not unambiguously mandate the FLSA analogy upon which the court of appeals seized.

2. a. The court of appeals' decision creates a direct conflict with the Fifth Circuit as to the scope of Section 825.220(d). Compare Pet. App. 3a ("[T]he 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."), with *Faris*, 332 F.3d at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.").

In *Faris*, the Fifth Circuit considered whether a severance agreement stating that the employee agreed to waive "claims arising under any * * * federal * * * law" barred her subsequent FMLA claim for retaliation. 332 F.3d at 318. The court concluded that "the proper reading of [Section 825.220(d)] is that it does not apply to post-dispute claims for damages under the FMLA." *Id.* at 319.[5] Therefore, as the law presently stands, em-

[5] The Fifth Circuit also stated that "th[e] regulation applies only to waiver of substantive rights under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for retaliation for the exercise of those rights." *Faris*, 332 F.3d at 320. Contrary to the court of appeals' suggestion in this case (Pet. App. 6a-7a), and as DOL explained in an amicus brief filed in *Dougherty* v. *TEVA Pharma-*

ployees and employers cannot privately settle FMLA claims for past violations of the Act in the Fourth Circuit but can do so in the Fifth Circuit.[6]

In addition, since the court of appeals' first opinion in this case, at least five district courts in other circuits have addressed the application of Section 825.220(d) to settlement agreements and have reached differing conclusions. Three district courts have expressly declined to follow the court of appeals' decisions in this case. See *Dougherty* v. *TEVA Pharm. USA, Inc.*, No. 05-cv-2336, 2007 WL 1165068, at *6 (E.D. Pa. Apr. 9, 2007) ("Section 825.220(d) does not prohibit an employee from waiving *past* FMLA claims as part of a severance agreement or settlement."); *Dougherty II*, *supra*, at *1 n.2 (declining to follow *Taylor II* because "(1) the majority's analysis of Section 825.220(d)'s text and administrative history is unpersuasive; and (2) the majority did not sufficiently defer to the DOL"); *Hicks* v. *John F. Murphy Homes, Inc.*, No. 07-cv-121, 2008 WL 216511, at *1 (D. Me. Jan. 25, 2008) (rejecting defendant's request to reinstate action for court approval of settlement agreement releasing FMLA claims because *Taylor* does not reflect the law in the First Circuit and court approval of FMLA releases therefore is not required); *Jones* v. *Qwest*

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*ceuticals USA, Inc.*, No. 05-cv-2336, 2008 WL 508011 (E.D. Pa. Feb. 20, 2008) (*Dougherty II*), DOL has never endorsed that distinction. See Gov't Amicus Br. 4 n.6, *Dougherty II*, *supra* (No. 05-cv-2336). Rather, DOL construes the regulation as barring the *prospective* waiver of *any* right under the FMLA (including the right to be free from retaliation or to sue for FMLA violations based on *future* employer misconduct).

[6] At least two other courts of appeals have approved the validity of private settlements of FMLA claims, though without addressing Section 825.220(d). See *Halvorson* v. *Boy Scouts of Am.*, 215 F.3d 1326 (6th Cir. 2000) (table); *Schoenwald* v. *ARCO Alaska, Inc.*, 191 F.3d 461 (9th Cir. 1999) (table).

*Commc'ns Int'l, Inc.,* No. 07-cv-02284, 2008 WL 1902670 (D. Colo. Apr. 28, 2008) (agreeing with *Hicks*). Another district court approved a settlement agreement but noted that it "does not necessarily conclude that its prior approval is necessary to the parties' settlement of the FMLA claim." *Bieber* v. *THK Mfg. of Am., Inc.*, No. 06-cv-481 (S.D. Ohio Oct. 22, 2007), slip op. 2. And one district court has followed the court of appeals' decision in this case. See *Brizzee* v. *Fred Meyer Stores, Inc.*, No. CV04-1566, 2006 WL 2045857, at *11 (D. Or. July 17, 2006) (holding that a release in a severance agreement was unenforceable under Section 825.220(d) in the absence of DOL or court approval); *Brizzee*, No.CV04-1566, 2008 WL 426510, at *1 (D. Or. Feb. 13, 2008).

b. The court of appeals' decision prevents employers from settling claims with finality and employees from obtaining payments through such settlements without the inevitable delay of seeking court or DOL approval. The uncertainty created by the court's decision also may discourage employers nationwide from offering settlement or severance agreements, thereby prompting increased litigation and reducing or eliminating the additional compensation employees often receive under such agreements.

In addition, the court of appeals' decision imposes an unnecessary burden on DOL and the federal courts to supervise agreements settling or releasing any FMLA claims. In order to meet the requirements of the decision in the Fourth Circuit, DOL would have to allocate significant resources to establish a process for reviewing settlement of FMLA claims that are not pending in court. The resulting shift of resources from investigating complaints to supervising private-party settlements would likely result in substantial delays for those em-

ployees who have filed complaints with, and are relying on, DOL to protect their rights under the FMLA.

3. Notwithstanding the circuit conflict and the legal and practical problems with the court of appeals' interpretation of Section 825.220(d), plenary review is not necessary at this time. As pointed out above (pp. 2-3, *supra*), on February 11, 2008, DOL published a Notice (73 Fed. Reg. 7876) proposing, *inter alia*, to clarify that, under Section 825.220(d), "employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court," 73 Fed. Reg. at 7901. The period for public comment on the proposed regulations closed on April 11, 2008, *id.* at 7876, and DOL is currently in the process of reviewing the submitted comments.

If the revised version of Section 825.220(d) is adopted in final form, it would eliminate any ambiguity in Section 825.220(d), resolve the question presented in this case, and effectively abrogate the Fourth Circuit's decision—at least on a going forward basis. For that reason, and because there is only a one-one circuit split under the current regulation, review of the question presented is not warranted at this time.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008